No. 12-304

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

STEPHANIE SUTHERLAND, on behalf of herself and all others similarly situated,

Plaintiff-Appellee,

v.

ERNST & YOUNG LLP,
Defendant-Appellant.

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

BRIEF FOR *AMICI CURIAE* NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, NATIONAL EMPLOYMENT LAW PROJECT, and THE EMPLOYEE RIGHTS ADVOCACY INSTITUTE FOR LAW & POLICY

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I. STATEMENT OF *AMICI CURIAE*

Amici curiae ("*Amici*") are organizations dedicated to securing enforcement of state, federal, and local laws, regulations, and ordinances that have been enacted for the purpose of protecting workers in the area of wages, hours, and working conditions, and thereby promoting the general welfare. A specific statement of *Amici* is attached hereto as Exhibit 1. *Amici* respectfully submit this brief pursuant to Rule 29 of the Rules of Appellate Procedure.[1]

Amici write to highlight the important national public policies that support the availability of collective actions under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201, *et seq* Depriving workers of their ability to fully enforce their rights to be paid minimum wage and overtime pay by prohibiting collective action in any forum undermines the wage protection policies of the FLSA, rewards unfair competition by encouraging employers to engage in wage theft, and violates the public policy Congress sought to implement through the FLSA. All parties have consented to the filing of this brief. Fed. R. App. P. 29(a).

[1] Pursuant to Federal Rule of Appellate Procedure 29(c) and Second Circuit Local Rule 29.1, *Amicus Curiae* National Employment Lawyers Association, The Employee Rights Advocacy Institute For Law & Policy, and National Employment Law Project hereby disclose that they are not-for-profit corporations, with no parent corporation and no publicly-traded stock. No party or counsel for any party was involved in authoring or editing this brief in whole or in part and 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.

II. SUMMARY OF ARGUMENT

The purposes of the FLSA are to correct "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers" and to prevent substandard wages from being used as "an unfair method of competition" against law-abiding competitors, by guaranteeing that *all* covered workers are paid minimum wage and overtime for hours over forty. The statutory right of employees to act collectively is an integral part of vindicating their rights under the FLSA and promotes the broad remedial purposes of the FLSA.

To ensure the FLSA's purposes are achieved, Congress specifically limited the right to contract and created a collective enforcement regime. Despite Congress' clear direction, employers are using contractual collective action waivers to undercut the FLSA's goal to protect *all* covered workers. Unable to enforce such waivers in court, employers try to use them under the guise of arbitration agreements, knowing that most workers will not bring individual wage-and-hour claims because the costs and risks of doing so greatly outweigh the potential recovery.

The public interest in the enforcement of the FLSA will always be undercut where employers can use private contracts to require workers to waive their rights

to bring claims collectively. Where an employer can contract around the FLSA's right to collective action, it greatly reduces the FLSA's check on illegal behavior. The waivers also incentivize other employers to violate the law to remain competitive. The result is behavior directly contrary to what Congress intended to achieve through the FLSA.

In requiring collective action waivers, employers' principal purpose is to evade the enforcement regime Congress enacted in the FLSA, thereby frustrating the broad remedial purposes of the FLSA. Therefore, applying this Court's vindication of rights analysis, particularly when examining the effect the waiver will have on a company's ability to engage in unchecked market behavior and related public policy concerns, waivers of FLSA collective action rights should rarely, if ever, be enforced.

Employers' attempt to use the Federal Arbitration Act ("FAA") to cripple the FLSA's purposes and its enforcement regime cannot stand. Arbitration agreements are only valid under the FAA where they provide an adequate forum in which to resolve statutory claims and where they adhere to the "broader social purposes behind the statute." Particularly as a later enacted statute, the FAA cannot eviscerate the FLSA's policies and enforcement regime. Because collective action

waivers preclude the vindication of employees' common statutory rights under the FLSA, refusal to enforce such waivers is consistent with the FAA.

III. ARGUMENT

A. The Purpose of the FLSA Is to Protect ALL Workers and the Public from the Harms of Detrimental Labor Conditions

The purpose of the FLSA is 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. Congress's goal in passing the FLSA was "to correct and as rapidly as practicable to eliminate the conditions." 29 U.S.C. § 202. To achieve this goal, the FLSA is designed to make sure all covered workers are paid minimum wage and overtime for hours over forty. *Barrentine v. Arkansas Best Freight System, Inc.*, 450 U.S. 728, 739 (1981) ("The principal congressional purpose in enacting the FLSA was to protect all covered workers from substandard wages and oppressive working hours. . . . [and to ensure that employees] would be protected from the evil of 'overwork' as well as 'underpay.'") (citations omitted and emphasis added); *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 710 (1945) (noting "the Congressional policy of uniformity in the application of the provisions of the Act to all employers subject thereto").

i. Congress Mandated Minimum and Overtime Wages in Order to Protect All Workers and the Public

Congress mandated a minimum wage as part of the FLSA in order to "secure for the lowest paid segment of the nation's workers a subsistence wage", *D.A. Schulte, Inc., v. Gangi*, 328 U.S. 108, 116 (1946), because "[e]mployees receiving less than the statutory minimum are not likely to have sufficient resources to maintain their well-being and efficiency…", *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. at 708-09. In enacting the FLSA, Congress recognized that substandard wages imperiled not only workers, but also more broadly "endangered the national health and well-being and the free flow of goods in interstate commerce." *Id.* at 706.

Congress intended the FLSA's overtime provisions to provide rights and protections to workers *as a whole*, and to protect the public at large. The Supreme Court explained:

> The purpose was to compensate those who labored in excess of the statutory maximum number of hours for the wear and tear of extra work and to spread employment through inducing employers to shorten hours because of the pressure of extra cost. The statute by its terms protects the group of employees by protecting each individual employee from overly long hours.

Bay Ridge Operating Co. v. Aaron, 334 U.S. 446, 460 (1948). Congress was concerned with the broader societal harms of long hours. *See Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 576 (1942). ("Long hours may impede the

free interstate flow of commodities by creating friction between production areas with different length workweeks, by offering opportunities for unfair competition through undue extension of hours, and by inducing labor discontent apt to lead to interference with commerce through interruption of work.") Thus, Congress's concern was not simply to provide rights and protections to each individual worker, but rather to protect workers *as a whole* and the public at large.

ii. The FLSA Protects All Workers and the Public from Unchecked Market Behavior by Limiting the Right to Contract

A significant aspect of ensuring that the FLSA protects "all" workers from substandard wages is a public interest independent of the individual employee or employer; it is to check the market incentives that result in the payment of substandard wages and prevent substandard wages from being used as "an unfair method of competition" against law-abiding competitors. 29 U.S.C. § 202(a)(3); *see Battaglia v. General Motors Corp.*, 169 F.2d 254, 259 (2d Cir.1948) ("Rights granted to employees under the Fair Labor Standards Act ... are 'charged or colored with the public interest.'"); *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 302 (1985) (allowing employees to opt out of FLSA protections would result in an impermissible downward pressure on wages across the market); H. Rep. No. 2182, 75th Cong., 3d Sess., pp. 6-7 ("No employer in any part of the United States in any industry affecting interstate commerce need fear that he will

be required by law to observe wage and hour standards higher than those applicable to his competitors".)

The FLSA checks market behavior by limiting the right to contract. *Brooklyn Sav. Bank*, 324 U.S. at 706-07 ("The [FLSA] was a recognition of the fact that due to the unequal bargaining power as between employer and employee, certain segments of the population required federal compulsory legislation to prevent private contracts on their part which endangered national health and efficiency and as a result the free movement of goods in interstate commerce."); *see also Sec'y of Labor v. Lauritzen*, 835 F.2d 1529, 1545 (7th Cir.1987) (Easterbrook, J., concurring) (The FLSA was "designed to defeat rather than implement contractual arrangements").[2] As a result, "FLSA rights cannot be abridged by contract or otherwise waived because this would 'nullify the purposes' of the statute and thwart the legislative policies it was designed to effectuate." *Barrentine*, 450 U.S. at 740-741 (*citations omitted).*

[2] Regulating behavior in the labor marketplace through limiting the right to contract is common practice. *West Coast Hotel v. Parrish*, 300 U.S. 379, 392-94 (1937) (because "self-interest is often an unsafe guide" in the labor market, legislatures may properly limit the right to contract); *Lehigh Valley Coal*, 218 F. 547, 553 (1914) (Judge Learned Hand noting that employment statutes were meant to "upset the freedom of contract"). *See, e.g.*, 29 U.S.C. § 103 (prohibiting any contract in conflict with the right of workers to engage in concerted activity for mutual aid or protection).

B. The Statutory Right to Collective Action is an Integral Part of the FLSA Enforcement Regime

Upon the findings of the Congressional Committees charged with creating the FLSA, Congress set forth a "comprehensive remedial scheme" designed to effectuate this important national policy. *Herman v. RSR Sec. Servs. Ltd.*, 172 F.3d 132, 144 (2d Cir.1999). Along with the right to earn minimum wages and overtime premium pay, Congress provided for both public and private enforcement, including enforcement actions brought by the Secretary of Labor (29 U.S.C. § 216 (c) and the right of workers to bring their own private actions, the right to proceed collectively to enforce the statute, the right to liquidated damages, and the right to shift fees and costs onto the employer. (29 U.S.C. § 216 (b) ("Section 16(b)")).

The collective action provision is integral to FLSA's comprehensive remedial scheme and *a statutory right in and of itself. See Raniere v. Citigroup, Inc.*, __ F. Supp.2d __, 2011 WL 5881926, *15 (S.D.N.Y. Nov. 22, 2011) ("Unlike employment-discrimination class suits under Title VII or the Americans with Disabilities Act that are governed by Rule 23, Congress created a unique form of collective action for minimum-wage and overtime pay claims brought under the FLSA."). The Supreme Court emphasized that, by "expressly authoriz[ing] employees to bring collective . . . actions . . . . Congress has stated its policy that

[Section 16(b)] plaintiffs should have the opportunity to proceed collectively." *Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, 170 (1989).[3]

In providing workers with the statutory right to proceed collectively, Congress struck a careful balance between promoting enforcement through "lower individual costs to vindicate rights by the pooling of resources" and limiting the litigation to "party plaintiffs" who have an actual stake in the claims and affirmatively consent to pursuing them. *See Hoffmann-La Roche*, 493 U.S. at 170, 173. Section 16(b) initially allowed third parties, such as labor unions, to file FLSA actions on behalf of unnamed workers, and no written consent to join the case was required. *Hoffmann-La Roche*, 493 U.S. at 173. In response "to excessive litigation spawned by plaintiffs lacking a personal interest in the outcome, the representative action by plaintiffs not themselves possessing claims," Congress removed that provision in the Portal-to-Portal Act of 1947 and instead required interested "party plaintiffs" to affirmatively opt into the litigation, while leaving in place the "similarly situated" language providing for collective actions. *Id.*; 29 U.S.C. § 216 (b). Had Congress not wanted to provide plaintiffs with the special statutory right of collective action,

[3] *Hoffmann-La Roche* involved a collective action brought under the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.*, which incorporates the FLSA's collective action provision in 29 U.S.C. § 626(b). Courts have looked to *Hoffmann-La Roche* for guidance on interpretation of the FLSA because the Court's opinion contains an extended discussion of the FLSA collective action provision.

it could have simply eliminated the language providing a right to collective action. However, that was not what Congress did. Although it limited plaintiffs' collective action right, it did not eliminate it as a statutory right.

Courts recognize that the statutory right to pursue claims jointly in a collective action promotes the broad remedial goals of the FLSA. For example, the Supreme Court, interpreting the ADEA's incorporation of the Section 16(b) collective action, rejected an employer's argument that courts should not be involved in issuing notice to "similarly situated" employees, emphasizing that "[t]he broad remedial goal of the statute should be enforced to the full extent of its terms." *Hoffmann-La Roche*, 493 U.S. at 173. Further, "FLSA collective actions allow plaintiffs the advantage of lower individual costs to vindicate rights by the pooling of resources." *Raniere*, 2011 WL 5881926 at *16, *citing Hoffmann-La Roche, Inc.*, 493 U.S. at 170. Without a collective action provision, plaintiffs would not be able to seek redress for violations of FLSA rights at all where damages amounts are prohibitively small for themselves and their counsel to pursue their claims individually. *See Sutherland v. E&Y*, 768 F.Supp.2d 547, 551 (S.D.N.Y. 2011) (finding collective action waiver provision unenforceable because plaintiff showed that "her maximum potential recovery would be too meager to justify the expenses required for the individual prosecution of her claim") *citing In re Am.*

Express Merchants' Litig., 554 F.3d 300, 311 (2d Cir. 2009). Thus, Congress did not design the FLSA merely to provide individuals with a private remedy; it declared a national policy to "correct and as rapidly as practicable to *eliminate* the [detrimental labor] conditions" addressed by the statute (29 U.S.C. § 202 (b) (emphasis added)) and gave workers the right to join together collectively to help accomplish this broad remedial goal.[4]

Courts have also noted that Section 16 (b) collective actions are a vital supplement to the enforcement powers of the Department of Labor ("DOL") on behalf of workers under Section 16(c) of the statute. *Raniere*, 2011 WL 5881926 at *16, *citing Brooklyn Sav. Bank v. O'Neil*, 324 U.S. at 706 fn 16, *quoting* Representative Keller during 83 Cong. Rec. 9264 ("The [collective action] provision has the further virtue of minimizing the cost of enforcement by the Government… [It] puts directly into the hands of the employees who are affected

[4] Congress' granting workers the right to act collectively in an effort to check market behavior and advance public policy is not unique to the FLSA. The Norris-LaGuardia Act guarantees employees the right to act collectively for their mutual aid and protection, 29 U.S.C. §102, and directs courts to refuse to enforce contracts where an employer requires an employee to waive rights to concerted activity as a condition of employment. 29 U.S.C. § 103. The National Labor Relations Act also guarantees workers the right to act collectively for their mutual aid and protection, including the right to bring claims collectively. 29 U.S.C. § 157. Indeed, these statutes provide a separate ground for striking E&Y's class action waiver. *See In re D.R. Horton*, 357 NLRB No. 184, 2012 WL 36274 (NLRB Jan. 3, 2012); *Herrington v. Waterstone Mortg. Corp.*, No. 11-cv-779-bbc, 2012 WL 1242318 (W.D. Wis. Mar. 16, 2012).

by violation the means and ability to assert and enforce their own rights, thus avoiding the assumption by Government of the sole responsibility to enforce the act.") Only through broad enforcement action by the DOL, on behalf of groups of employees, and by opt-in party plaintiffs, through joint litigation in the form of a collective action, can the FLSA's broad remedial purpose to eliminate substandard labor conditions be accomplished.[5]

C. Despite the FLSA's Enforcement Regime, the Goals of the FLSA Remain at Risk

Congress's stated policy in the FLSA of eliminating substandard labor conditions remains as necessary today as it was in 1938. Violations of the FLSA continue to be widespread and systemic throughout the United States. For example, the DOL found staggering levels of noncompliance with wage and hour laws across the country in 1999 and 2000. It found that 65% of garment manufacturing firms and 33% of nursing homes and residential care facilities in New York City were violating applicable laws. DOL, Employment Standards Administration, Wage and Hour Division, *1999-2000 Report on Initiatives*, 13, 36 (Feb. 2001),

[5] Section 16(b) is no less integral to the enforcement of other federal statutes that have incorporated its collective action provision, such as the ADEA, 29 U.S.C. §621 *et seq*. and the Equal Pay Act of 1963, 29 U.S.C. § 206(d) which are part of the FLSA.

available at http://nelp.3cdn.net/a5c00e8d7415a905dd_o4m6ikkkt.pdf (last visited May 17, 2012).

Similarly, a 2008 survey of 1,432 workers in low-wage industries in New York City "found that many employment and labor laws regularly and systematically are violated," including 21% of workers in the sample who were paid less than the legally required minimum wage in the prior workweek and more than 23% who were not paid the legally required overtime rate by their employer. Annette Bernhardt, *et al*., *Working Without Laws: A Survey of Employment and Labor Law Violations in New York City* 2 (National Employment Law Project 2010) *available at* http://nelp.3cdn.net/990687e422dcf919d3_h6m6bf6ki.pdf (last visited on May 17, 2012).

Unlawful underpayment of employees' wages is not limited to the Second Circuit, of course. 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.showusthejobs.org/issues/jobseconomy/overtimepay/upload/FLSA.pdf (last visited on April 19, 2012).

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/index.php/broken_laws/index (last visited on May 17, 2012). 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 work they performed outside their scheduled shift. *Id.* at 3. Finding an FLSA collective action ban unenforceable would have its greatest impact on low-wage workers who seek to recover lost wages resulting from such violations, although Congress's concern with overtime was not limited solely to low wage workers.

Despite widespread violations, government agencies are unable to enforce our nation's wage and hour 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 2). By 2007, when 130 million American workers were protected by the FLSA, the Division employed *fewer* investigators – only 750 – and conducted only 24,950 investigations.[6] *Id.* From 1941 to 2009, DOL experienced a thirteen-fold decrease in enforcement capacity. Progressive States Network, *Cracking Down on Wage Theft* at 5 (Apr. 2012) available at http://www.progressivestates.org/sync/pdfs/PSN.CrackingDownonWageTheft.pdf (last visited on May 17, 2012).

In addition to a decline in investigations, the total number of enforcement actions pursued by the DOL's 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/assets/130/120636.pdf (last visited on May 17, 2012). This reduction in public enforcement of the wage and hour laws has led employees to rely almost entirely on private

[6] It should be noted that in recent years the DOL has begun hiring additional wage and hour investigators. DOL News Release (Nov. 19, 2009), *available at* http://www.dol.gov/opa/media/press/whd/whd20091452.htm (last visited on May 17, 2012). 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.

enforcement actions. In 2007, for instance, there were 6,825 FLSA cases filed in federal court, but only 138 of these were filed by the DOL. 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 on May 17, 2012).[7]

D. Arbitration Must Allow Employees to Vindicate Their Statutory Rights Under the FLSA

The principle that arbitration cannot preclude the vindication of federal statutory rights is a bedrock principle of FAA interpretation, as expressed by the Supreme Court in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991) and *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc*., 473 U.S. 614, 637 (1985). Federal statutory rights cannot be eviscerated by an employer under the guise of an arbitration clause. *Id.* at 637 n. 19 (noting "that in the event the [provisions of the arbitration agreement] operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we

[7] As with the DOL, state agencies charged with enforcing wage and hour laws also have reduced their enforcement activities. *See* National Employment Law Project, *Holding the Wage Floor: Enforcement of Wage and Hour Standards for Low-Wage Workers in an Era of Government Inaction and Employer Unaccountability* 8-9 (Oct. 2006), *available at* http://nelp.3cdn.net/95b39fc0a12a8d8a34_iwm6bhbv2.pdf (last visited May 17, 2012).

would have little hesitation in condemning the agreement as against public policy.") The prohibition on waiver applies "to a statutory right conferred on a private party, but affecting the public interest" *Brooklyn Sav.*, 324 U.S. at 704-05 ("Where a private right is granted in the public interest to effectuate a legislative policy, waiver of a right so charged or colored with the public interest will not be allowed where it would thwart the legislative policy which it was designed to effectuate.")

Relying on this principle, this Court found that where a class action waiver in an arbitration agreement prevents the vindication of statutory rights, it cannot be enforced. *See In re Am. Express Merchants' Litig.*, 554 F.3d 300, 304 (2d Cir.2009) ("*Amex I*"). In determining the enforceability of the class action waiver, the Court set forth the factors to be examined, including: 1) fairness of the provisions; 2) the cost to an individual plaintiff of vindicating the claim when compared to the plaintiff's potential recovery; 3) the ability to recover attorneys' fees and other costs and thus obtain legal representation to prosecute the underlying claim; 4) the practical effect the waiver will have on a company's ability to engage in unchecked

market behavior; and 5) related public policy concerns. *Id.* (citing *Dale v. Comcast Corp.*, 498 F.3d 1216, 1224 (11th Cir.2007).[8]

Under the vindication of rights test set forth by this Court in the *Amex* cases, a waiver of the right to proceed collectively granted in the FLSA should rarely, if ever, be permitted because it violates the statutory purpose by preventing workers from vindicating their rights under the FLSA. While Plaintiffs-Appellees demonstrate in their brief why the waiver is unenforceable in their particular collective action, *Amici* here focus on how the public interest in the enforcement of the FLSA will always be undercut should employers be given license to require workers to waive their right to collective action as a condition of employment.

[8] While *Amex I* was vacated by the Supreme Court and remanded for further consideration in light of its ruling in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S.Ct. 1758 (2010), this Court reaffirmed the holding of *Amex I* in *In re Am. Express Merchants' Litig.*, 634 F.3d 187, 189 (2d Cir.2011) ("*Amex II*") (upholding rejection of class waiver in *Amex I*), and again in *In re Am. Express Merchants' Litig.*, 667 F.3d 204, 206 (2d Cir.2012) ("*Amex III*") (*AT & T Mobility LLC v. Concepcion*, 131 S.Ct. 1740 (2011) does not alter the analysis of *Amex I*). *Concepcion* is further distinguishable from this case because the Court it dealt with a state law prohibiting class action waivers per se, not the issue here, whether the right to a collective action provided by a federal statute can be extinguished by waiver. 131 S.Ct. at 1747.

E. Applying the Factors of Unchecked Market Behavior and Public Policy of the *Amex I* Test to FLSA Cases Shows That Collective Action Waivers Should Never Be Permitted

i. A Class Waiver Provision that Forces Workers to Pursue Individual Claims Will Effectively Preclude Them From Pursuing Claims and Vindicating Statutory Rights

a) Many FLSA Claims Will Go Without Redress Due to Their Small Dollar Value Relative to the Costs and Risks of Individual Arbitration.

Courts have recognized that individual wage and hour claims are typically so small that they are seldom brought as individual litigation. *See, e.g., Scholtisek v. The Eldre Corp.,* 229 F.R.D. 381, 394 (W.D.N.Y. 2005); *Chase v. AIMCO Props., L.P.*, 374 F. Supp. 2d 196, 198 (D.D.C. 2005). Due to the relatively low-dollar-value nature of wage and hour claims, "without the economic benefit of class representation, many of the plaintiffs would be forced to forego compensation to which they are entitled." *Frank v. Eastman Kodak Co.,* 228 F.R.D. 174, 183-84 (W.D.N.Y. 2005). In wage and hour cases of low-wage workers, for example, the individual claims "tend to involve relatively small dollar figures, prohibitively small for a private attorney." Juliet M. Brodie, *Post-Welfare Lawyering: Clinical Education and a New Poverty Law Agenda*, 20 Wash. U. J.L. & Pol'y 201, 248-49 (2006).

One need only visit the DOL's website to see that FLSA claims for unpaid minimum wages and overtime premiums are relatively small. DOL's enforcement statistics for 2008 (the last year published) show that minimum wage claims handled by DOL averaged only $392 per worker, and overtime claims averaged only $676. *See* U.S. Dep't of Labor, Employ't Standards Admin., Wage and Hour Div., *Wage and Hour Collects Over $1.4 Billion in Back Wages for Over 2 Million Employees Since Fiscal Year 2001*, at 2 (2008), *available at* http://www.dol.gov/whd/statistics/2008FiscalYear.pdf (last visited on May 17, 2012). These sums are relatively small when compared to the transaction costs of individual litigation. But the sums are not insignificant to low wage workers struggling to feed a family.

Finally, plaintiffs will be very unlikely to obtain counsel to bring individual cases because very few attorneys would take on such cases after weighing the typically modest recovery, and the typically modest means of the plaintiffs bringing FLSA lawsuits, with the risk of not prevailing and plaintiffs being unable to pay the substantial costs. *See Sutherland*, 768 F.Supp.2d 547 ("[J]ust as no rational person would expend hundreds of thousands of dollars to recover a few thousand dollars in damages, 'no attorney (regardless of competence) would ever take such a case on a contingent fee basis.'"); *Reyes v. Altamarea Group, LLC*, No.

10–CV–6451, 2011 WL 4599822 (S.D.N.Y. Aug. 16, 2011) ("Where… the law relies on prosecution by 'private attorneys general,' attorneys who fill the private attorney general role must be adequately compensated for their efforts. If not, wage and hour abuses would go without remedy because attorneys would be unwilling to take on the risk.") The reality is that individual claims on the scale of those collected by DOL for FLSA violations in 2008 are too small for most attorneys to take on as an individual matter.

b) Many Individuals Will Not Know Their Rights Are Being Violated Absent Notice of a Collective Action.

A collective action prohibition would eliminate court or arbitrator supervised notice to potential opt-in plaintiffs who may be unaware that their rights are being violated. Under *Hoffmann-La Roche*, potential opt-in plaintiffs are entitled to notice of the collective action once the named plaintiffs have made a showing that there are "similarly situated" employees. 493 U.S. at 172-73. Without such notice, many aggrieved workers, including those in transient jobs, individuals with limited English abilities, and those who are told by their employers that they are properly classified, may never even realize they may have been wronged. *See Gentry v. Superior Court*, 42 Cal. 4th 443, 459 (2007) (citations omitted); *Ansoumana v. Gristede's Operating Corp.*, 201 F.R.D. 81, 86-87 (S.D.N.Y. 2001).

c) Many Aggrieved Workers Will Not Step Forward to Pursue Individual Actions Due to the Fear of Retaliation.

FLSA enforcement depends upon employees stepping forward to complain. *See Kasten v. Saint-Gobain Perf. Plastics, Corp.*, 131 S.Ct. 1325, 1333 (2011). The collective action process allows workers to effectively sue their current employer and have their claims heard as opt-in plaintiffs, without taking a visible role, and without being perceived as the ringleader, which the named plaintiff must do. That is why almost all FLSA cases are brought by former, rather than current employees. Courts have long recognized the very real risks that plaintiffs endure, not just with their current employer, but even with respect to an industry. Employees have a reasonable fear that sticking their necks out to collect the small sums due for wage and hour violations could ruin their professional careers if it becomes known that they brought litigation against their employer. *See 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"); *Kasten*, 131 S.Ct. at 1333. *Does I thru XXIII v. Advanced Textile Corp.*, 214 F.3d 1058 (9th Cir.2000) (permitting anonymous filings because of risks to FLSA plaintiffs).

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, 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 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"); *Brock v. Richardson*, 812 F.2d 121, 124 (3d Cir.1987). Thus, many employees with legitimate claims for back overtime wages may not pursue their remedies for the very real fear of retaliation and coercion if collective action prohibitions are enforced and they are required to proceed individually.

ii. <u>Allowing Employers to Use Contracts to Avoid FLSA Liability Encourages Behavior Congress Intended the FLSA to Discourage.</u>

a) Denying Workers the Right to Proceed Collectively Allows Employers to Engage in Unchecked Market Behavior.

Like the Sherman Act at issue in *Amex I*, Congress designed the FLSA to be a check on market behavior. And like the Sherman Act, the FLSA's power to check the market is only as effective as its enforcement. Employers determine when and how the FLSA applies in the first instance and the market incentive to misapply it is strong. The only check on an employer's determination is the FLSA's enforcement regime. A critical part of the regime is the statutory right to bring private, collective actions to supplement the DOL's limited resources for

enforcing the FLSA and deterring violations. *See*, *Reiter v. Sonotone Corp.*, 442 U.S. 330, 344 (1979). The private right of action is as important today as ever as it has far outpaced government action as the leading method of enforcement. In 2007, for example, there were 6,825 FLSA cases filed in federal court.[9]

By forcing workers to forfeit the right to proceed collectively, class action waivers emasculate the FLSA's check on market behavior. For all the reasons discussed above, most workers do not bring wage and hour claims individually. Consequently, where an employer can force workers to forfeit the right to proceed collectively, it faces a significantly reduced risk that its illegal behavior will ever be challenged. Even where one or several individual challenges are raised, there is little or no chance that a significant percentage of the affected workers will bring their claims. This case illustrates the point. When a staff accountant was able to overcome the hurdles to bringing misclassification claims in 2003, E&Y simply resolved the action individually without changing its practices. *Garrett v. Ernst & Young*, 1:03-cv-06257-AKH (S.D.N.Y.). Apparently since that case was resolved, E&Y has continued to treat its staff accountants as FLSA exempt, having disposed of the only misclassification case brought by an accountant against it in 8 years. Now, in 2012, it seeks to employ the same strategy through its class action waiver.

[9] Even with both these avenues of enforcement, FLSA violations remain rampant. *See* section C above.

So long as the cost of resolving the few individual claims that are raised is less than the labor costs avoided by the violation, the market encourages FLSA violations. Indeed, given the economics of the violations, the market incentive is to violate the FLSA on a widespread basis so that the labor cost avoided is large enough to offset any individual claims.

Where, like here, a class action waiver neutralizes the FLSA's check on market behavior that drives wages down, promotes long work hours, and discourages the spreading of employment, it undermines Congress' purpose in enacting the FLSA. Such a waiver cannot stand. *Amex III*, 667 F.3d at 214-15 (an agreement frustrating the public policy embodied in private enforcement provisions through class action waivers "is inconsistent with the public interest"); *see also Shankle v B-G Maint. Mgmt of Colo. Inc.*, 163 F.3d 1230, 1234 (10th Cir.1999) ("arbitration of statutory claims works because potential litigants have an adequate forum in which to resolve their statutory claims and because the broader social purposes behind the statute are adhered to.") *citing Gilmer*, 500 U.S. at 28.

b) Allowing Employers to Contract Around FLSA Rights Undermines the FLSA's Limitations on Contracts

Congress designed the FLSA to check market behavior by limiting the right to contract. *Brooklyn Sav. Bank*, 324 U.S. at 706-07. The Supreme Court has repeatedly held that an employer may not write itself out of the Congressional

enforcement plan by contracting otherwise with employees. *Barrentine*, 450 U.S. at 740-741 ("we have held that FLSA rights cannot be abridged by contract or otherwise waived because this would "nullify the purposes" of the statute and thwart the legislative policies it was designed to effectuate.") (citations omitted).

The principal purpose of a contract requiring workers to forfeit their statutory right to bring claims collectively is to prevent workers from bringing wage and hour claims as Congress intended. *Raniere*, 2011 WL 5881926, 30 (class action waivers "quite obviously run counter to the values of simplicity, expedience, and cost-saving that underlie the federal policy preference for arbitration.") (citations omitted); *Gentry*, 42 Cal.4th at 459 (class action waivers in arbitration "drive up the costs of arbitration and diminish the prospect that the overtime laws will be enforced.") Unable to enforce a class waiver in court, employers seek to use private contracts to do so through arbitration. But the FLSA brooks no such impediment to the social policies it promotes or the rights it grants workers. *Brooklyn Sav. Bank*, 324 U.S. at 704; *Barrentine*, 450 U.S. at 740-741. Indeed, it makes no sense that Congress would limit the right to contract only to allow employers to contract around the limitation.

There is nothing about the FAA that would allow employers to use an arbitration agreement to negate the FLSA's policies. Congress intended the FAA to

enforce contracts to arbitrate. *Thomson-CSF, S.A. v. Am. Arbitration Ass'n*, 64 F.3d 773, 779 (2d Cir.1995) ("Arbitration is strictly a matter of contract.") Enhancing the FAA is therefore largely a matter of "mak[ing] arbitration agreements as enforceable as other contracts, but not more so." *Opals on Ice Lingerie v. Bodylines, Inc.*, 320 F.3d 362, 369 (2d Cir.2003); *see* 9 U.S.C. § 2 (agreements to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."). It has long been federal law that "a statutory right conferred on a private party, but affecting the public interest may not be waived or released if such waiver or release contravenes the statutory policy." *Brooklyn Sav. Bank*, 324 U.S. at 704-05.

Thus, as contracts, arbitration agreements are only valid under the FAA where they provide an adequate forum in which to resolve statutory claims and where they adhere to the "broader social purposes behind the statute." *Amex III*, 667 F.3d at 216. The FAA's policy favoring arbitration does not trump the FLSA's purposes.[10] The FLSA (1938) was enacted twelve years after the FAA

[10] The issue here is not whether FLSA claims can be subjected to compulsory arbitration pursuant to an arbitration agreement. *Gilmer* resolved that issue. 500 U.S. at 35. The issue here is whether an employer can extinguish the FLSA's right to collective action by arguing that the FAA trumps the FLSA. The NLRB's analysis in *D.R. Horton* reconciles the FAA and the FLSA. Citing Gilmer, the NLRB held that FLSA claims can be arbitrated in accordance with the FAA, but that the FAA does not allow employees to be forced to forfeit the right to collective

(1925), and its collective action process was installed in 1947. As part of a specific later-enacted statute, the FLSA's collective action process applies over any contrary provision of the FAA, not the other way around. *See Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154 (1976) ("where provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one.")

An employer can no more frustrate the FLSA's policies through an arbitration agreement than it can through any other contract. Accordingly, E&Y's class action waiver cannot stand because it is contrary to the congressional purposes underlying the FLSA and its limitation on private contracts. *Brooklyn Sav. Bank*, 324 U.S. at 704-05.

c) Denying Workers the FLSA Right to Proceed Collectively Promotes Violations of the Law

Not only does denying workers the ability to proceed collectively violate the social policy behind the FLSA, it creates an economic incentive to violate the law. Denying workers the right to proceed collectively effectively guarantees an employer that it will avoid most of the liability associated with wage and hour violations because, as discussed above, most low-wage workers will not bring

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action where it prevents the vindication of statutory rights. 357 NLRB No. 184, 2012 WL 36274 at *12. *Concepcion* is not to the contrary. *See Amex III*, 667 F.3d at 213-14.

claims individually. Without the risk of substantial liability, an economically rational employer will violate the FLSA to reap the savings in labor cost, knowing that these savings will more than offset the cost of any individual claims that may be raised.

By creating an incentive to violate the law, class waivers put law-abiding employers at a competitive disadvantage. The competitive advantage of employers who violate the law puts great pressure on otherwise law-abiding competitors in the industry to follow suit. Because E&Y's class action waiver immunizes its own violation of the FLSA and also encourages other employers' violations of the FLSA, it cannot stand. *Brooklyn Sav. Bank*, 324 U.S. at 709-10 ("contracts tending to encourage violation of laws are void as contrary to public policy.")

F. The Result Is Not Contrary to the FAA as Arbitration Under the FAA Must Allow for the Vindication of Federal Statutory Rights

The Supreme Court's arbitration jurisprudence is not to the contrary, as the Court has always recognized that arbitration is merely substituting the arbitral forum for the court tribunal, both fully allowing the vindication of federal statutory rights. Thus, the Supreme Court has held that FLSA rights and the federal policy favoring arbitration are not inherently inconsistent. *Gilmer*, 500 U.S. at 28 (ADEA claims are arbitrable). So long as arbitration is merely an alternate forum and affords no other advantages to an employer, and no evasion of the vindication of

the FLSA's purposes, the Courts can be sure that "the statute will continue to serve both its remedial and deterrent function." *Mitsubishi*, 473 U.S. at 637.

But that is not what is occurring here. E&Y here uses its arbitration clause as a Trojan horse. Stuffing its arbitration clause with a far reaching collective action waiver, E&Y is attempting to secure limitations on FLSA rights that it could never achieve in Court under the guise of an otherwise enforceable arbitration clause. No Court has ever permitted an employer to demand that employees waive their right to collective action for FLSA claims in court as a condition of employment. Amici have never even seen an employer make this argument, it being so contrary to the FLSA and Supreme Court jurisprudence. Employers may not limit FLSA rights under the guise of a federal policy encouraging arbitration.

IV. CONCLUSION

For these reasons, the Court should affirm the district court's order denying Defendant-Appellant's motion to dismiss or stay the proceedings and compel arbitration of Plaintiff-Appellee's collective action claims.

Dated: May 18, 2012

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and 32(a)(7)(B) because this brief contains 6984 words excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. The brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in Times New Roman 14-point font.

Dated: May 18, 2012 *<u>/s/ Michael J.D. Sweeney</u>*
Michael J.D. Sweeney

EXHIBIT 1

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STATEMENT OF AMICI CURIAE

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 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.

The Employee Rights Advocacy Institute For Law & Policy (The Institute) is a charitable non-profit organization whose mission is to advocate for employee rights by advancing equality and justice in the American workplace. The Institute achieves its mission through a multi-disciplinary approach combining innovative legal strategies, policy development, grassroots advocacy, and public

education. In particular, The Institute has sought to eliminate mandatory pre-dispute arbitration of employment claims through its public education work.

The **National Employment Law Project ("NELP")** is a non-profit legal organization with 40 years of experience advocating for the employment and labor rights of low-wage workers. In partnership with com-munity groups, unions, and state and federal public agencies, NELP seeks to ensure that all employees, and especially the most vulnerable ones, receive the basic workplace protections guaranteed in our nation's labor and employment laws. NELP has litigated and participated as *amicus* in numerous cases addressing the rights of workers under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201, *et seq*., as well as other federal workplace rights laws. Depriving workers of their rights to fully enforce their rights to be paid minimum wage and overtime pay by prohibiting collective action in any forum undermines the wage floor and the policies of the FLSA, and rewards unfair competition by employers engaging in wage theft.