UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

Bridget Mabe, **Plaintiff,** **v.** **Wal-Mart Associates, Inc.,** **Defendant.**	**No. 1:20-cv-00591** **Thomas J. McAvoy, U.S.D.J.**

BRIEF OF AMICI CURIAE THE RETAIL LITIGATION CENTER, INC., THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, THE NATIONAL RETAIL FEDERATION, THE RESTAURANT LAW CENTER, THE NEW YORK STATE RESTAURANT ASSOCIATION, THE BUSINESS COUNCIL OF NEW YORK STATE, AND THE BUSINESS COUNCIL OF WESTCHESTER IN SUPPORT OF DEFENDANT'S MOTION TO CERTIFY THE COURT'S MARCH 24, 2022 ORDER FOR INTERLOCUTORY APPEAL

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INTRODUCTION AND STATEMENTS OF INTEREST

Amici are trade and business associations representing members who collectively employ hundreds of thousands of workers in New York. They have a unique perspective, based on their members' first-hand experiences, on why the legal issues in this case have enormous practical significance for employers across many industries and merit immediate consideration by the U.S. Court of Appeals for the Second Circuit—and potentially the New York Court of Appeals. *Amici* include:

- The Retail Litigation Center, Inc. ("RLC") is the only trade organization solely dedicated to representing the United States retail industry in the courts. The RLC's members include many of the country's largest and most innovative retailers. Collectively, they employ millions of workers throughout the United States, provide goods and services to tens of millions of consumers, and account for tens of billions of dollars in annual sales. The RLC seeks to provide courts with retail-industry perspectives on important legal issues impacting its members, and to highlight the potential industry-wide consequences of significant pending cases. Since its founding in 2010, the RLC has participated as *amicus curiae* in more than 175 judicial proceedings of importance to retailers.
- The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae*

briefs in cases, like this one, that raise issues of concern to the nation's business community.

- The National Federation of Independent Business ("NFIB") is the nation's leading small business association, representing members in Washington, D.C., and all fifty states. Its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. The NFIB Small Business Legal Center ("Legal Center") is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. To fulfill its role as the voice for small business, the Legal Center frequently files *amicus* briefs in cases that will impact small businesses.
- The National Retail Federation ("NRF") is the world's largest retail trade association and the voice of retail worldwide. The NRF's membership includes retailers of all sizes, formats and channels of distribution, as well as restaurants and industry partners from the United States and more than 45 countries abroad. In the United States, the NRF represents the breadth and diversity of an industry that is the nation's largest sector employer with more than 52 million employees and contributes $3.9 trillion annually to GDP. NRF has filed briefs in support of the retail community on topics stemming from the pandemic, including workers' compensation and COVID-19 vaccine policies.
- The Restaurant Law Center ("Law Center") is the only independent public policy organization created specifically to represent the interests of the food service industry in

the courts. This labor intensive industry is comprised of over one million restaurants and other foodservice outlets employing 15 million people—approximately 10 percent of the U.S. workforce. Restaurants and other foodservice providers are the second largest private-sector employers in the United States. Through amicus participation, the Law Center provides courts with perspectives on legal issues that have the potential to significantly impact its members and their industry. The Law Center's *amicus* briefs have been cited favorably by state and federal courts.

- The New York State Restaurant Association ("NYSRA") is a not-for-profit employer association that represents food service establishments throughout New York State. Founded in 1935, the NYSRA is the oldest and most comprehensive professional organization for restaurant management in New York. It provides a forum for restaurants to exchange ideas and information, participate in creative problem-solving, and receive education. The NYSRA has over 10,000 members representing nearly every type of dining establishment in New York State. NYSRA participates through *amicus* briefs in cases such as this one with a significant impact on our industry. Most NYSRA members are covered by the New York Labor Law section that is the subject of this case.
- The Business Council of New York State, Inc., is the leading business organization in New York State, representing the interests of large and small firms throughout the state. Our membership is made up of roughly 3,500 member companies, local chambers of commerce and professional and trade associations. Though 72 percent of our members are small businesses, we also represent some of the largest and most important corporations in the world. Combined, our members employ more than 1.2 million New Yorkers. We serve as an advocate for employers in the state's political and policy-making arenas, working for a

healthier business climate, economic growth, and jobs. We also provide important benefits to our members' employees with group insurance programs and serve as an information resource center for our members.

- The Business Council of Westchester is the county's largest and most prestigious business membership organization representing more than 1,000 members, including multinational corporations, hospitals, universities, biotech pioneers, not-for-profits, entrepreneurs and companies of all sizes. As the most influential economic development and advocacy organization in Westchester, The Business Council of Westchester's members enjoy unparalleled access to today's top thought leaders, diverse business development opportunities and lawmakers at all levels of government.

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The Court's March 24, 2022 order reflects an *Erie* guess as to whether there is a private right of action for technical violations of N.Y. Labor Law § 191. The Court made that guess based on a 2019 decision from one of New York's intermediate appellate courts. That decision broke with a long line of cases holding Section 191 is not privately enforceable and has opened the proverbial floodgates, inspiring plaintiffs, like Plaintiff here, who claims that manual workers who are paid in full every two weeks are entitled to seek, as liquidated damages, an extra payment equal to half of all wages they had already been paid for up to six full years. This threatens all New York employers—and especially, small business—with massive and ruinous liability for using the most common (biweekly) pay cycle in the country.

These issues merit immediate consideration by the Second Circuit—and potentially, the N.Y. Court of Appeals. For these reasons, and those stated below, *Amici* respectfully submit that the Court should grant Defendant's motion and certify the March 24 order for immediate appeal.

ARGUMENT

As the Court knows, the N.Y. Appellate Division – First Department held in 2019 that N.Y. Labor Law § 198(1-a) creates an express private right of action to obtain liquidated damages (plus interest and attorneys' fees) when an employer pays manual workers on anything other than a weekly basis. *Vega v. CM & Assocs. Constr. Mgmt., LLC*, 175 A.D.3d 1144, 1145 (1st Dep't 2019). *Vega*, which upset the near-unanimous rulings of federal courts that no such right of action exists,[1] has inspired a tidal wave of class action litigation claiming untimely payment of "manual workers" and seeking colossal amounts of damages. For employers of all sizes, this liability would be ruinous, especially given the purported availability of liquidated damages and New York's six-year limitations period. *See* N.Y. Lab. Law § 198(3) (creating six-year statute of limitations).

Consider a couple of examples, which, for simplicity's sake, assume that the hypothetical employers have been paying their manual workers the current New York City minimum wage ($15 per hour) on a biweekly rather than weekly basis and that all employees receive compensation for 40 hours per week, 52 weeks per year. On plaintiffs' theory, 26 of those weeks' wages throughout the entire six-year limitations period were paid one week late and therefore must be paid again—as liquidated damages, even though the employees already received 100% of the wages earned. No matter the employer's size, the effect of this legal regime would be crippling.

First, consider **Employer A**, a small employer with 7 full-time employees, all of whom meet the "manual worker" definition and all of whom were paid in full on a biweekly basis. Under

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[1] *See, e.g.*, *Coley v. Vannguard Urban Improvement Ass'n*, 2018 WL 1513628, at *13 (E.D.N.Y. Mar. 29, 2018); *Hussain v. Pak. Int'l Airlines Corp.*, 2012 WL 5289541, at *3 (E.D.N.Y. Oct. 23, 2012); *Hunter v. Planned Bldg. Servs.*, 2018 WL 3392476, at *2-3 (N.Y. Sup. Ct. Queens Cnty. June 11, 2018); *Gardner v. D&D Elec. Constr. Co.*, 2019 WL 3765345, at *3-4 (N.Y. Sup. Ct. N.Y. Cnty. Aug. 7, 2019).

the assumptions above, Employer A faces liability of $655,200—nearly $100,000 for each member of its workforce:

7 x $15/hour x 40 hours/week x 26 weeks/year x 6 years = **$655,200**

Such liability will easily bankrupt a small business. According to one recent survey, 72% of New York small businesses have *total annual revenues* under $1 million.[2] Businesses like these cannot absorb a financial hit that exceeds more than half of their total annual revenue.

Next, consider **Employer B**, a significantly larger employer with 999 employees who are all paid in full on a biweekly basis and who a plaintiff alleges are all "manual workers." Section 191 creates a waiver process whereby the Commissioner of Labor can authorize certain employers to pay manual workers biweekly or semi-monthly rather than weekly. N.Y. Labor Law § 191(a)(ii). But to be eligible, the employer must employ at least 1,000 employees. So Employer A is per se ineligible, and Employer B is still not large enough to qualify for a statutory waiver. Its potential liability under plaintiffs' reading of Section 191 is nearly *nine figures*:

999 x $15/hour x 40 hours/week x 26 weeks/year x 6 years = **$93,506,400**

Now consider the broader exposure for employers throughout New York. Even if Employer B is one of only *ten* similarly sized companies employing 999 manual workers, their collective liability on plaintiffs' view would be over $935 million. And that's to say nothing of the potential liability of the many other employers of manual workers that are large enough to qualify for the statutory waiver. All told, the potential monetary liability on this issue could easily exceed several billion dollars.

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[2] Empire State Development, Annual Report on the State of Small Businesses 3 (2002), https://esd.ny.gov/sites/default/files/2020-ESD-ANNUAL-REPORT-SMALL-BUSINESS.pdf.

These hypotheticals accurately capture the implications of plaintiffs' interpretation of Sections 191 and 198.[3] In one recent case, for instance, a court awarded a *single* maintenance worker and cleaner, who was paid in full on a biweekly basis, $119,906.25 in liquidated damages on this type of claim for just a *three-year* period (the extent of his employment). *Williams v. Miracle Mile Props. 2 LLC*, No. 20-cv-3127, 2022 WL 1003854, at *9 (E.D.N.Y. Feb. 1, 2022). Had he been able to assert claims for the entire six-year limitations period, this one worker's share of liquidated damages would have exceeded $200,000. Adding additional workers through joinder or class certification would multiply damages accordingly.

Such amounts are eye-popping in any context, but here they were imposed simply because an employer issued 26 paychecks per year rather than 52. This is not a scenario where employees suffered an underpayment of wages. Rather, under plaintiffs' legal theory, an employer's adherence to the predominant pay cycle effectively entitles manual workers to time-and-a-half pay—the premium for overtime work—stretching up to six years into the past.[4]

With this degree of exposure, it is not surprising that *Vega* has created a boom in Section 191 lawsuits. *Amici* have identified roughly 150 cases raising Section 191 claims since the start of 2019.[5] This does not include the unknowable number of threatened Section 191 claims that are

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[3] These hypotheticals reflect Plaintiffs' reading of the statute. Amici do not agree with that reading, which fails to track either the plain language of the statute or the legislators' intentions, and which would impose excessive punitive liability in violation of the Due Process Clause of the U.S. Constitution. But these problems are beyond the scope of this submission.

[4] U.S. Bureau of Labor Statistics, Current Employment Statistics, Length of Pay Periods in the Current Employment Statistics Survey (May 3, 2021), https://www.bls.gov/ces/publications/length-pay-period.htm (explaining that 43% of American employers use a biweekly pay cycle, as compared to 33.3% who pay weekly, 19% who pay semimonthly, and 4.7% who pay monthly).

[5] *Abreu v. Monarch Realty Holdings, LLC*, No. 21-cv-2418 (S.D.N.Y.); *Acevedo v. Trader Joe's East Inc.*, No. 22-cv-2024 (S.D.N.Y.); *Adduci v. Swissport USA Inc.*, No. 22-cv-1172 (E.D.N.Y.); *Al Zinnah v. Pep Boys—Manny, Moe & Jack of Del., Inc.*, No. 701394/2020 (Queens Cnty. Sup. Ct.); *Al Zinnah v. Pep Boys—Manny, Moe & Jack of Del., Inc.*, No. 20-cv-1544 (E.D.N.Y.); *Almonte v. Gabrielli Truck Sales Ltd.*, No. 805777/2021E (Bronx Cnty. Sup. Ct.);

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settled without litigation. Yet even with all these pending and threatened cases, there have been virtually no final judgments and no decisions by any New York Appellate Division beyond *Vega*,[6] and no decisions at all by the New York Court of Appeals or Second Circuit. That is because many defendants are forced to settle to avoid the risk attendant to litigation of a potential "liability catastrophe" that may or may not be covered by insurance, especially given the narrow construction that courts often given the statute's "good faith" exception and the potential for litigation over the boundaries of Section 191's category of "manual workers."

The statute defines "manual worker" as "a mechanic, workingman or laborer," N.Y. Lab. Law § 190(4), which is an antiquated formulation that dates back at least to 1897 and provides little direction today. *See* 1897 N.Y. Laws p. 462. According to guidance from the New York Department of Labor, the agency's longstanding interpretation of "manual worker" includes individuals who spend more than 25% of their working time engaged in "physical labor."[7] The potential liquidated damages—if a putative class were found to fit that definition—can drive an

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22-cv-1257 (E.D.N.Y.); *Suquilanda v. Competitive Ventures Inc.*, No. 21-cv-1454 (E.D.N.Y.); *Thomas v. Charter Commc'ns Holding Co.*, LLC, No. 21-cv-2751 (E.D.N.Y.); *Torres v. 1100 Jefferson Assocs., L.L.C.*, No. 21-cv-862 (S.D.N.Y.); *Turkaj v. Lantower Realty L.P.*, No. 20-cv-2539 (S.D.N.Y.); *Umadat v. Costco Wholesale Corp.*, No. 21-cv-4814 (E.D.N.Y.); *Valentin v. Pirgos Food Corp.*, No. 21-cv-5781 (S.D.N.Y.); *Vasconcelo v. Edco Supply Corp.*, No. 506591/2021 (Kings Cnty. Sup. Ct.); *Wilcher v. Vilano Emp't Servs., Inc.*, No. 21-cv-5930 (E.D.N.Y.); *Williams v. Sunrise Senior Living Mgmt. Inc.*, No. 603289/2022 (Nassau Cnty. Sup. Ct.); *Wright v. Skywest Airlines Inc.*, No. 22-cv-914 (E.D.N.Y.); *Yunganaula v. D.P. Grp. Gen. Contractors/Developers Inc.*, No. 21-cv-2015 (E.D.N.Y.); *Zhu v. King Chef Yang's Corp.*, No. 717293/2020 (Queens Cnty. Sup. Ct.).

[6] As Defendant correctly observes, ECF No. 41 at 5-6, the decision in *Phillips v. Max Finkelstein, Inc.*, 73 Misc. 3d 1 (N.Y. App. Term. 2021), by the Second Department's adjunct Appellate Term, is not a decision of the Second Department. An appeal from a trial court ruling that no private right of action exists for payment-frequency claims is currently pending before the Second Department, which is bound by neither *Vega* nor *Philips*. *See Grant v. Global Aircraft Dispatch, Inc.*, No. 2021-03202 (N.Y. App. Div. 2d Dep't).

[7] N.Y. Dep't of Labor, Frequency of Pay Frequently Asked Questions 2 (Mar. 2021), https://dol.ny.gov/system/files/documents/2021/03/frequency-of-pay-frequently-asked-questions.pdf.

employer to settlement. Such coerced settlements have the unfortunate effect of hindering further clarity around the law.

There is good reason to conclude that further development of the law, and interlocutory appeal, are warranted here. *Vega* is highly questionable because the statutory text of Section 198(1-a) is a poor fit for payment-frequency claims. *Vega* rests on the provision's use of the word "underpayment," penned by the New York Legislature in 1967. But the court interpreted underpayment to occur "[t]he moment that an employer fails to pay wages in compliance with section 191(1)(a)," based on the court's cursory review of a 2012 dictionary. *Vega*, 175 A.D.3d at 1145. That interpretation cannot be squared with the provision when read in its entirety. Section 198(1-a) uses "underpayment" in reference to the amount that is "found to be due" and the amount the employee is entitled "to recover" in the lawsuit:

> In any action instituted in the courts upon a wage claim by an employee or the commissioner in which the employee prevails, *the court shall allow such employee to recover the full amount of any underpayment*, all reasonable attorney's fees, prejudgment interest as required under the civil practice law and rules, and, unless the employer proves a good faith basis to believe that its underpayment of wages was in compliance with the law, *an additional amount as liquidated damages equal to one hundred percent of the total amount of wages found to be due*.

N.Y. Lab. Law § 198(1-a) (emphases added); *see also id.* (referring to an "underpayment" as a payment "less than the wage to which [the employee] is entitled"). When an employer has paid the full amount of an employee's wages on a biweekly schedule that both sides agreed upon in advance, there is no amount of unpaid wages remaining for the employee to "recover" or that remains "due"—regardless of whether that payment occurs on a biweekly rather than weekly timetable.

Vega ignored this problem by analogizing Section 198(1-a) to Section 16(b) of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 216(b), as construed by the Supreme Court in

Brooklyn Savings Bank v. O'Neil, 324 U.S. 697, 707 (1945). On this theory, the New York Legislature was trying to accomplish the same result as Congress. But this theory stumbles on significant differences between the federal and state statutes. First and foremost, there is no FLSA requirement to pay certain employees on a weekly basis when the employer and employee have contractually agreed to biweekly pay. *See, e.g.*, *Rogers v. City of Troy*, 148 F.3d 52, 55 (2d Cir. 1998) ("The [FLSA] does not specify *when* [the required minimum] wage must be paid."); 29 C.F.R. § 778.106 ("There is no requirement in the [FLSA] that overtime compensation be paid weekly.").

Second, the scenario in *Brooklyn Savings Bank* bears no resemblance to this sort of pay-frequency claim. There, the employer had wrongly held onto wages owed to the employee for over two years after the employee had stopped working for the employer. *Brooklyn Savings Bank*, 324 U.S. at 700. The Supreme Court was concerned that violations of the FLSA's minimum wage and overtime requirements would "be so detrimental to maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers" to require extra payments "to insure restoration of the worker to that minimum standard of well-being." *Id.* at 707. These "Congressional purposes," which were pivotal to the Court's decision, *id.* at 708, do not extend to a requirement that certain employees receive payment each week rather than every two weeks. If they did, Congress would have included such a requirement in the FLSA.

Third, under the FLSA, liquidated damages take the place of prejudgment interest as "compensation for damages arising from delay in the payment of the basic minimum wages," and prejudgment interest is thus unavailable where liquidated damages are awarded. *Id.* at 715. But the New York Legislature has viewed liquidated damages somewhat differently and has, for example, expressly authorized the recovery of "prejudgment interest" in addition to liquidated

damages. N.Y. Lab. Law § 198(1-a). In addition, the FLSA's maximum three-year statute of limitations, *see* 29 U.S.C. § 255, is much shorter than Section 198's six-year limitations period. In short, the FLSA cannot support *Vega*'s reading of New York law. Under the FLSA, there is no possibility of punitive liability for employers (or windfall recoveries for employees and their attorneys) when an employer adheres to a mutually agreed-upon biweekly pay schedule.[8]

It is no surprise that Section 198(a-1) provides a poor fit for the pay-frequency violations of Section 191, because the statutory history shows that the two provisions evolved separately. Section 191 traces to an 1890 statute that punished violations by a civil penalty "to be paid to the people of the state" rather than the affected employees, in actions brought by state "factory inspectors" rather than private plaintiffs. 1890 N.Y. Laws p. 741. This same authority persists today in Section 197. *See* N.Y. Lab. Law § 197 ("Any employer who fails to pay the wages of his employees or shall differentiate in rate of pay because of protected class status, as provided in this article, shall forfeit to the people of the state the sum of five hundred dollars for each such failure, to be recovered by the commissioner in any legal action necessary, including administrative action or a civil action."). Section 198, on the other hand, traces to the 1937 Model Wage Bill, *see* 1937 N.Y. Laws p. 1157, and it was not until 1967 that the statute authorized the liquidated damages found in Section 198(1-a). That 1967 legislation, moreover, not only created Section 198(1-a) but also authorized the same sort of liquidated damages for still-due amounts in Section 663 in Article 19 of the Minimum Wage Act. 1967 N.Y. Laws pp. 1014-15. The 1967 legislative history

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[8] *Vega* took out of context the Second Circuit's statement in *Rana v. Islam*, 887 F.3d 118, 123 (2d Cir. 2018), that "there are no meaningful differences" between the two statutes' liquidated damages provisions. The Second Circuit expressed that position to *limit* courts' ability to impose "duplicative liquidated damages for the same course of conduct" under both statutes. *Id.* This observation recognizing the importance of avoiding excessive liquidated damages hardly justifies using the FLSA provision, which affords no remedy for the type of weekly-pay claim at issue here, to expand the New York provision.

confirms that the Legislature's concern was with employers who "fail[ed] to pay wages" or "fail[ed] to pay the minimum wage." ECF No. 23-3 at 228, Tab 17 at 2. There is no indication that the Legislature intended this provision to impose liquidated damages to employers who paid their employees' wages in full, but simply did so through a biweekly rather than weekly pay cycle.

For all these reasons, the core legal question in this case—whether New York law authorizes the sort of liquidated damages that Plaintiff seeks here—is one that has not been resolved by the Second Circuit or the New York Court of Appeals. The lack of any on-point, controlling precedent makes this issue particularly well-suited for certification to the New York Court of Appeals by the Second Circuit, since trial courts lack that power. *See* N.Y. Ct. of App. Rule of Practice 500.27(a). And given the sheer volume of lawsuits constantly being filed (and settled) and the massive, business-crippling amounts of damages at stake, this Court should grant Defendant's motion to certify this Court's order for interlocutory appeal to give those courts the opportunity to resolve this indisputably important legal question now.

CONCLUSION

The Court should certify its March 24, 2022 order for interlocutory appeal.

Respectfully submitted,

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