UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 24-2111 Caption [use short title] Advance Auto Stores Co., Inc. v. Birthwright

Motion for: Leave to File Brief as Amici Curiae

Set forth below precise, complete statement of relief sought:

Leave to file the brief attached to the motion as Exhibit A as Amici Curiae in support of the petition for interlocutory appeal.

MOVING PARTY: The Retail Litigation Center, et al. **OPPOSING PARTY:** Hugh Birthwright

☐ Plaintiff ☐ Defendant

☐ Appellant/Petitioner ☐ Appellee/Respondent

MOVING ATTORNEY: Stephanie Schuster **OPPOSING ATTORNEY:** Brian Schaffer

[name of attorney, with firm, address, phone number and e-mail]

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Court- Judge/ Agency appealed from: E.D.N.Y. - Hon. Gary R. Brown

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):
☑ Yes ☐ No (explain):

Opposing counsel's position on motion:
☐ Unopposed ☑ Opposed ☐ Don't Know

Does opposing counsel intend to file a response:
☑ Yes ☐ No ☐ Don't Know

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUCTIONS PENDING APPEAL:

Has this request for relief been made below? ☐ Yes ☐ No

Has this relief been previously sought in this court? ☐ Yes ☐ No

Requested return date and explanation of emergency:

Is oral argument on motion requested? ☐ Yes ☑ No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? ☐ Yes ☑ No If yes, enter date:

Signature of Moving Attorney:

s/ Stephanie Schuster **Date:** 08/12/2024 Service by: ☑ CM/ECF ☐ Other [Attach proof of service]

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

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 STATE TO FILE A BRIEF AS *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR INTERLOCUTORY APPEAL

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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 (collectively, "*Amici*"), through counsel, respectfully move this Court for leave to file the brief attached as **Exhibit A** as *amici curiae* in support of Advance Auto Stores d/b/a Advance Auto Parts's petition for interlocutory appeal. In support of this motion, *Amici* state as follows:

1. *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 this Court—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 200 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, Inc. ("NFIB") is the nation's leading small business association, representing members in Washington, D.C., and all fifty states. 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, Inc. ("NFIB 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.
- The Retail Council of New York State is the leading statewide trade organization of its kind, representing thousands of stores that range in size from sole proprietor businesses to national and international brands. Headquartered in Albany, just one block from the state Capitol, the Retail Council is the exclusive voice for the retail industry in New York.

2. The district court easily found, and the Petition shows, that the three statutory criteria necessary for interlocutory appeal under 28 U.S.C. § 1292(b) are present here. *Amici* respectfully submit that their brief demonstrates why the Court should exercise its discretion to take this appeal now.

3. *Amici*'s members include hundreds of New York employers from various industries that collectively employ millions of New Yorkers. Retailers alone employ more than 2 million workers in New York. Retail's Impact in New York, National Retail Federation (2020).[1] *Amici* thus have a unique vantage point that enables them to offer the Court valuable context beyond that provided by the parties. Their members' broad, real-world experiences can inform the Court on the enormous practical significance of the legal question at issue—a significance that highlights the importance of an immediate appeal. Accordingly, *Amici* respectfully submit that the brief attached as Exhibit A will be helpful to the Court in its determination of whether to allow an immediate appeal pursuant to 28 U.S.C. § 1292(b).

4. *Amici*'s brief focuses on the massive and potentially crippling impact the legal issues addressed in the district court's interlocutory order have for New York employers across various industries. For example, *Amici* show that, if Section 191 is privately enforceable, small businesses face potential liability that

[1] https://cdn.nrf.com/sites/default/files/2020-09/new-york-2020-retails-impact.pdf

could easily put them out of business simply for using the most common (biweekly) pay cycle in the country. Amici also show that even large employers face astonishing liability—again, for paying workers in full every two weeks as agreed—of nearly $1 billion across just ten employers. This is relevant context not developed by the parties, who are focused on their particular interests. *See Prairie Rivers Network v. Dynegy Midwest Generation, LLC*, 976 F.3d 761, 763 (7th Cir. 2020). (finding that "[p]roviding practical perspectives on the consequences of potential outcomes" and"[e]xplaining the broader … commercial context in which a question comes to the court" are classic, helpful, and appropriate roles of an amicus).

5. *Amici* represent the broader interests of employers across numerous industries. Many of *Amici*'s members are defendants in cases involving pay-frequency claims under Section 191. Many of *Amici*'s members have been threatened with such litigation. All of *Amici*'s members who employ "manual workers" in New York are impacted by the prospect of financially ruinous Section 191 litigation.

6. In March 2023, *Amici* were granted leave to file a brief as *amici curiae* in support of a motion to certify for interlocutory appeal an order holding that Section 191 is privately enforceable in *Miner-Vargas v. Wal-Mart Associates, Inc.*, No. 1:20-cv-00591 (N.D.N.Y).

7. In addition, considering *Amici*'s brief when determining whether to accept this interlocutory appeal will neither delay proceedings nor prejudice Plaintiff, who may address the issues raised in *Amici*'s brief in his response to the Petition.

8. *Amici* have conferred with counsel for the parties about this motion. Petitioner consents to *Amici* filing a brief as *amici curiae*. Respondent does not consent and intends to file an opposition.

WHEREFORE, *Amici* respectfully seek leave to file the brief attached as Exhibit A as *amici curiae* in support of the petition for leave to appeal.

Respectfully submitted,

MORGAN, LEWIS & BOCKIUS LLP

Dated: August 12, 2024

s/ Stephanie Schuster

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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 1,591 words.

Dated: August 12, 2024

s/ Stephanie Schuster
Stephanie Schuster

EXHIBIT A

24-2111

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INTEREST OF *AMICI CURIAE*

Amici are trade and business associations representing members who collectively employ hundreds of thousands of workers in New York.[1] 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 appellate review. *Amici* include:

- The Retail Litigation Center, Inc.—the only trade organization solely dedicated to representing the U.S. retail industry in the courts and whose members collectively employ millions of workers throughout the country, including in New York.
- The Chamber of Commerce of the United States of America—the world's largest business federation.
- The National Federation of Independent Business, Inc.—the nation's leading small business association.
- The National Retail Federation—the world's largest retail trade association and the voice of retail worldwide.

[1] Pursuant to Rule 29(a)(4)(E), *Amici* state that no party's counsel authored this brief in whole or in part, and no party, party's counsel, or other person (other than *Amici*, their members, or their counsel) contributed money that was intended to fund preparing or submitting this brief.

- The Restaurant Law Center—the only independent public policy organization created specifically to represent the interests of the labor-intensive food service industry in the courts.
- The New York State Restaurant Association—a not-for-profit employer association representing over 10,000 food service establishments throughout New York State since 1935.
- The Business Council of New York State, Inc.—the leading business organization in New York State, representing the interests of large and small firms throughout the state, whose members collectively employ more than 1.2 million New Yorkers.
- The Business Council of Westchester is the county's largest and most prestigious business membership organization representing more than 1,000 members, including entrepreneurs and companies of all sizes.
- The Retail Council of New York State is the leading statewide trade association representing thousands of stores.

INTRODUCTION

This is the quintessential case for interlocutory appeal. The prerequisites to appellate jurisdiction under 28 U.S.C. § 1292(b) are present here. Whether Plaintiff and the putative class have a right of action for alleged technical violations of N.Y. Labor Law § 191, which requires that "manual workers" be paid weekly, is a dispositive legal question that has divided New York's appellate courts and the district courts in this circuit. The real-world significance of this question is further reason for the Court to permit immediate appeal—either to review the question itself or to certify it to the N.Y. Court of Appeals.

Plaintiffs, like Plaintiff here, have leveraged the side of the split holding that Section 191 is privately enforceable in order to threaten businesses big and small with ruinous liability for paying workers in full and as agreed using the most common pay cycle (biweekly) in the country. Specifically, Plaintiff claims that "manual workers" who are paid in full every two weeks have a right of action for liquidated damages equal to 50% of all wages earned—and paid—for up to six years. Numerous employers have been compelled to settle due to the sheer threat of such massive damages awards.

Settlements inhibit appellate review, perpetuating the unsettled legal landscape that enables Plaintiffs to continue pursuing pay-frequency claims at high rates. This Court's grant of immediate appeal of this state-law question is especially warranted

both because these claims are overwhelmingly filed in federal court—the only venue where Plaintiffs can pursue *class* claims for alleged violations of Section 191—and because district courts lack the power to certify the question. Accordingly, and as discussed below, the petition should be granted.[2]

ARGUMENT

I. INTERLOCUTORY APPEAL IS NECESSARY TO ENSURE CONSISTENT DECISIONS AMONG THE DISTRICT COURTS.

Neither this Court nor the N.Y. Court of Appeals has addressed the question whether N.Y. Labor Law § 198(1-a) creates a private right of action for an employer's payment of "manual workers" on anything other than a weekly basis. District courts have been forced to guess how the N.Y. Court of Appeals would resolve the question. *See, e.g.*, *In re Vebeliunas*, 332 F.3d 85, 90–91 (2d Cir. 2003) ("In the absence of controlling authority, this Court must attempt to determine how the New York Court of Appeals would resolve this issue."). Before any N.Y. appellate court weighed in, federal courts had held that no such right of action exists.[3]

That changed in 2019, when the First Department held that Section 198(1-a) makes Section 191 privately enforceable. *Vega v. CM & Assocs. Constr. Mgmt.*,

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[2] *Amici* submit this brief in support of the petition. If the petition is granted, *Amici* reserve the right to submit a separate brief, on the merits, in support of reversal.

[3] *See, e.g.*, *Coley v. Vannguard Urban Improvement Ass'n*, 2018 WL 1513628, at *13 (E.D.N.Y. 2018); *Hussain v. Pak. Int'l Airlines*, 2012 WL 5289541, at *3 (E.D.N.Y. 2012).

175 A.D.3d 1144, 1145 (1st Dep't 2019). A tidal wave of litigation followed, involving claims of untimely payment of "manual workers" and demands for colossal damages awards. These cases are overwhelmingly filed in *federal* courts (invoking jurisdiction under the Class Action Fairness Act) because only in *federal* court may Plaintiffs bring claims under Section 191 on a class basis. *See* N.Y. C.P.L.R. § 901(b) (barring class actions for statutory damages unless authorized by statute). Without any contrary rulings, federal courts faced with these suits determined that they were required to follow *Vega*. *See, e.g.*, *Espinal v. Sephora, Inc.*, 2022 WL 16973328, at *6 (S.D.N.Y. 2022) ("While we would likely not reach this conclusion ourselves if the issue were presented afresh, for reasons explained further below, we feel bound to follow *Vega*'s holding on this point.").

In January 2024, the Second Department expressly rejected *Vega*'s analysis and and held that there is no right of action, express or implied, for alleged violations of Section 191. *Grant v. Global Aircraft Dispatch, Inc.*, 223 A.D.3d 712, 715 (2d Dep't 2024) ("[W]e respectfully disagree with the reasoning of *Vega* and decline to follow it."). This conflict among New York's appellate courts created conflict among the district courts in this circuit. *Compare Espinal v. Sephora, Inc.*, 2024 WL 3589604, at *11 (S.D.N.Y. 2024) (following *Grant*), *with Birthwright v. Advance Stores Co.*, 2024 WL 3202973, at *2 (E.D.N.Y. 2024) (following *Vega*). Pay-frequency claims

continue to be filed in federal court at an alarming rate—at least 76 of the hundreds of active cases were filed in 2024 alone.[4]

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[4] *Mejia v. Creative Foods Corp.*, No. 24-cv-00091 (E.D.N.Y); *Ayala v. Jetblue Airways.*, No. 24-cv-00259 (E.D.N.Y.); *Zhinin v. Sistina Restaurant Inc.*, No. 24-cv-00288 (S.D.N.Y.); *Velasquez v. 1501 Undercliff Assocs.*, No. 24-cv-00341 (S.D.N.Y.); *Quintero v. Le General Servs. Inc.*, No. 24-cv-00451 (E.D.N.Y.); *Sharma v. Open Door NY Home Care Services, Inc.*, No. 24-cv-00497 (E.D.N.Y.); *Santos v. Lidl, LLC*, No. 24-cv-00611 (E.D.N.Y.); *Cruz v. El Bohio Tropical Square Inc.*, No. 24-cv-00684 (S.D.N.Y.); *Schwartz v. Qazi*, No. 24-cv-00911 (E.D.N.Y); *Pheonix v. Cushman & Wakefield, Inc.*, No. 24-cv-00965 (S.D.N.Y.); *Nokaj v. Pappas N.Y.*, No. 24-cv-1076 (S.D.N.Y.); *Jarvis v. AutoZone, Inc.*, No. 24-cv-00117 (E.D.N.Y.); *Cartagena v. Walmart, Inc.*, No. 24-cv-01211 (E.D.N.Y); *Vangorden v. Honeybee Foods Corp.*, No. 24-cv-01248 (E.D.N.Y.); *Ginenthal v. TEC Building Sys.*, No. 24-cv-01256 (E.D.N.Y.); *Caguana v. Yeshiva Gedolah Zichron Moshe*, No. 24-cv-01279 (S.D.N.Y.); *Gega v. La France LLC*, No. 24-cv-1344 (E.DN.Y.); *Sharma v. PEP Boys - Manny, Moe & Jack, Inc.*, No. 24-cv-01510 (E.D.N.Y.); *Harford v. 38th St. Suites LLC*, No. 24-cv-01531 (S.D.N.Y.); *Mouchas v. Under Pressure Coffee Inc.*, No. 24-cv-02221 (E.D.N.Y.); *Fakhurtdinov v. ITG Commc'ns*, No. 24-cv-01696 (E.D.N.Y.); *Sylvester v. Souther Cross*, No. 24-cv-01776 (E.D.N.Y.); *Santana v. Seoul Shopping, Inc.*, No. 24-cv-01839 (E.D.N.Y.); *Santiago v. Belmont Realty LLC*, 24-cv-02041 (S.D.N.Y.); *Davila v. Chelsea Senior Living LLC*, No. 24-cv-02384 (E.D.N.Y.); *Smith v. Alliant Ins. Servs.*, No. 24-cv-02389 (E.D.N.Y.); *Duggins v. Heritage Ne. Med. Mgmt.*, No. 24-cv-02388 (E.D.N.Y.); *Valoria v. JGV Assocs.*, No. 24-cv-02404 (E.D.N.Y.); *Mile v. MLJ Painting Corp.*, No. 24-cv-02400 (E.D.N.Y.); *McDonald v. H & M Hennes & Mauritz LP*, No. 24-cv-2476 (S.D.N.Y.); *Mohammed v. Leap Servs.*, No. 24-cv-01318 (S.D.N.Y.); *Lewis v. Progressive Pipeline Mgmt.*, No. 24-cv-02567 (E.D.N.Y.); *Apkaki v. Proguard Protection Inc.*, No. 24-cv-02687 (S.D.N.Y.); *Hernandes v. Lo Sewing Inc.*, No. 24-cv-02882 (E.D.N.Y.); *Vega v. Regent Hospitality Linen Servs.*, No. 24-cv-02911 (S.D.N.Y.); *Diakite v. Autozonerz, LLC*, No. 24-cv-02927 (E.D.N.Y.); *Discolo v. United Security Inc.*, No. 24-cv-03161 (E.D.N.Y.); *Ford v. Quest Diagnostic Inc.*, No. 24-cv-03160 (E.D.N.Y.); *Luke v. Genting LLC*, No. 24-cv-03159 (E.D.N.Y); *Prepetit v. Unique On the Go Corp.*, No. 24-cv-03197 (E.D.N.Y.); *Brown v. CE Solutions Inc.*, No. 24-cv-03226 (E.D.N.Y.); *Hayes v. 355 Restaurant Grp.*, No. 24-cv-03468 (S.D.N.Y.); *Shadiha v. Apollo Manufac.*, No. 24-cv-03502 (S.D.N.Y.); *Rue v. VMD Sys. Integrators, Inc.*, No. 24-cv-00476 (W.D.N.Y.); *Sanchez v. Bavarian Mansion, LLC*, No. 24-cv-00693 (N.D.N.Y.);

II. THE STAKES ARE HIGH FOR ALL EMPLOYERS, BUT ESPECIALLY SMALL BUSINESSES.

For employers of all sizes, the threatened liability in these cases would be ruinous, especially given the purported availability of liquidated damages and the six-year limitations period. *See* N.Y. Lab. Law § 198(3). Consider two hypothetical employers that have been paying "manual workers" on a biweekly basis $16 per hour (the current NYC minimum wage) for 40 hours per week, 52 weeks per year.

Otieno v. Braman, No. 24-cv-00706 (N.D.N.Y.); *Varona v. New Age Lounge, Inc.*, No. 24-cv-04020 (S.D.N.Y.); *Karim v. Port Brokers Inc.*, No. 24-cv-03905 (E.D.N.Y.); *Bhuiyan v. Walgreen E. Co.*, No. 24-cv-03881(E.D.N.Y.); *Azad v. CVS LLC*, No. 24-cv-04122 (S.D.N.Y.); *Dorval v. Think Outscourcing LLC*, No. 24-cv-04204 (S.D.N.Y.); *Doorkan v. Carnadby House LLC*, No. 24-cv-03922 (E.D.N.Y.); *Jordan v. CE Solutions Inc.*, No. 24-cv-04168 (S.D.N.Y.); *Valdez v. Right Time Job, Inc.*, No. 24-cv-03945 (E.D.N.Y.); *Nicolas v. Rosenthal Wine Merchant Ltd.*, No. 24-cv-03990 (E.D.N.Y); *Valle v. Lamar Gourmet Deli Corp.*, No. 24-cv-04547 (S.D.N.Y.); *Smith v. Vogelstein*, No. 24-cv-04583 (S.D.N.Y.); *Bishop v. N.H. Ross, Inc.*, No. 24-cv-04286 (E.D.N.Y.); *Edwards v. CRST Expedited, Inc.*, No. 24-cv-04330 (E.D.N.Y.); *Headley-Tomilson v. Engel Burman Senior Housing at North Hills, Inc.*, No. 24-cv-04445 (E.D.N.Y); *Rodriguez v. Elite Parking Area Maintenance*, No. 24-cv-04444 (E.D.N.Y.); *Andujar v. Purchase St. Ventures Corp.*, No. 24-cv-04862 (S.D.N.Y.); *Martinez v. Surefox Inc.*, No. 24-cv-04933 (S.D.N.Y); *Burkett v. Dennis Shipping, Co.*, No. 24-cv-04942 (S.D.N.Y.); *Hancle v. W. Bar & Lounge, Inc.*, No. 24-cv-04613 (E.D.N.Y.); *Lachoo v. Smilie Hearts House Inc.*, No. 24-cv-04841 (E.D.N.Y.); *Miller v. Building Servs. Inc.*, No. 24-cv-04814 (E.D.N.Y.); *Lugo v. OT Nyack, LLC*, No. 24-cv-05220 (S.D.N.Y.); *Garzon v. Building Servs. Inc.*, No. 24-cv-05429 (S.D.N.Y.); *Theodore v. CorpHousing LLC*, No. 24-cv-05432 (S.D.N.Y.); *Lozano v. Cajun Seafood Middletown LLC*, No. 24-cv-05476 (S.D.N.Y.); *Jimenez v. Brownstone Prop. Grp.*, No. 24-cv-05108 (E.D.N.Y.); *Trimble v. Sentry Commc'ns*, No. 24-cv-05206(E.D.N.Y.); *Sam v. Stone Security Serv.*, No. 24-cv-05620 (S.D.N.Y.); *Lagos v. Camelot Realty Grp.*, No. 24-cv-05233 (E.D.N.Y.); *Carpio v. Alcott HR Grp. LLC*, No. 24-cv-05336 (E.D.N.Y.); *Nieves v. NYC Sch. Support Servs., Inc.*, No. 24-cv-05783 (S.D.N.Y.).

Plaintiff's theory, which *Vega* enables and *Grant* forecloses, is that 26 of those weeks' wages each year during the six-year limitations period were paid one week late and therefore must be paid again—as liquidated damages, even though the employees received 100% of the wages earned.

Assume **Employer A** is a small business with seven manual worker employees, who were paid in full biweekly. Employer A's potential liability is $698,880—nearly $100,000 for each member of its small workforce:

7 x $16/hour x 40 hours/week x 26 weeks/year x 6 years = $698,880

Such liability could easily bankrupt a small business. According to one survey, 72% of N.Y. small businesses have *total annual revenues* under $1 million.[5] Businesses like these cannot absorb a financial hit that exceeds more than half of their total annual revenue.

This is no mere hypothetical. Faced with potential liability in the millions, two sisters who own a Medford ice cream shop with 40 employees settled on a class basis for $450,000. They reportedly had to cash in their personal retirement accounts to make the first of six $75,000 payments. Keshia Clukey, *Century-old New York State Weekly Pay Law Sparking Contentious Legal Battle*, NEWSDAY (June 23, 2024).

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

Assume **Employer B** is significantly larger, with 999 manual worker employees who were all paid in full biweekly. Employer B's potential liability under Plaintiff's reading of Section 191 is nearly *nine figures*:

999 x $16/hour x 40 hours/week x 26 weeks/year x 6 years = $99,740,160

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. Lab. Law § 191(a)(ii). But to be eligible, the entity must employ at least 1,000 employees. So, neither Employer A nor Employer B could possibly obtain a waiver.

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 Plaintiff's view would be *nearly $1 billion*—for paying workers in full and as promised using the most common pay cycle. And that's to say nothing of the potential liability of the many other manual worker employers 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.

These hypotheticals accurately capture the implications of Plaintiff's interpretation of Sections 191 and 198. In one 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 for just a *three-year* period (the extent of his

employment). *Williams v. Miracle Mile Props. 2 LLC*, 2022 WL 1003854, at *9 (E.D.N.Y. 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. Class certification would multiply damages exponentially.

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 were underpaid. Rather, under Plaintiff's 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—for up to six years. U.S. Bureau of Labor Statistics, *Current Employment Statistics, Length of Pay Periods in the Current Employment Statistics Survey* (May 3, 2021) (explaining that 43% of American employers use a biweekly pay cycle, compared to 33.3% who pay weekly, 19% who pay semimonthly, and 4.7% who pay monthly).[6] As at least one judge has recognized, the lack of proportion between these massive damages and the claimed harm would "invariably" render such damages unconstitutionally excessive under either the Due Process Clause or the Excessive Fines Clause. *Espinal*, 2024 WL 3589604, at *5.

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6 https://www.bls.gov/ces/publications/length-pay-period.htm

Many defendants are forced to settle to avoid the risk attendant to litigation of a potential "liability catastrophe," especially given the narrow construction courts have often given the statute's "good faith" exception and the potential for litigation over the boundaries of Section 191's category of "manual workers."[7] The potential liquidated damages on a class basis can easily drive an employer to settlement. These coerced settlements hinder further clarity around the law.

In short, the core legal question in this case—whether N.Y. law authorizes the sort of liquidated damages Plaintiff seeks here—can be resolved only by this Court or the N.Y. Court of Appeals. The lack of controlling authority makes this issue well-suited for certification to the N.Y. Court of Appeals, which only this Court may do. *See* 22 N.Y.C.R.R. § 500.27(a). Clarity is needed now to protect New York employers, especially small businesses.

[7] "Manual worker" is unhelpfully defined as "a mechanic, workingman or laborer." N.Y. Lab. Law § 190(4).

CONCLUSION

The petition for interlocutory appeal should be granted.

Respectfully submitted,

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Dated: August 12, 2024

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 5(c)(1) and 29(a)(5) because it contains 2,597 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface, Times New Roman 14-point font.

Dated: August 12, 2024

s/ Stephanie Schuster
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