

24-2111

In the United States Court of Appeals
FOR THE SECOND CIRCUIT

ADVANCE STORES COMPANY, INC., d/b/a ADVANCE AUTO PARTS,

Petitioner,

v.

HUGH BIRTHWRIGHT,

Respondent.

On Appeal from the United States District Court
for the Eastern District of New York,
No. 2:22-cv-00593, Hon. Gary R. Brown

**REPLY IN FURTHER SUPPORT OF MOTION OF
THE RETAIL LITIGATION CENTER, INC., THE CHAMBER OF
COMMERCE OF THE UNITED STATES OF AMERICA, THE NATIONAL
FEDERATION OF INDEPENDENT BUSINESS, INC., THE NATIONAL
RETAIL FEDERATION, THE RESTAURANT LAW CENTER, THE NEW
YORK STATE RESTAURANT ASSOCIATION, THE BUSINESS COUNCIL
OF NEW YORK STATE, THE BUSINESS COUNCIL OF WESTCHESTER,
AND THE RETAIL COUNCIL OF NEW YORK FOR LEAVE TO FILE A
BRIEF AS *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR
INTERLOCUTORY APPEAL**

MORGAN, LEWIS & BOCKIUS LLP
Stephanie Schuster
1111 Pennsylvania Avenue, NW
Washington, DC 20004
202.373.6595
stephanie.schuster@morganlewis.com

INTRODUCTION

Amici's members employ hundreds of thousands of New Yorkers and have been sued by plaintiffs claiming to have a private right of action for technical violations of Section 191. *Amici* seek leave to file a brief in support of the petition for interlocutory appeal to underscore why the underlying question—whether such a right of action exists—merits immediate review. Plaintiff reflexively opposes *Amici*'s motion on untenable grounds. The motion should be granted.

ARGUMENT

Plaintiff's chief complaint is that *Amici* focus their brief on the importance of the question presented, rather than the elements required for a district court to certify an interlocutory appeal or the ultimate merits. Opp. 3. Plaintiff misunderstands the scope of relevant issues. When (as here, *see* *Amici* Br. 1) the statutory elements are present, the Court retains discretion to accept or refuse the appeal. 28 U.S.C. § 1292(b) (“The Court of Appeals ... may ... in its discretion, permit an appeal to be taken ...”). That discretion is best exercised in cases involving questions “of special consequence.” *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 111 (2009); *see Balintulo v. Daimler AG*, 727 F.3d 174, 186 (2d Cir. 2013). *Amici* address that issue and demonstrate the “special consequence” of the issue beyond the parties to this case.

In addition, the ultimate merits—*i.e.*, whether there is a right of action for pay frequency claims under Section 191—is a distinct question from the one presently

before the Court. If the Court exercises its discretion to allow this appeal, *Amici* can and will address the merits at that time.

Plaintiff’s assertion that *Amici* “simply regurgitate[] arguments made by Petitioner,” Opp. 1, is wrong. *Amici*’s brief addresses and expands on the scope of the legal issues addressed in the district court’s interlocutory order—explaining the significant impact on large and small employers alike. That is relevant context not developed by the parties that can help the Court decide whether to exercise its discretion to allow this appeal. *See Prairie Rivers Network v. Dynegy Midwest Generation*, 976 F.3d 761, 763 (7th Cir. 2020). (proper for amicus to “[p]rovid[e] practical perspectives on the consequences of potential outcomes” and “[e]xplain[] the broader ... commercial context in which a question comes to the court”).

Plaintiff’s other arguments merit little attention. That Petitioner has its own counsel, *see* Opp. 5, is irrelevant. *See Neonatology Assocs. v. C.I.R.*, 293 F.3d 128, 132 (3d Cir. 2002) (“Even when a party is very well represented, an amicus may provide important assistance to the court,” such as “explain[ing] the impact a potential holding might have on an industry or other group.”). Nor must *Amici* be disinterested. *See* Opp. 4–5. Amici are necessarily interested and may support one party or neither party. *See* Fed. R. App. P. 29(a)(4)(D), (a)(6).

CONCLUSION

The Court should grant *Amici*’s motion for leave to file their brief.

Respectfully submitted,

MORGAN, LEWIS & BOCKIUS LLP

Dated: August 28, 2024

s/ Stephanie Schuster
Stephanie Schuster
1111 Pennsylvania Avenue NW
Washington, DC 20004
(202) 373-6595
stephanie.schuster@morganlewis.com

Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE

This motion complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2) because it contains 477 words.

Dated: August 28, 2024

s/ Stephanie Schuster
Stephanie Schuster