No. 12-20605

United States Court Of Appeals
For The Fifth Circuit

In Re Wells Fargo Wage and Hour Employment Practices Litigation (No. III)

ON PETITION FOR WRIT OF MANDAMUS FROM THE UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

MULTI-DISTRICT LITIGATION CASE NO. H-11-2266

BRIEF OF *AMICUS CURIAE* NATIONAL EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF RESPONDENTS RAYMOND RICHARDSON, ET AL.

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Amicus Curiae NELA is not financially interested in the outcome of the litigation. *Amicus Curiae* NELA does, however, have a professional and public policy interest in the outcome of this litigation. The **National Employment Lawyers Association ("NELA")** is the largest professional membership organization in the country comprised of lawyers who represent workers in labor, employment, and civil rights disputes. Founded in 1985, NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA and its 68 circuit, state, and local affiliates have a membership of over 3,000 attorneys who are committed to working on behalf of those who have been illegally treated in the workplace. NELA's members litigate daily in every circuit, affording NELA a unique perspective on how the principles announced by the courts in employment cases actually play out on the ground. NELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace.

Dated this 20th day of December 2012

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IDENTITY AND INTEREST OF AMICUS CURIAE

Amicus Curiae NELA is an organization of lawyers dedicated to representing employees who often cannot safeguard their fundamental labor protections in the workplace without collective actions. They advocate on behalf of some of the most vulnerable and exploited low-wage and immigrant worker populations—for example, in the building maintenance, car wash, construction, landscaping, food processing, food service, hospitality, light manufacturing, warehousing and shipping, child care and nursing home industries—all across this country. While the workers represented by NELA member attorneys continue to confront widespread poor working conditions, as well as retaliation for asserting their rights, they lack the financial and legal resources necessary to enforce their rights through individual lawsuits. For them, meaningful enforcement of broad, remedial statutes such as the FLSA, which is intended to protect workers, depends upon the availability of collective actions.

No party opposes the filing of this *amicus* brief.

FEDERAL RULE 29(c)(5) STATEMENT

(A) No party's counsel authored this brief in whole or in part;

(B) No party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and

(C) No person, other than *amicus curiae*, its members, or its counsel,

contributed money that was intended to fund preparing or submitting the brief.

SUMMARY OF THE ARGUMENT

The Fair Labor Standards Act of 1938 (FLSA) plays a vital role in our nation's economy by both protecting the rights of workers and ensuring that employment will be spread evenly amongst those who seek work. The Supreme Court has long recognized that the FLSA is a remedial statute which is meant to protect workers. Seventy-five years after its passage, however, violations of the FLSA are still shockingly common. Continued enforcement of the FLSA is vital for the protection of workers and stimulation of the economy.

One of the key FLSA enforcement mechanisms is the two-stage notice and joinder process at issue in this petition. This two-stage process, which is almost uniformly applied by district courts in every circuit, arose from the Supreme Court's edict that district courts "oversee the joinder of additional parties [in collective actions] to assure that the task is accomplished in an efficient and proper way." *Hoffmann-La Roche, Inc. v. Sperling*, 493 U.S. 165, 170-71 (1989). The Supreme Court recognized that the benefits of a collective action (to both the parties and the court) "depend on employees receiving accurate and timely notice concerning the pendency of the collective action, so that they can make informed decisions about whether to participate." *Id.* The two-stage process is critical to FLSA enforcement because it provides notice to employees who might otherwise

lose their claims due to the running statute of limitations. Eliminating the two-stage process will provide unscrupulous employers with a financial incentive to violate their employees' fundamental statutory rights.

The unequal bargaining power between employers and employees and the fear of retaliation are powerful deterrents to individual enforcement of employee rights. Adequate FLSA enforcement depends on the statutory right to proceed collectively. The right to proceed collectively, in turn, depends on timely notice of the right to join an FLSA collective action. District courts throughout the country have dutifully responded to the Supreme Court's directive to issue notice when appropriate and manage the joinder of claims in an FLSA collective action by implementing the two-stage notice and joinder process. Continued effective enforcement depends on continued use of this process.

ARGUMENT

I. The History And Purpose Of The FLSA Demonstrates That It Is A Remedial Statute Designed To Empower And Protect Workers.

Congress enacted the FLSA as a remedial statute designed to correct "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers . . . ." 29 U.S.C. § 202(a). The FLSA establishes a uniform minimum hourly wage (29 U.S.C. § 206(a)(1), currently $7.25) and a standard forty-hour workweek with premium pay for additional "overtime" hours worked (29 U.S.C. § 207(a)(1)). The FLSA

requires employers to pay its employees one-and-one-half times their "regular rate" for each hour worked in excess of forty hours per week. 29 U.S.C. § 207(a)(1).

The FLSA was enacted in 1938 in the midst of the Great Depression to protect vulnerable workers and enable them to secure a fair wage or negotiate reasonable work hours with their employers, freeing vulnerable employees from substandard wages and oppressive working hours. *See Barrentine v. Arkansas–Best Freight Sys., Inc.*, 450 U.S. 728, 739 (1981) (*citing* 29 U.S.C. § 202(a)). The United States Supreme Court has recognized that Congress enacted the statute in order "to aid the unprotected, unorganized and lowest paid of the nation's working population; that is, those employees who lacked sufficient bargaining power to secure for themselves a minimum subsistence wage." *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 707 n.18 (1945); *see also D.A. Schulte, Inc., v. Gangi*, 328 U.S. 108, 116 (1946) (stating that the purpose of the Act was "to secure for the lowest paid segment of the nation's workers a subsistence wage"). The Court has described the law as "remedial and humanitarian in purpose" because it deals not with "mere chattels or articles of trade but with the rights of those who toil, of those who sacrifice a full measure of their freedom and talents to the use and profit of others." *Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 597 (1944).

In addition to securing wages for individual workers themselves, the FLSA is meant to benefit the economy as a whole. The Supreme Court has long recognized two additional congressional goals critically furthered by the FLSA: "(1) to spread employment by placing financial pressure on the employer," and "(2) to compensate employees for the burden of a workweek in excess of the hours fixed in the Act." *Walling v. Helmerich & Payne*, 323 U.S. 37, 40 (1944); *see also Jewell Ridge Coal Corp. v. Local 6167, United Mine Workers*, 325 U.S. 161, 167 (1945); *Donovan v. Brown Equip. & Serv. Tools, Inc.*, 666 F.2d 148, 152 (5th Cir. 1982); H.R. Rep. No. 75-1452 (1937); S. Rep. No. 75-884 (1937). As the Supreme Court has acknowledged, Congress enacted the FLSA to spur economic growth in response to the Great Depression by reducing unemployment: "[i]n a period of widespread unemployment and small profits, the economy inherent in avoiding extra pay was expected to have an appreciable effect in the distribution of available work." *Overnight Motor Co. v. Missel*, 316 U.S. 572, 578 (1942); *see also Parker v. Nutrisystem, Inc.*, 620 F.2d 274, 279 (3d Cir. 2010) (recognizing that a core purpose of the FLSA's enactment was "to spread available work among a larger number of workers and thereby reduce unemployment"). The FLSA's policy goal of reducing unemployment is vitally important today, when our economy is slowly recovering from the worst recession since the very Depression that spurred the enactment of the statute. Enforcement of the FLSA not only protects those

employees who suffered illegal pay practices in the workplace, but also protects unemployed workers and families in the broader labor force, and the public at large.

Lawsuits brought under the FLSA to recover unpaid minimum and overtime wages may be brought "by any one or more employees for and in behalf of himself or themselves and other employees similarly situated." 29 U.S.C. § 216(b). "No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought." *Id.*

As the Supreme Court has explained, the FLSA's collective action mechanism serves the dual purpose of lowering litigation costs for individual plaintiffs, and decreasing the burden on the courts through "efficient resolution in one proceeding of common issues of law and fact arising from the same alleged discriminatory activity." *Hoffmann-La Roche*, 493 U.S. at 170. "These benefits . . . depend on employees receiving accurate and timely notice concerning the pendency of the collective action, so that they can make informed decisions about whether to participate." *Id.* To ensure that these benefits are preserved, the district court "has a managerial responsibility to oversee the joinder of additional parties to assure that the task is accomplished in an efficient and proper way." *Id.* at 170-71.

Thus, the collective action provision is integral to the FLSA's comprehensive remedial scheme and is a statutory right in and of itself. *See Skirchak v. Dynamics Research Corp.*, 508 F.3d 49, 60 (1st Cir. 2007) (the FLSA "statutorily created [an] interest in [collective] actions"). Collective actions empower workers by putting "directly into the hands of the employees who are affected by violation the means and ability to assert and enforce their own rights[.]" 83 Cong.Rec. 9264 (1938) (statement of Rep. Keller).

II. Violations Of The FLSA Are Common.

Collective action enforcement remains essential because wage and hour violations are common, particularly in low-wage sectors of our economy. *See generally Winning Wage Justice: A Summary of Research on Wage and Hour Violations in the United States*, Nat'l Employment Law Project (January 2012) (compiling dozens of studies from across the country);[1] Annette Bernhardt *et al.*, *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities*, Center for Urban Economic Development at the University of Illinois-Chicago, Nat'l Employment Law Project & UCLA Institute for Research on Labor and Employment (September 2009).[2] "Numerous investigations have documented shocking rates of noncompliance with the minimum standards

[1] *Available at* http://nelp.3cdn.net/509a6e8a1b8f2a64f0_y2m6bhlf6.pdf (last visited Dec. 17, 2012).
[2] *Available at* http://www.nelp.org/page/-/brokenlaws/BrokenLawsReport2009.pdf?nocdn=1 (last visited Dec. 17, 2012).

established in the FLSA, particularly in low-wage industries such as the janitorial, food service, garment, and hospitality industries." Craig Becker & Paul Strauss, *Representing Low-Wage Workers in the Absence of A Class: The Peculiar Case of Section 16 of the Fair Labor Standards Act and the Underenforcement of Minimum Labor Standards*, 92 Minn. L. Rev. 1317, 1318 (2008). For example, the *Broken Laws* study surveyed "4,387 low-wage workers in Chicago, New York City, and Los Angeles, [and] found that nearly two-thirds of low-wage workers had not been paid their complete wages the previous week, and that on average these workers were losing $2,634 annually to wage theft." Sebastian Amar & Guy Johnson, *Here Comes the Neighborhood: Attorneys, Organizers, and Immigrants Advancing A Collaborative Vision of Justice*, 13 N.Y. City L. Rev. 173 n.4 (2009).

FLSA violations persist in part because of the economic advantages gained by those who violate the Act. In passing the FLSA, Congress declared that companies engage in "an unfair method of competition in commerce" when they violate the statute. 29 U.S.C. § 202(a). As the United States Supreme Court has long recognized, failing to comply with the FLSA "would undoubtedly give petitioners and similar organizations an advantage over their competitors. It is exactly this kind of 'unfair method of competition' that the [FLSA] was intended to prevent." *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 299 (1985). Because the nation's recovery from the Great Recession of 2008-2010 has

been concentrated in lower-wage occupations,[3] the proliferation of FLSA violations in low wage jobs has a greater cumulative effect on our nation's workforce and economy today than it did even three years ago. Effective enforcement is as important now as it was when Congress enacted the FLSA 74 years ago.

III. The FLSA's First Stage Process Is Vital To Providing Notice To Workers And Eliminating Substandard Working Conditions.

Collective actions under Section 216(b) provide underrepresented workers a crucial mechanism for recovering their unpaid minimum and overtime wages. Plaintiffs are able to lower their individual costs, and judicial economy is served by resolving common issues arising out of the same allegedly unlawful conduct in a single proceeding. *Hoffmann-La Roche*, 493 U.S. at 170 (discussing the FLSA's collective action procedure as incorporated by the Age Discrimination in Employment Act). These benefits, however, "depend on employees receiving accurate and timely notice concerning the pendency of the collective action, so that they can make informed decisions about whether to participate." *Id.*

The timing of this notice is of the utmost importance in an FLSA collective action. As this Court recognized almost forty years ago, "[t]here is a fundamental,

[3] *The Low-Wage Recovery and Growing Inequality*, Nat'l Employment Law Project (August 2012), *available at* http://www.nelp.org/page/-/Job_Creation/LowWageRecovery2012.pdf?nocdn=1 (last visited December 10, 2012).

irreconcilable difference between the class action described by Rule 23 and that provided for by FLSA [Section] 16(b)." *LaChapelle v. Owens-Illinois, Inc.*, 513 F.2d 286, 288 (5th Cir. 1975). Unlike a Rule 23 class action, in which the statute of limitations is tolled upon the filing of the action, the statute of limitations in an FLSA case keeps running for each individual employee until he or she files a consent form to join the case. *Compare Am. Pipe & Const. Co. v. Utah*, 414 U.S. 538, 551 (1974) (statute of limitations for entire putative class is tolled upon filing of Rule 23 class action complaint) *with* 29 U.S.C. § 256 (statute of limitations tolled upon filing of consent with court for plaintiffs not named in complaint); *see also Sandoz v. Cingular Wireless LLC*, 553 F.3d 913, 917 (5th Cir. 2008) (statute of limitations in FLSA case runs from date consent form is filed).

It is precisely because of the FLSA's opt-in requirement, and the running statute of limitations, that the United States Supreme Court vested district courts with the authority and discretion "to implement 29 U.S.C. § 216(b) . . . by facilitating notice to potential plaintiffs." *Hoffmann-La Roche*, 493 U.S. at 169. Indeed, the *Hoffmann-La Roche* case "illustrate[d] the propriety, if not the necessity, for court intervention in the notice process." *Id.* Accordingly, Congress's decision to allow ADEA and FLSA plaintiffs to proceed collectively "***must*** grant the court the ***requisite procedural authority*** to manage the process of joining multiple parties . . . . It follows that . . . the court has a managerial

responsibility to oversee the joinder of additional parties to assure that the task is accomplished in an efficient and proper way." *Id.* at 170-71 (emphasis added).[4] The Supreme Court stated that effective FLSA enforcement (and case management) "depend(s) on employees receiving accurate and timely notice concerning the pendency of the collective action, so that they can make informed decisions about whether to participate." *Id.* at 170.

In the years since *Hoffmann-La Roche*, district courts in this circuit and around the country have reached an overwhelming consensus on the propriety and necessity of using a two-stage process for managing a collective action under 216(b). *See Sandoz*, 553 F.3d at 915 n.2 (recognizing that collective actions "typically proceed in two stages); *Oliver v. Aegis Communications, Inc.*, 2008 WL 7483891, at *3 (N.D. Tex. Oct. 30, 2008) (noting that the two-stage process is the prevailing approach); *Tice v. AOC Senior Home Health Corp.*, 826 F. Supp. 2d 990, 994 (E.D. Tex. 2011) ("district courts have the discretionary power to conditionally certify collective actions and authorize notice to potential class members" and the two-stage process is the most frequently used); *Pedigo v. 3003*

[4] The Supreme Court itemized the many benefits of court-supervised notice: "Court-authorized notice may counter the potential for misuse of the class device, avoids a multiplicity of duplicative suits, and sets reasonable cutoff dates to expedite the action's disposition. Moreover, by monitoring preparation and distribution of the notice, a court can ensure that the notice is timely, accurate, and informative, and can settle disputes about the notice's content before it is distributed." *Hoffmann-La Roche*, 493 U.S. at 166.

S. Lamar, LLP, 666 F. Supp. 2d 693, 696-97 (W.D. Tex. 2009) (most federal courts use the two-stage process); *Kaluom v. Stolt Offshore, Inc.*, 474 F. Supp. 2d 866, 871 (S.D. Tex. 2007) (two-stage process is the "favored approach by courts in the Fifth Circuit"); *Strickland v. Hattiesburg Cycles, Inc.*, 2010 WL 2545423, *1 (S.D. Miss. June 18, 2010) (majority of courts use the two-stage approach); *Treme v. HKA Enterprises, Inc.*, 2008 WL 941777 (W.D. La. April 7, 2008) (same); *Lima v. Int'l Catastrophe Solutions, Inc.*, 493 F. Supp. 2d 793, 797 (E.D. La. 2007) (same); *England v. New Century Fin. Corp.*, 370 F. Supp. 2d 504, 509 (M.D. La. 2005) (two-stage process has been "embraced"); *Symczyk v. Genesis HealthCare Corp.*, 656 F.3d 189, 192 (3d Cir. 2011) *cert. granted on other grounds*, 133 S. Ct. 26 (U.S. 2012) ("courts typically employ a two-tiered analysis"); *Myers v. Hertz Corp.*, 624 F.3d 537, 555 (2d Cir. 2010) *cert. denied*, 132 S. Ct. 368 (U.S. 2011) (noting that district courts in the Second Circuit have settled on the two stage process, which "is sensible"); *Comer v. Wal-Mart Stores, Inc.*, 454 F.3d 544, 546-47 (6th Cir. 2006) (courts typically use two-stage approach); *Thiessen v. Gen. Elec. Capital Corp.*, 267 F.3d 1095, 1105 (10th Cir. 2001) (district court did not err in applying two-stage analysis); *Morgan v. Family Dollar Stores, Inc.*, 531 F.3d 1233 (11th Cir. 2008) (two-stage approach is applied in 11th Circuit cases); *Prescott v. Prudential Ins. Co.*, 729 F. Supp. 2d 357, 364-65 (D. Me. 2010) (recognizing that district courts follow the two-stage process); *LaFleur v. Dollar Tree Stores, Inc.*,

2012 WL 4739534, at *3 (E.D. Va. Oct. 2, 2012) ("federal courts, including this Court, have developed a two-step analysis for establishing 'similarly situated' plaintiffs"); *Nehmelman v. Penn Nat'l Gaming, Inc.*, 822 F. Supp. 2d 745, 750 (N.D. Ill. 2011) ("most courts follow a two-step inquiry"); *Brennan v. Qwest Commc'ns Int'l, Inc.*, 2008 WL 819773, at *3 (D. Minn. March 25, 2008) ("Determining whether Plaintiffs are similarly situated to the proposed class requires a two-step inquiry[.]"); *Gee v. Suntrust Mortg., Inc.*, 2011 WL 722111 (N.D. Cal. Feb. 18, 2011) ("Courts in this District apply a two-step approach to determine whether the putative class is 'similarly situated'"). Even a cursory review of this case law reveals that the Chamber of Commerce's amicus brief greatly distorts any "divide" amongst district courts regarding FLSA certification procedure. The two stage process is clearly the supermajority within every circuit. That district courts in every circuit have settled on the same notice procedure is strong evidence that the process works.

The FLSA statute of limitations is only two years, extended to three for a willful violation. 29 U.S.C. § 255(a). If notice is not issued early in a case, a great number of employees will lose their claims due to nothing more than the passage of time. District courts recognize the great prejudice that befalls employees when notice of a collective action is not issued in a timely fashion. *See LaFleur*, 2012 WL 4739534, at *3 ("Because the statute of limitations continues to run on

unnamed class members' claims until they opt into the collective action . . . courts have concluded that the objectives to be served through a collective action justify the conditional certification of a class of putative plaintiffs early in a proceeding"); *see also Taylor v. Pittsburgh Mercy Health Sys., Inc.*, 2009 WL 1324045, at *2 (W.D. Pa. May 11, 2009) ("time is of the essence for purposes of FLSA notice because the statute of limitations is not tolled until a potential plaintiff opts into the proposed collective action"); *Lynch v. United Services Auto. Ass'n*, 491 F. Supp. 2d 357, 367 (S.D.N.Y. 2007) (issuance of notice "protects plaintiffs' claims from expiring under the statute of limitations"); *Smith v. Lowe's Cos., Inc.*, 2005 WL 6742234, at *4 (S.D. Ohio May 11, 2005) (because the statute of limitations continues to run until consent forms are filed, the plaintiff's burden at the notice stage is light). A review of the FLSA actions filed by employees in this circuit in January 2012 bears this out.[5] On average, 139 days passed between the filing of the case and an initial case scheduling conference.[6] This is almost twenty percent of an individual employee's two-year statute of limitations. Because most

[5] *See* attached chart at page 21. Publicly available filings on PACER are the proper subject of judicial notice by this Court. *See United States v. Berrojo*, 628 F.3d 368 (5th Cir. 1980) ("The doctrine of judicial notice permits a judge to consider a generally accepted or readily verified fact as proved without requiring evidence to establish it."); *Mangiafico v. Blumenthal*, 471 F.3d 391, 398 (2d Cir. 2006) ("[D]ocket sheets are public records of which the court could take judicial notice."); *Headwaters Inc. v. U.S. Forest Service*, 399 F.3d 1047, 1051 n.3 (9th Cir. 2005) (courts may take judicial notice of the docket in related cases as materials from a proceeding in another tribunal are appropriate for judicial notice).

[6] *See* attached chart at page 21.

employees will not know about a collective action before receiving court-authorized notice, those employees cannot join the case until after that notice is sent and will have lost a large portion of their claim(s) by the time they do join.

If this Court eliminates the first stage notice procedure in favor of a standard requiring more extensive discovery, numerous FLSA violations would persist without redress, due to nothing more than the running statute of limitations. Indeed, defendant employers could easily eliminate all FLSA exposure by simply running out the clock on discovery. Conversely, employees who lack meritorious claims or who are not ultimately found to be "similarly situated" to the named plaintiffs in a given case receive no structural advantage from early court facilitated notice. These employees still must prove their case on the merits, and they still must withstand a stage-two decertification analysis in order to proceed in the group action. In sum, the only plausible purpose for limiting early notice is to foreclose the vindication of valid claims under the FLSA.

The Chamber of Commerce's argument that judicial notice of a collective action presents due process concerns for *employees* ignores the very real impact of the statute of limitations in an FLSA case. An employee who is unaware of her right to join a pending lawsuit will have her FLSA claims compromised by the simple passage of time, and without any compensation whatsoever for the damages she suffered. The second stage certification analysis ensures that only employees

who are similarly situated will have their claims tried together. Moreover, employees may pursue their FLSA claims individually if they so choose. Any imagined prejudice employees may suffer as a result of joining a collective action pales in comparison to the prejudice caused by a running statute of limitations.

IV. Private Enforcement Of The FLSA Is Unrealistic Without The Two-Stage Process.

For all workers, "the right to *file* a lawsuit in the future is materially different than . . . the right to *join* a lawsuit that is already pending." *Woods v. RHA/Tennessee Group Homes, Inc.*, 803 F. Supp. 2d 789, 801 (M.D. Tenn. 2011). "In the former situation, an employee who wishes to pursue a claim must undertake the potentially time-consuming and expensive process of finding and hiring an attorney; in the latter, all an employee must do is sign and return a Notice of Consent form." *Id.*

But "[e]specially for the poor, it is difficult to find lawyers of the private bar who are able and willing to take on what seems like an insignificant minimum wage violation." Susan Miloser, *Picking Pockets for Profit: Wage Theft and the Fair Labor Standards Act*, WASH. & LEE SCH. L. CAPSTONE PAPER at 34 (Spring 2011). After all, an employee who is not paid for an hour's worth of minimum wage work, each week, for 6 months, has a claim of less than $380. "To a private attorney, who bills that much or more per hour, the remedy seems hardly worth his time." *Id.*

The FLSA's structure and enforcement mechanism is premised on the common-sense recognition that there is "unequal bargaining power as between employer and employee[.]" *Brooklyn Sav. Bank*, 324 U.S. at 706. Thus, a principal purpose of the FLSA is "to aid the unprotected, unorganized and lowest paid of the nation's working population; that is, those employees who lacked sufficient bargaining power to secure for themselves a minimum subsistence wage." *Id*. at 707. Such workers are, by definition, unlikely to oppose an employer's violation of the wage and hour laws. *Cf. Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960) ("it needs no argument to show that fear of economic retaliation might often operate to induce aggrieved employees quietly to accept substandard conditions").

Individual litigation also exposes a worker to retaliation—a particularly pointed concern for unorganized workers. Few things focus an employer's attention on an employee more sharply than the filing of a lawsuit. The risk of retaliation faced by a worker who opposes unlawful conditions "is no imaginary horrible given the documented indications that fear of retaliation is the leading reason why people stay silent instead of voicing their concerns[.]" *Crawford v. Metro. Gov't of Nashville & Davidson County, Tenn.*, 555 U.S. 271, 279 (2009) (internal punctuations and citations omitted). These employees live "paycheck-to-

paycheck" and can ill-afford the interruption or reduction in pay that often accompanies retaliation.

Thus, the fact that even a single worker is prepared to serve as a lead plaintiff is often miraculous. David Weil & Amanda Pyles, *Why Complain? Complaints, Compliance, and the Problem of Enforcement in the U.S. Workplace*, 27 COMP. LAB. L. & POL'Y J. 59, 83 (2005) ("Studies suggest that, despite explicit retaliation protections under various labor laws, being fired is widely perceived to be a consequence of exercising certain workplace rights."). Collective actions provide these workers with at least some measure of protection from "individualized retaliation." *Bonilla v. Las Vegas Cigar Co.*, 61 F. Supp. 2d 1129, 1139 (D. Nev. 1999); *see also* Alba Conte & Herbert Newberg, *Newberg on Class Actions*, § 24.61 (4th Ed. 2002).

Collective actions also encourage compliance with the FLSA by raising the stakes for employers who break the law. An employer who violates the FLSA knows it may have to answer to more than a single, brave lead plaintiff. Collective actions therefore serve the "prophylactic function" encouraging employers to comply with the FLSA. *Amalgamated Workers Union of Virgin Islands v. Hess Oil Virgin Islands Corp.*, 478 F.2d 540, 543 (3d Cir. 1973). If an employer can avoid the issuance of notice, "the enforcement of [FLSA] remedies for violations which victimize a group of people will be limited only to those victims who are

already known to their 'champion,' . . . or who are fortunate enough to hear and heed 'the vagaries of rumor and gossip,' . . . or who are courageous enough to recognize the wrong done them and sue on their own." *Sperling v. Hoffmann-La Roche, Inc.*, 118 F.R.D. 392, 403 (D.N.J. 1988) *aff'd in part, appeal dismissed in part sub nom. Sperling v. Hoffmann-La Roche, In*c., 862 F.2d 439 (3d Cir. 1988*) aff'd and remanded sub nom. Hoffmann-La Roche,* 493 U.S. 165. This simply does not comport with the broad remedial goals of the FLSA.

Even so, the two-step process is far from a perfect enforcement mechanism. Sign-up rates for FLSA collective actions are usually quite low. *See* Andrew C. Brunsden, *Hybrid Class Actions, Dual Certification, and Wage Law Enforcement in the Federal Courts*, 29 BERKELEY J. EMP. & LAB. L. 269, 294 (2008) (opt-in rate of 15.71% in one study of FLSA cases). The low sign-up rate, in conjunction with the running statute of limitations, means that an employee's best day in court might only result in wage recovery for a short period of time for a small percentage of affected employees. "The FLSA opt-in regime creates perverse incentives for employers' noncompliance, because FLSA's limits to employee participation insulate employers from more expansive liability." *Id.* at 298. Eliminating the first stage notice process would allow even more FLSA violations to continue, and may ultimately eliminate any deterrent effect to FLSA violations, recasting a matter of statutory compliance as a small cost of doing business.

Removing a district court's discretion to issue court-authorized notice would gravely undercut the promise of private enforcement. Effective private enforcement hinges on the ability to prosecute collective actions on behalf of sizeable groups of employees. If attorneys for plaintiff-employees believe that they must engage in years of costly discovery before the court is authorized to certify a collective action that, at the point of certification, contains no plaintiffs with timely claims, few plaintiffs or attorneys would embark on such a needless war of attrition. *Cf.* Susan Miloser, *Picking Pockets for Profit: Wage Theft and the Fair Labor Standards Act*, WASH. & LEE SCH. L. CAPSTONE PAPER at 34 (Spring 2011).

CONCLUSION

Despite the thousands of FLSA collective actions filed each year, wage and hour violations still plague the American workplace. Congress and the United States Supreme Court have vested district courts with the authority to manage the notice process in collective actions. District courts nationwide, in turn, have determined that the two-stage process used by the district court in this case best balances the competing forces at play in FLSA cases. It provides notice to employees early in the litigation and allows employees to stop the running statute of limitations, while still ensuring that FLSA cases are tried only on behalf of similarly situated employees. Eliminating the initial notice phase of an FLSA case would only increase the financial incentives for employer non-compliance.

District courts must retain the discretion to issue notices, so that private enforcement of the FLSA can remain viable.

CHART 1

Case	Filing Date	District	Case No.	Conference Date, Initial Order	Date Conference Actually Occurred	Lapse in Days to Conference (Ordered or Actual)
Abakwue, et al v. Bluebonnet Hospice Care, Inc. et al	**1.10.2012**	**N.D. Tex.**	**3:12-cv-00086-P**	NONE	NONE	NONE
Aldrich v. Pro-Care Injury & Rehab Centers Inc.	**1.17.2012**	**N.D. Tex.**	**3:12-cv-00157-P**	NONE	NONE	NONE
Arriaga v. Jess Enterprises, LLC, et al	**1.11.2012**	**N.D. Tex.**	**3:12-cv-00094-D**	NONE	NONE	NONE
Beall v. WFG Investments Inc.	**1.24.2012**	**N.D. Tex.**	**3:12-cv-00241-F**	NONE	NONE	NONE
Buruca v. Tsai & Tsai Inc. dba Hunan Village Restaurant, et al	**1.10.2012**	**S.D. Tex.**	**4:12-cv-00089**	5.3.2012	6.5.2012	147
Castro v. The Acosta Landscaping Services, et al	**1.3.2012**	**N.D. Tex.**	**3:12-cv-00003-M**	NONE	NONE	NONE
Chuong v. New Timmy Chan Corporation	**1.17.2012**	**S.D. Tex.**	**4:12-cv-00150**	5.25.2012	6.13.2012	148
Clark v. Brazoria County Appraisal District, et al	**1.6.2012**	**S.D. Tex.**	**3:12-cv-00003**	4.11.2012	4.10.2012	95
Cross v. Plains Exploration & Production Company	**1.31.2012**	**S.D. Tex.**	**4:12-cv-00300**	5.16.2012	5.16.2012	106
Dearman v. Northrop Grumman Systems Corporation	**1.30.2012**	**S.D. Miss.**	**1:12-cv-00030-LG-JMR**	8.16.2012	8.16.2012	199
Diaz v. Rio Grande Mexican Restaurants, Inc., et al	**1.9.2012**	**S.D. Tex.**	**4:12-cv-00075**	5.3.2012	5.3.2012	115
Driscoll v. Fannin County, Texas	**1.13.2012**	**E.D. Tex.**	**4:12-cv-00024-RC-ALM**	7.3.2012	NEVER TOOK PLACE	172
Duncan v. The Steamery, Inc., et al	**1.27.2012**	**S.D. Tex.**	**4:12-cv-00275**	5.4.2012	NEVER TOOK PLACE	98
Gallegos et al v. Sok Seafood, Inc.	**1.9.2012**	**S.D. Tex.**	**4:12-cv-00073**	4.18.2012	6.19.2012	162
Gamez v. Sportstar Athletic, Inc.	**1.19.2012**	**S.D. Tex.**	**4:12-cv-00189**	5.16.2012	NEVER TOOK PLACE	118
Garcia v. South San Antonio Independent School District	**1.10.2012**	**W.D. Tex.**	**5:12-cv-00029-FB**	8.1.2012	NEVER TOOK PLACE	204
Guox et al v. Almeda China Star, Inc., et al	**1.26.2012**	**S.D. Tex.**	**4:12-cv-00264**	5.4.2012	5.4.2012	99
Guzman-Estrada v. Southside Independent School District	**1.4.2012**	**W.D. Tex.**	**5:12-cv-00009-HLH**	NONE	NONE	NONE

Harris, et al v. Hinds County, Mississippi, et al	**1.26.2012**	**S.D. Miss.**	**3:12-cv-00058-TSL-MTP**	5.29.2012	5.29.2012	124
Hernandez, et al v. Han Nara Enterprises, LP dba Ashley Furniture HomeStore, et al	**1.20.2012**	**N.D. Tex.**	**5:12-cv-00010-C**	NONE	NONE	NONE
Herrera, et al v. Wells Fargo Bank NA	**1.5.2012**	**S.D. Tex.**	**4:12-cv-00040**	4.27.2012	NEVER TOOK PLACE	113
Hicks, et al v. TCIM Services, Inc.	**1.20.2012**	**E.D. Tex.**	**2:12-cv-00035-JRG**	8.22.2012	8.22.2012	215
Karna v. BP Corporation North America Inc.	**1.11.2012**	**S.D. Tex.**	**4:12-cv-00101**	4.20.2012	NEVER TOOK PLACE	100
Lara-Bustamante v. El Globo Taqueria Inc., et al	**1.16.2012**	**N.D. Tex.**	**3:12-cv-00147-P**	NONE	NONE	NONE
LaRue, et al v. Burger Fresh, Inc., et al	**1.30.2012**	**S.D. Tex.**	**4:12-cv-00290**	4.30.2012	NEVER TOOK PLACE	91
Lavalais v. Corky's Mobile Home Transport & Setup, Inc., et al	**1.3.2012**	**W.D. Tex.**	**1:12-cv-00002-LY**	7.30.2012	7.30.2012	179
Lee v. ASUI Healthcare and Development Center et al	**1.10.2012**	**S.D. Tex.**	**4:12-cv-00082**	4.2.2012	4.2.2012	83
Lee v. Center for Psychological Health Care, Inc., et al	**1.18.2012**	**M.D. La.**	**3:12-cv-00027-EEF-KWR**	4.26.2012	11.29.2012	316
Lockhart v. Northrop Grumman Systems Corporation	**1.27.2012**	**S.D. Miss.**	**1:12-cv-00025-LG-JMR**	8.16.2012	8.16.2012	202
Lopez v. A Healthy Living Home Health Inc., et al	**1.23.2012**	**S.D. Tex.**	**7:12-cv-00031**	4.4.2012	4.6.2012	74
Lopez v. Houston Contact Patrol, Inc., et al	**1.16.2012**	**S.D. Tex.**	**4:12-cv-00139**	5.25.2012	6.14.2012	150
Marin v. Marek Brothers Company, Inc. et al	**1.19.2012**	**S.D. Tex.**	**4:12-cv-00183**	5.25.2012	6.14.2012	147
Mohammadi v. Nwabuisi, et al	**1.13.2012**	**W.D. Tex.**	**5:12-cv-00042-XR**	NONE	NONE	NONE
Montano v. Montrose Restaurant Associates, Inc.	**1.17.2012**	**S.D. Tex.**	**4:12-cv-00153**	4.9.2012	4.9.2012	83
Munoz-Preciado et al v. Nguyen, et al	**1.3.2012**	**N.D. Tex.**	**3:12-cv-00013-O**	NONE	NONE	NONE
Osorio v. Rocore Southwest, Inc.	**1.26.2012**	**N.D. Tex.**	**3:12-cv-00269-G**	NONE	NONE	NONE
Patel v. Ehaan & King Business, Inc., et al	**1.4.2012**	**S.D. Tex.**	**4:12-cv-00032**	5.3.2012	6.5.2012	153
Payne v. Grayco Cable Services, Inc.	**1.23.2012**	**S.D. Tex.**	**4:12-cv-00206**	4.13.2012	4.19.2012	87
Pittman et al v. McClain's R.V., Inc., et al	**1.25.2012**	**E.D. Tex.**	**6:12-cv-00037-MHS**	8.29.2012	NEVER TOOK PLACE	217
Quiroz v. Shan Namkeen, Inc.,	**1.23.2012**	**N.D.**	**3:12-cv-00236-L**	NONE	NONE	NONE

et al		**Tex.**				
Rainbolt v. Seacor Holdings Inc., et al	**1.17.2012**	**S.D. Tex.**	**3:12-cv-00012**	4.18.2012	4.18.2012	92
Reaves, et al v. Poole's Cable Services, Inc.	**1.20.2012**	**S.D. Miss.**	**3:12-cv-00043-TSL-MTP**	5.1.2012	5.1.2012	72
Reid v. Hillary's Sweet Temptations, Inc.	**1.30.2012**	**W.D. Tex.**	**1:12-cv-00094-ML**	7.31.2012	7.23.2012	175
Reyes v. Lane, et al	**1.6.2012**	**S.D. Tex.**	**4:12-cv-00050**	5.3.2012	5.3.2012	118
Roberts v. James Wood Motors, Inc., et al	**1.13.2012**	**E.D. Tex.**	**4:12-cv-00023-RC-ALM**	7.3.2012	NEVER TOOK PLACE	172
Rodriguez, et al v. Capstone Real Estate Services, Inc. 2	**1.31.2012**	**N.D. Tex.**	**3:12-cv-00318-D**	NONE	NONE	NONE
Rodriguez v. Carrizales, et al	**1.31.2012**	**N.D. Tex.**	**3:12-xc-00314**	NONE	NONE	NONE
Ruiz v. Whitworth, et al	**1.11.2012**	**N.D. Tex.**	**3:12-cv-00092-D**	NONE	NONE	NONE
Sazo v. Master Valet & Custom Transport, Inc.	**1.27.2012**	**S.D. Tex.**	**4:12-cv-00269**	5.4.2012	5.4.2012	98
Schneider v. Nationstar Mortgage LLC	**1.4.2012**	**N.D. Tex.**	**3:12-cv-00020-P**	NONE	NONE	NONE
SELF v. Beal Service Corporation	**1.20.2012**	**E.D. Tex.**	**4:12-cv-00035-RC-ALM**	7.3.2012	NEVER TOOK PLACE	165
Sellers v. Faststream Recruitment, Inc.	**1.17.2012**	**S.D. Tex.**	**1:12-cv-00008**	NONE	NONE	NONE
Shidler v. Alarm Security Group, LLC	**1.6.2012**	**S.D. Tex.**	**7:12-cv-00006**	3.19.2012	3.19.2012	73
Solis v. Chi Buffet, LLC dba Chi Chinese Buffet, et al	**1.17.2012**	**W.D. Tex.**	**1:12-cv-00051-LY**	10.10.2012	10.10.2012	270
Stephen v. Wael Mc Co., et al	**1.31.2012**	**S.D. Tex.**	**4:12-cv-00299**	6.29.2012	6.29.2012	150
Tula, et al v. ABM Janitorial Services-South Central, Inc., et al	**1.18.2012**	**W.D. Tex.**	**1:12-cv-00054-LY**	NONE	NONE	NONE
Uribe v. Andrews & Gould Law Firm, et al	**1.4.2012**	**W.D. Tex.**	**5:12-cv-00007-HLH**	NONE	NONE	NONE
Vercher, et al v. Hill County et al	**1.31.2012**	**W.D. Tex.**	**6:12-cv-00025-WSS**	NONE	NONE	NONE
Walker, et al v. HongHua America, LLC	**1.13.2012**	**S.D. Tex.**	**4:12-cv-00134**	4.20.2012	4.20.2012	98
Wherley v. Schellsmidt, et al	**1.24.2012**	**N.D. Tex.**	**3:12-cv-00242-D**	NONE	NONE	NONE
Wilson v. Klimek	**1.3.2012**	**S.D. Tex.**	**4:12-cv-00005**	4.2.2012	4.6.2012	90
Average Lapse In Days						**139.25**

Dated this 20th day of December 2012

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CERTIFICATE OF SERVICE

I certify that this amicus brief was served on all the counsels of record on the 20th day of December, 2012 via the Court's electronic filing system.

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