No. 23-1812

In the United States Court of Appeals for the Seventh Circuit

MARY RODGERS-ROUZIER,

Plaintiff-Appellant,

v.

AMERICAN QUEEN STEAMBOAT OPERATING COMPANY, LLC and HMS GLOBAL MARITIME LLC,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Indiana, New Albany Division, No. 4:20-cv-00004-SEB-KMB.
The Honorable Sarah Evans Barker, Judge Presiding.

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF OF NATIONAL EMPLOYMENT LAWYERS' ASSOCIATION IN SUPPORT OF PLAINTIFF-APPELLANT AND REVERSAL

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Counsel for Amicus Curiae

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 23-1812

Short Caption: Rodgers-Rouzier v. American Queen Steamboat Operating Co.

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N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:
N/A

Attorney's Signature: /s/ Clif Alexander Date: September 5, 2023

Attorney's Printed Name: Clif Alexander

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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Attorney's Signature: /s/ Lauren E. Braddy Date: September 5, 2023

Attorney's Printed Name: Lauren E. Braddy

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: s/Summer H. Murshid Date: September 5, 2023

Attorney's Printed Name: Summer H. Murshid

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☑ **No** ☐

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Phone Number: 414-271-8650 Fax Number: 414-207-6079

E-Mail Address: smurshid@hq-law.com

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N/A

Attorney's Signature: s/ Martha L. Burke Date: September 5, 2023

Attorney's Printed Name: Martha L. Burke

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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E-Mail Address: mburke@hq-law.com

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N/A

Attorney's Signature: s/ Connor J. Clegg Date: September 5, 2023

Attorney's Printed Name: Connor J. Clegg

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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Phone Number: 414-271-8650 Fax Number: 414-207-6079

E-Mail Address: cclegg@hq-law.com

1. Pursuant to Federal Rule of Appellate Procedure 29 and Circuit Rule 29.1, the National Employment Lawyers Association (hereafter "NELA") respectfully request leave from the Court to file the attached brief as *Amici Curaie* in support of Plaintiffs-Appellants' appeal from the final judgment entered against them.

2. NELA is the largest professional membership organization in the country comprising 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 69 circuit, state, and local affiliates have a membership of over 4,000 attorneys who are committed to working on behalf of those who have been illegally treated in the workplace.

3. This membership includes residents of Seventh Circuit states who would be adversely impacted by a ruling against Plaintiffs-Appellants. 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.

4. *Amicus's* proposed brief (attached hereto) is relevant to the disposition of this matter in that it contends that the District Court made a manifest error of law by

improperly interpreting § 216(b) and holding that opt-in plaintiffs are not party plaintiffs.

5. *Amicus's* proposed Brief does not duplicate the arguments of Appellants, but rather focuses primarily on legal principles of general applicability. While the proposed Brief referenced some specifics from Rodgers-Rouzier's case for context, the primary focus of the brief is the proper legal interpretation of § 216(b). On the other hand, Appellants' Brief focuses more on the facts of their own case, without examination Amicus's more thorough examination of the FLSA.

WHEREFORE, NELA respectfully requests that this Court it leave to file the Brief of *Amicus Curiae*.

Dated: September 5, 2023.

Respectfully submitted,

/s/ Summer H. Murshid

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing motion complies with Fed. R. App. P. 27(a) and the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because it contains 302 words.

The undersigned further certifies that this motion 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 motion has been prepared in a proportionally spaced typeface using Microsoft Word Version 2016 in 12-point Palatino Linotype font.

Dated: September 5, 2023

/s/ Summer H. Murshid
Summer H. Murshid
One of the Attorneys for Amicus

CERTIFICATE OF SERVICE

I hereby certify that on September 5, 2023, the aforementioned motion was filed with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Summer H. Murshid
Summer H. Murshid

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Counsel for Amicus Curiae

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Attorney's Signature: /s/ Clif Alexander Date: September 5, 2023

Attorney's Printed Name: Clif Alexander

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Attorney's Signature: /s/ Lauren E. Braddy Date: September 5, 2023

Attorney's Printed Name: Lauren E. Braddy

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Attorney's Signature: s/Summer H. Murshid Date: September 5, 2023

Attorney's Printed Name: Summer H. Murshid

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Attorney's Signature: s/ Martha L. Burke Date: September 5, 2023

Attorney's Printed Name: Martha L. Burke

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Short Caption: Rodgers Rouzier v. American Queen Steamboat Operating Co.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

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(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):
National Employment Lawyers Association (NELA) as Amicus Curiae on behalf of Mary Rodgers-Rouzier and all Opt-In Plaintiffs identified in the notice of appeal and docketing statement.

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:
Hawks Quindel S.C., Anderson Alexander PLLC

(3) If the party, amicus or intervenor is a corporation:

i) Identify all its parent corporations, if any; and

N/A

ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

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Attorney's Signature: s/ Connor J. Clegg Date: September 5, 2023

Attorney's Printed Name: Connor J. Clegg

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTEREST OF *AMICI CURIAE*

The National Employment Lawyers Association (hereafter "NELA") is the largest professional membership organization in the country comprising 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 69 circuit, state, and local affiliates have a membership of over 4,000 attorneys who are committed to working on behalf of those who have been illegally treated in the workplace. This membership includes residents of Seventh Circuit states who would be adversely impacted by a ruling against Plaintiffs-Appellants. 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.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court has jurisdiction to hear the Opt-In Plaintiffs' appeal of the final judgment entered against them because they were parties to the underlying action. The statutory text of § 216(b) explicitly provides that employees become party plaintiffs to FLSA actions by filing their written consent forms with the court. No further action—including certification—is required. Finding otherwise would create a circuit split, pitting the Seventh Circuit against every other circuit that has addressed the issue, including the First, Second, Third, Fourth, Fifth, Sixth, Eighth, Ninth, and Eleventh Circuits, and would be contrary to the Supreme Court's legal analysis in *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66 (2013). Holding otherwise would read additional terms into § 216(b), wrongfully conflate a § 216(b) opt-

[1] No party's counsel authored this brief in whole or in part nor did a party, its counsel, or any other person contribute money to fund preparing or submitting this brief. *See* Fed. R. App. P. 29(a)(4).

in collective action with an opt-out class action under Federal Rule of Civil Procedure 23 and would negatively impact the Opt-In Plaintiff's statutes of limitations and necessitate the filing of countless "prophylactic" lawsuits, further burdening the district courts and the parties.

ARGUMENT

I. The FLSA's Statutory Text and Remedial Purpose Compels a Finding that Opt-In Plaintiffs Are Party Plaintiffs.

"The principal congressional purpose in enacting the FLSA was to protect all covered workers from substandard wages and oppressive working hours, labor conditions that are detrimental to the maintenance of the minimum standard of living necessary for health, efficiency and general well-being of workers." *Mei Xing Yu v. Hasaki Rest., Inc.*, 944 F.3d 395, 402 (2d Cir. 2019) (quoting *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 739 (1981)) (brackets omitted); *see also Salinas v. Commercial Interiors, Inc.*, 848 F.3d 125, 132 (4th Cir. 2017) ("Congress enacted the FLSA in 1938—in the midst of the Great Depression—to combat the pervasive 'evils and dangers resulting from wages too low to buy the bare necessities of life and from long hours of work injurious to health.'") (quoting S. Rep. No. 75-884, at 4 (1937)).

Congress intended the FLSA "to free commerce from the interferences arising from production of goods under conditions that were detrimental to the health and well-being of workers." *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 727 (1947).

As part of this, Congress gave workers a mechanism to aggregate their claims against their employer on a representative basis. Under the FLSA as originally enacted, a worker could bring a class action against their employer under Federal Rule of Civil Procedure 23 to recover their unpaid overtime or minimum wages. *See De Asencio v. Tyson Foods, Inc.*, 342 F.3d 301, 306 (3d Cir. 2003), as amended (Nov. 14, 2003). However, after a surge in FLSA litigation, Congress sought "to define and limit the jurisdiction of the courts" through the Portal–to–Portal Act, Pub.L. No. 80–49, ch. 52, § 1(b)(3), 61 Stat. 85 (1947). *Id.* (quoting 93 Cong. Rec. 2,087 (1947) ("[T]he attention of the Senate is called to a dramatic influx of litigation, involving vast alleged liability, which has suddenly entered the Federal courts of the Nation.")).

> Noting the "immensity of the [litigation] problem," Congress attempted to strike a balance to maintain employees' rights but curb the number of lawsuits. Under the Portal–to–Portal Act, an FLSA action for overtime pay could be maintained by "one or

> more employees for and in behalf of himself or themselves and other employees similarly situated." But the statute contained an express opt-in provision: "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."

See De Asencio, 342 F.3d at 306 (internal citations omitted). Because of this, the Portal–to–Portal Act amendment changed participation in an FLSA class from "opting-out" to "opting-in." *Id.* (citing *Lusardi v. Lechner*, 855 F.2d 1062, 1068 n.8 (3d Cir. 1988) ("Courts have generally recognized that Rule 23 class actions may not be used under FLSA § 16(b)."); 5 *James Wm. Moore et al*., MOORE'S FEDERAL PRACTICE § 23.06[1] (3d ed. 2003) ("Rule 23 is inapplicable to class proceedings under the FLSA.").

Now, 29 U.S.C. § 216(b) provides that

> [a]ny employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. . . . An action to recover the liability prescribed in the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. *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*.

29 U.S.C. § 216(b) (requiring only the filing of a written consent form to become a party plaintiff) (emphasis added).

The Supreme Court has "consistently construed the Act liberally to apply to the furthest reaches consistent with congressional direction" because "broad coverage is essential to accomplish the goal of outlawing from interstate commerce goods produced under conditions that fall below minimum standards of decency." *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 296 (1985) (quoting *Mitchell v. Lublin, McGaughy & Associates*, 358 U.S. 207, 211 (1959) and citing *Powell v. United States Cartridge Co.*, 339 U.S. 497, 516 (1950)) (internal quotations omitted). "Above and beyond the plain language" of the FLSA, "the remedial nature of the statute further warrants an expansive interpretation of its provisions so that they will have the widest possible impact in the national economy." *Herman v. RSR Sec. Servs. LLC*, 172 F.3d 132, 139 (2d Cir. 1999) (quotation omitted). Here, simply interpreting the plain language of § 216(b) as it was written, without

inserting judicially created and non-statutory requirements, provides the broadest relief for FLSA claimants.

II. Collective Certification Provides for Notice or Representative Treatment, Not Separate Party Status

How employees may proceed on a representative basis has recently re-emerged as a hot-button issue.[2] This process is relevant here for the limited purpose of discussing what role certification plays in FLSA litigation, if any. Jurisprudence—both new and old—recognizes that the certification of an FLSA action has no effect on the substantive claims at issue: i.e., the only effect of conditional certification is the dissemination of notice to the defined collective and the only effect of post-discovery certification, or a finding of "similarly situated" status in the Sixth Circuit, is entitlement to a representative trial on the merits. *See, e.g., Genesis*, 569 U.S. at 75; *Clark v. A&L Homecare & Training Cntr., LLC*, 68 F.4th 1003 (6th Cir. 2023) (recognizing that

[2] The Fifth and Sixth Circuits have now established differing frameworks for deciding when representative plaintiffs in FLSA actions may proceed collectively—and how that determination is reached. *See, e.g., Swales v. KLLM Transport Srvs., L.L.C.*, 985 F.3d 430 (5th Cir. 2021); *Clark*, 68 F.4th 1003.

whether called "conditional certification" or otherwise—the notice determination has zero effect on the character of the underlying suit[ ]").

In the underlying action, however, it was the *lack* of certification and notice that formed the basis for the district court's determination that the 127 Opt-In Plaintiffs were not properly before it upon dismissing the action without prejudice.[3] *See* ECF No. 165, p. 33 ("[B]ecause the Collective Action has never been certified, indeed notice has never issued, *these individuals are not actually party plaintiffs to this litigation.*") (emphasis added). This holding conflates the issue of certification with that of party-status to the extreme detriment of the 127 Opt-In Plaintiffs who placed their FLSA claims before the district court. It also sets a dangerous precedent for future FLSA litigants before district courts in the Seventh Circuit moving forward.

That Opt-In Plaintiffs are "party plaintiffs" is not only statutorily explicit, "[a]lmost all circuits to address this issue interpret the [FLSA] as making opt-in plaintiffs parties to the action as soon as they file consent

[3] Though the district court cites *Genesis* in support of its finding that the Opt-In Plaintiffs were not party plaintiffs, as discussed *infra*, *Genesis* does not support that finding.

forms."[4] *Waters v. Day & Zimmermann NPS, Inc*., 23 F.4th 84, 90–91 (1st Cir.), cert. denied, 142 S. Ct. 2777 (2022) ("Both the Supreme Court and nearly all of our sister circuits that have considered the question agree that opt-in plaintiffs become parties to the action without regard to conditional certification.") (citing *Campbell v. City of Los Angeles*, 903 F.3d 1090, 1104 (9th Cir. 2018) ("The FLSA leaves no doubt that 'every plaintiff who opts in to a collective action has party status.'"); (*Halle v. W. Penn Allegheny Health Sys. Inc*., 842 F.3d 215, 225 (3d Cir. 2016); *Mickles v. Country Club Inc*., 887 F.3d 1270, 1278 (11th Cir. 2018) ("The plain language of § 216(b) supports that those who opt in become party plaintiffs upon the filing of a consent and that nothing further, including conditional certification, is required."); *Simmons v. United Mortg. and Loan Inv., LLC*, 634 F.3d 754, 758 (4th Cir. 2011)

[4] While this Circuit has not addressed this issue directly, Appellees relied on *Hollins v. Regency Corp*., 867 F.3d 830, 833 (7th Cir. 2017) as supporting the district court's determination that the Opt-In Plaintiffs were not properly before it. Though *Hollins* appears to be the outlier with the determinations of the other Courts of Appeals, it is distinguishable in that it "attributed significance to the district court's failure to conditionally certify the collective action, or to "accept[ ] efforts by the unnamed members to opt in or intervene." *Waters*, 23 F.4th at 91 (citing *Hollins*, 867 F.3d at 833–34). "There is no indication that the *Hollins* court would find lack of party status in a case like this, in which the opt-in forms were accepted as filed by the district court." *Id.*

("[I]n a collective action under the FLSA, a named plaintiff represents only himself until a similarly-situated employee opts in as a 'party plaintiff' by giving 'his consent in writing to become such a party and such consent is filed in the court in which such action is brought.'" (quoting § 216(b)); *Anson v. Univ. of Tex. Health Sci. Ctr. at Hous.*, 962 F.2d 539, 540 (5th Cir. 1992) ("Under Section 216(b), an employee may become an 'opt-in' party plaintiff to an already filed suit by filing written consent with the court where the suit is pending."); *Canaday v. Anthem Cos.*, 9 F.4th 392 (6th Cir. 2021) (finding "[o]nce they file a written consent, opt-in plaintiffs enjoy party status as if they had initiated the action").

In *Genesis*, the Supreme Court determined that collective allegations (without additional opt-in plaintiffs) would not create a justiciable controversy "when the 'lone plaintiff's' individual claim becomes moot." 569 U.S. at 69. In reaching that determination, the Supreme Court recognized that employees become parties to collective actions upon filing their written consent forms with the court. *Id.* at 75.

> Under the FLSA, by contrast, "conditional certification" does not produce a class with an independent legal status, or *join*

> *additional parties to the action*. The sole consequence of conditional certification is the sending of court-approved written notice to employees, who in turn become parties to a collective action only by filing written consent with the court.

Id. (citing *Hoffmann–La Roche Inc. v. Sperling*, 493 U.S. 165, 169–170 (1989); 29 U.S.C. § 216(b)) (emphasis added).

III. Principles Underlying Rule 23 Class Certification Highlight Why Party Status Is Conferred Upon Filing a Written Consent Form with the District Court

Rule 23 allows for representative actions in which class members' interests are litigated by the named plaintiff. FED. R. CIV. P. 23(a). In certifying a class action under Rule 23, the court defines the scope of the class, and anyone who meets that definition becomes a part of the class, except that, only in an action for damages maintained under Rule 23(b)(3), a putative class member may choose to affirmatively opt out of the class. *See id.* at 23(c)(2)(B)(v) (explaining that "the court will exclude from the class any member who requests exclusion"). Once a class is certified, class members "are bound by the judgment, whether favorable or unfavorable, unless they affirmatively 'opt out' of the suit." *Cameron–Grant v. Maxim Healthcare Servs., Inc.*, 347 F.3d 1240, 1248 (11th Cir. 2003) (per curiam).

> [C]ollective actions are distinct from Rule 23 class actions in that the latter's putative class members do not become parties until after certification, *see Smith v. Bayer Corp.*, 564 U.S. 299, 315 (2011), and putative class members who have not intervened in a Rule 23 class action cannot appeal denials of class certification, *Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 330, 332 (1980) (citing *United Airlines, Inc. v. McDonald*, 432 U.S. 385 (1977)); *see also Molock v. Whole Foods Mkt. Grp., Inc.*, 952 F.3d 293, 298 (D.C. Cir. 2020) ("Putative class members become parties to an action—and thus subject to dismissal—only after class certification."). . . . In short, the FLSA's text, Supreme Court precedent, and a majority of circuit court decisions compel only one conclusion: the opt-ins who filed consent forms with the court became parties to the suit upon filing those forms." Nothing else is required to make them parties.

Waters, 12 F.4th at 91.

Recognizing Opt-In Plaintiffs as party plaintiffs makes sense when considered against the FLSA's statutory framework as it has historically been interpreted and applied after the Portal-to-Portal Act amended the FLSA to create an opt-in mechanism. This recognition highlights the fundamental differences between Rule 23 class actions and § 216(b) collective actions and it serves the FLSA's broad remedial purpose by preserving the statutes of limitations for those workers upon their initial

filing of a consent form. It also comports with the Supreme Court's determination in *Genesis Healthcare Corp. v. Symczyk.*

IV. The FLSA's Running Statute of Limitations Also Requires Party Status Upon the Filing of a Written Consent Form.

The statute of limitations for opt-in plaintiffs in an FLSA collective action is tolled on the date they file their written consent to become a party plaintiff. This tolling rule is supported by the FLSA's statutory language, this Circuit's caselaw, and the purpose of collective actions.

The FLSA has a two- or three-year statute of limitation depending on the nature of the violation:

> Any action . . . to enforce any cause of action for unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act . . . may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued.

29 U.S.C. § 255. An action is "commenced" for purposes of the statute of limitations:

> (a) on the date when the complaint is filed, if he is specifically named as a party plaintiff in the complaint and his written

> consent to become a party plaintiff is filed on such date in the court in which the action is brought; or
>
> (b) if such written consent was not so filed or if his name did not so appear—on the subsequent date on which such written consent is filed in the court in which the action was commenced.

29 U.S.C. § 256. Accordingly, the filing of an opt-in plaintiff's written consent commences their FLSA action, *see Smith v. Prof'l Transp., Inc.*, 5 F.4th 700, 702 (7th Cir. 2021), and tolls their statute of limitations.

This Court has not issued a precedential holding on the issue of whether the filing of an opt-in plaintiff's written consent tolls their statute of limitations. However, this Court, in dicta observing the difference between FLSA collective actions and Rule 23 class actions, stated: "[U]nnamed members of a Rule 23 class benefit from *American Pipe*'s tolling rule, whereas the claims of potential members of an FLSA collective action are not tolled until they file opt-in notices." *Hollins*, 867 F.3d at 834.

This rule is appropriate given the purpose of FLSA collective actions. The Supreme Court and this Circuit have recognized that FLSA collective actions serve two purposes:

> The twin goals of collective actions are enforcement and efficiency: enforcement of the FLSA, by preventing violations of

> the overtime-pay requirements and by enabling employees to pool resources when seeking redress for violations; and efficiency in the resolution of disputes, by resolving in a single action common issues arising from the same alleged illegal activity.

Bigger v. Facebook, Inc., 947 F.3d 1043, 1049 (7th Cir. 2020); *see also Hoffmann-La Roche*, 493 U.S. at 170. Unless an opt-in plaintiff's statute of limitations is tolled upon the filing of their written consent, the opt-in plaintiff would also need to file a separate individual action to preserve their claim. This would lead to a proliferation of individual claims arising from the same action, sapping both individual employees and the court of limited resources.

Take for example, the filing fee. For a collective action with one named plaintiff and 99 opt-ins, the cost of filing these claims would be $402.00 through a collective action but $40,200.00 for 100 individual claims. Moreover, this proliferation of individual claims would also be detrimental to the goal of enforcement because it would create the risk of inconsistent verdicts—a result that serves neither employees nor employers.

Moreover, this tolling rule has been accepted by numerous circuit courts of appeals and district courts across the circuits. *See, e.g.*, *Symczyk v.*

Genesis Healthcare Corp., 656 F.3d 189, 200 (3d Cir. 2011), *rev'd on other grounds Genesis*, 569 U.S. 66 (quoting *Crown v. Parker*, 462 U.S. 345, 350 (1983)) ("For an opt-in plaintiff, . . . the action commences only upon filing of a written consent. [29 U.S.C. § 256(b)] This represents a departure from Rule 23, in which the filing of a complaint tolls the statute of limitations 'as to all asserted members of the class' even if the putative class member is not cognizant of the suit's existence."); *Mickles*, 887 F.3d at 1281 (citing 29 U.S.C. § 256(b)) ("[W]e hold Appellants are entitled to statutory tolling of their claims beginning on the dates they filed their written consents."); *Bonilla v. Las Vegas Cigar Co.*, 61 F. Supp. 2d 1129, 1137 (D. Nev. 1999) ("The only tolling which makes sense with respect to § 216(b) is to toll the statute of limitations between the time each individual plaintiff consents to the suit, and the time the court dismisses the plaintiff if the court determines that the plaintiff is not 'similarly situated,' and must pursue their claim individually."); *Green v. Harbor Freight Tools USA, Inc.*, 888 F. Supp. 2d 1088, 1105 (D. Kan. 2012) ("The statute of limitations for a plaintiff in a collective action is tolled after the plaintiff has filed a consent to opt in to the collective action, and begins to

run again if the court later decertifies the collective action."); *Butler v. DirectSAT USA, LLC*, 55 F. Supp. 3d 793, 801 (D. Md. 2014) (same); *see also* 7B *Charles Alan Wright & Arthur R. Miller*, FED. PRAC. & PROC. § 1807 (3d ed. April 2023 Update ("Unlike Rule 23 class actions in which the statute of limitations will be tolled for all class members until the class-certification decision has been made, or until an individual class member opts out, the statute of limitations for a plaintiff in a collective action will be tolled only after the plaintiff has filed a consent to opt in to the collective action.").

In sum, the language of the FLSA, this Circuit's caselaw, and the purpose of FLSA collective actions all support a rule that the statute of limitations for opt-in plaintiffs in an FLSA collective action is tolled on the date they file their written consent and become a party plaintiff to the action.

CONCLUSION

For these reasons, and the reasons stated in Plaintiffs-Appellants' brief, this Court should exercise its jurisdiction over the appeals of Plaintiffs-Appellees and reverse the district court's order dismissing their claims without prejudice.

Dated: September 5, 2023.

Respectfully submitted,

/s/ Summer H. Murshid

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing Amicus Brief complies with Fed. R. App. P. 29(c) and the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 3,594 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

The undersigned further certifies that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word Version 2010 in 14-point Palatino font.

Dated: September 5, 2023

/s/ Summer H. Murshid
Summer H. Murshid
One of the Attorneys for Amicus

CERTIFICATE OF SERVICE

I hereby certify that on September 5, 2023, the Amicus Curiae Brief of National Employment Lawyers' Association was filed with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Summer H. Murshid
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