

No. 09-1917

---

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

---

**MOUNTAIRE FARMS, INC., et al,**  
*Appellants/Cross-Appellees,*

**v.**

**LUISA PEREZ, et al,**  
*Appellees/Cross-Appellants.*

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND

---

**BRIEF OF AMICI CURIAE PUBLIC JUSTICE CENTER, LEGAL AID  
BUREAU, LEGAL AID JUSTICE CENTER, MARYLAND EMPLOYMENT  
LAWYERS ASSOCIATION, AND METROPOLITAN WASHINGTON  
EMPLOYMENT LAWYERS ASSOCIATION**

---

Monisha Cherayil  
*Francis D. Murnaghan Appellate  
Advocacy Fellow*  
Public Justice Center  
One North Charles Street, Suite 200  
Baltimore, Maryland 21218  
410-625-9409

Counsel for *Amici Curiae*

Dated: March 1, 2010

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES ..... ii

SUMMARY OF ARGUMENT ..... 1

INTERESTS OF AMICI.....2

ARGUMENT .....5

I. Pervasive Violations of the Fair Labor Standards Act Harm Low-Wage  
Workers, Their Families, and Their Communities .....5

    A. Violations of Federal Wage-and-Hour Laws Are Widespread.....5

    B. FLSA Violations Push Low-Wage Workers Deeper Into Poverty .....8

II. Liquidated Damages Awards Play A Critical Role in Compensating Injured  
Employees and Deterring Wage Theft..... 13

    A. Liquidated Damages Compensate Employees for Non-Payment,  
    Under-Payment, and Late Payment of Wages ..... 13

    B. Liquidated Damages Promote Compliance with the FLSA..... 14

CONCLUSION ..... 19

CERTIFICATE OF COMPLIANCE ..... 21

CERTIFICATE OF SERVICE ..... 21

## TABLE OF AUTHORITIES

### CASES

<i>Arnett v. Kennedy</i> , 416 U.S. 134 (1974).....	9
<i>Avitia v. Metro. Club of Chicago, Inc.</i> , 49 F.3d 1219 (7th Cir. 1995) .....	1
<i>Brooklyn Sav. Bank v. O’Neil</i> , 324 U.S. 697 (1945) .....	9, 13, 14-15
<i>Cornier v. Paul Tulacz, DVM PC</i> , 30 P.3d 1210 (Or. Ct. App. 2001).....	15
<i>Ellis v. Edward D. Jones &amp; Co.</i> , 527 F.Supp.2d 439 (W.D. Pa. 2007).....	18
<i>Galaviz-Zemora v. Brady Farms</i> , 230 F.R.D. 499 (W.D.Mich. 2005) .....	11
<i>Gentry v. Superior Court</i> , 165 P.3d 556 (Cal. 2007).....	17
<i>Hoffman Plastic Compounds, Inc. v. NLRB</i> , 535 US 137 (2002).....	11
<i>Lindsey v. Amer. Cast Iron Pipe Co.</i> , 810 F.2d 1094 (11th Cir. 1987).....	14
<i>Madeira v. Affordable Hous. Found., Inc.</i> , 469 F.3d 219 (2d Cir. 2006).....	11
<i>Martin v. Cooper Elec. Supply Co.</i> , 940 F.2d 896 (3d Cir. 1991).....	1
<i>Mayhew v. Wells</i> , 125 F.3d 216 (4th Cir. 1997).....	1
<i>Mitchell v. Robert DeMario Jewelry</i> , 361 U.S. 288 (1960) .....	15-16
<i>Montoya v. SCCP Painting Contractors, Inc.</i> , 530 F.Supp.2d 746 (D.Md. 2008)..	11
<i>Reich v. S. New England Telecomm. Corp.</i> , 121 F.3d 58 (2d Cir. 1997).....	13
<i>Richard v. Marriott Corp.</i> , 549 F.2d 303 (4th Cir. 1977).....	1
<i>Rivera v. NIBCO, Inc.</i> , 364 F.3d 1057 (9th Cir. 2004).....	11
<i>Singh v. Jutla &amp; C, D &amp; R’s Oil, Inc.</i> , 214 F. Supp.2d 1056 (N.D. Cal. 2002)	

.....	16-17
<i>State v. McKenzie</i> , 532 N.W.2d 210 (Minn. 1995).....	9
<i>Thompson v. Sawyer</i> , 678 F.2d 257 (D.C. Cir. 1982).....	14
<i>United States v. Ursery</i> , 518 U.S. 267 (1996) .....	14
<i>Wright v. Carrigg</i> , 275 F.2d 448 (4th Cir. 1960) .....	1
<i>Zeng Liu v. Donna Karan, Intern. Inc.</i> , 207 F.Supp.2d 191 (S.D.N.Y. 2002).....	11

**STATUTE**

29 U.S.C. § 202(a) (enacted 1938) .....	1
---	---

**OTHER AUTHORITES**

Patrick M. Anderson, <i>The Agricultural Employee Exemption from the Fair Labor Standards Act of 1938</i> , 12 <i>HAMLIN L. REV.</i> 649 (1989).....	12
Craig Becker & Paul Strauss, <i>Representing Low-Wage Workers in the Absence of a Class: The Peculiar Case of Section 16 of the Fair Labor Standards Act and the Underenforcement of Minimum Labor Standards</i> , 92 <i>MINN. L. REV.</i> 1317 (2008) 15	
Craig Becker, <i>The Check is in the Mail: Timely Payment Under the Fair Labor Standards Act</i> , 40 <i>UCLA L. REV.</i> 1241 (1993).....	9-10
BRENNAN CENTER FOR JUSTICE, <i>UNREGULATED WORK IN THE GLOBAL CITY: EMPLOYMENT AND LABOR LAW VIOLATIONS IN NEW YORK CITY</i> (2007) .....	11
CENTER FOR RESPONSIBLE LENDING, <i>PHANTOM DEMAND: SHORT-TERM DUE DATES GENERATE NEED FOR REPEAT PAYDAY LOANS, ACCOUNTING FOR 76% OF TOTAL VOLUME</i> (2009) .....	10-11
CENTER FOR RESPONSIBLE LENDING, <i>WEALTH-STRIPPING PAYDAY LOANS TROUBLE COMMUNITIES OF COLOR</i> (2008) .....	10

Daniel V. Dorris, Comment, <i>Fair Labor Standards Act Preemption of State Wage-and-Hour Law Claims</i> , 76 U. CHI. L. REV. 1251 (2009) .....	18
Steven Greenhouse, <i>Low-Wage Workers Are Often Cheated, Study Says</i> , N.Y. TIMES (Sept. 1, 2009) .....	19
Daisy Ha, Comment, <i>An Analysis of KIWA’s Reform Efforts in the Los Angeles Korean American Restaurant Industry</i> , 8 ASIAN L. J. 111 (2001) .....	17
HUMAN RIGHTS WATCH, <i>BLOOD, SWEAT, AND FEAR</i> (2004) .....	16
Creola Johnson, <i>Payday Loans: Shrewd Business or Predatory Lending?</i> , 87 MINN. L. REV. 1 (2002).....	10
Kathleen Kim, <i>The Trafficked Worker as Private Attorney General: A Model for Enforcing the Civil Rights of Undocumented Workers</i> , 1 U. CHI. L. REV. 247 (2009) .....	16
Deborah Maranville, <i>Workplace Mythologies &amp; Unemployment Insurance: Exit, Voice, and Exhausting All Reasonable Alternatives to Quitting</i> , 31 HOFSTRA L.REV. 459 (2002).....	9
Siobhan McGrath, <i>A SURVEY OF LITERATURE ESTIMATING THE PREVALENCE OF LABOR LAW VIOLATIONS IN THE U.S.</i> (2005).....	6-7, 16
NATIONAL EMPLOYMENT LAW PROJECT, <i>BROKEN LAWS, UNPROTECTED WORKERS</i> (2009) .....	passim
S. REP. NO. 75-884 at 2 (1937).....	12
NATIONAL IMMIGRATION LAW CENTER, <i>FACTS ABOUT IMMIGRANT WORKERS</i> (2007) .....	8
Note, <i>Rule Porousness and the Design of Legal Directives</i> , 121 HARV. L. REV. 2134 (2008) .....	15
UNITED STATES DEPARTMENT OF LABOR, <i>POULTRY PROCESSING COMPLIANCE SURVEY FACT SHEET</i> (2001).....	7-8

News Release, U.S. Department of Labor, Tyson Foods Found in Violation of Fair Labor Standards Act (Nov. 5, 2009).....8

UNITED STATES DEPARTMENT OF LABOR, WAGE AND HOUR COLLECTS OVER 1.4 BILLION IN BACK WAGES FOR OVER 2 MILLION EMPLOYEES SINCE 2001 (2008).. 5-6

## SUMMARY OF ARGUMENT

Congress' stated intention in passing the Fair Labor Standards Act (FLSA) was that the American workplace would one day guarantee employees the "minimum standard of living necessary for health, efficiency and general well-being." *See* 29 U.S.C. § 202(a) (enacted 1938). Seventy years later, FLSA violations in the form of non-payment, late payment, and underpayment of wages remain widespread to the detriment of the nation's most vulnerable workers and their families. Liquidated damages awards offer a partial solution by remedying the injuries that employees suffer when they are illegally denied their pay and by deterring employers from withholding such pay in the future. Consistent with Congressional intent and Fourth Circuit precedent, courts must continue to award liquidated damages as the "norm"<sup>1</sup> and consider departure from this rule only in rare cases where employers present compelling proof of their sincere and reasonable efforts to comply with the law.

---

<sup>1</sup> *Mayhew v. Wells*, 125 F.3d 216, 220 (4th Cir. 1997) accord *Avitia v. Metro. Club of Chicago, Inc.*, 49 F.3d 1219, 1223 (7th Cir. 1995); *Martin v. Cooper Elec. Supply Co.*, 940 F.2d 896, 908 (3d Cir. 1991); *see also, e.g., Richard v. Marriott Corp.*, 549 F.2d 303 (4th Cir. 1977); *Wright v. Carrigg*, 275 F.2d 448 (4th Cir. 1960).

## INTERESTS OF AMICI

The **Public Justice Center (PJC)**, a non-profit civil rights and anti-poverty legal services organization, has a longstanding commitment to promoting the rights of low-wage workers. Towards that end, the PJC has represented thousands of employees seeking to recover unpaid wages from their employers through collective and/or class actions under the Fair Labor Standards Act (FLSA) and state wage and hour laws. *See re Tyson Foods, Inc., Fair Labor Standards Act Litigation*, MDL Docket No. 1854 (M.D. Ga.) (pending); *Fox v. Tyson Foods, Inc.*, No. 4:99-CV-1612-VEH, 2006 WL 6012784 (N.D. Ala. Nov. 15, 2006); *Trotter v. Perdue Farms, Inc.*, 2001 WL 1002448, 144 Lab. Cas. ¶ 34,364 (D. Del. Aug. 16, 2001); *Heath v. Purdue Farms, Inc.*, 87 F. Supp. 2d 452 (D.Md. 2000). The PJC has an interest in this case because its outcome may determine whether successful FLSA litigation remains an effective tool, as Congress intended, for making whole low-wage workers who have been denied payment and encouraging unscrupulous employers to comply with the law.

The **Legal Aid Bureau, Inc.** (“**Legal Aid**”) is a non-profit law firm that provides legal services to low-income Maryland residents from thirteen offices located throughout the state. Legal Aid’s advocates address the legal needs of low-income persons regarding their most fundamental necessities, including employment. Legal Aid has an interest in this case because it assists hundreds of



clients each year who have claims against their employers for unpaid wages. The decision in this case will impact Legal Aid's clients, as the ability to obtain liquidated damages for unpaid wages is a crucial negotiating tool used to resolve many of these disputes prior to litigation. Additionally, the prospect of paying liquidated damages provides an incentive for employers to comply with wage and hour laws in the first place. For many of Legal Aid's clients a loss of wages can result in eviction from their housing, inability to afford food or medicine, repossession of a vehicle, and other serious consequences.

The **Legal Aid Justice Center** is a non-profit provider of free legal assistance to low-income individuals throughout Virginia. The organization has represented thousands of workers in individual, collective, and class actions to recover unpaid wages under the Fair Labor Standards Act (FLSA), contract law, and state wage and hour laws, and has a strong interest in the outcome of this case, and preserving FLSA litigation as a viable tool for ensuring employer compliance with the provisions of the Act.

The **Maryland Employment Lawyers Association (MELA)**, a local affiliate of the National Employment Lawyers' Association, is comprised of more than 100 attorneys who represent individuals under federal and state laws that protect the interests of employees in receiving their full wages earned for their work performed, including the Fair Labor Standards Act and Maryland wage laws.

The purpose of MELA is to bring into close association employee advocates and attorneys in order to promote the efficiency of the legal system and fair and equal treatment under the law. MELA has been granted leave to participate as *amicus curiae* in many cases before Maryland state and federal appellate courts. *See, e.g., Newell v. Runnels*, 967 A.2d 729 (Md. 2009); *Haas v. Lockheed Martin Corp.*, 914 A.2d 735 (Md. 2007). Because the outcome of this case will have a direct impact upon the ability of MELA members and their clients to protect employees' interest in receiving the full fruits of their labors, MELA has a specific interest in the fair resolution of the issues presented in this appeal.

**The Metropolitan Washington Employment Lawyers Association**

("MWELA") is a local affiliate of the National Employment Lawyers Association. MWELA is comprised of over 250 members who represent plaintiffs in employment and civil rights litigation in the Washington, D.C. metropolitan area, including litigation within the Fourth Circuit. MWELA's purpose is to bring into close association plaintiffs' employment lawyers in order to promote the efficiency of the legal system, elevate the practice of employment law, and promote fair and equal treatment under the law. MWELA has participated in numerous cases as *amicus curiae* before this Court, the Court of Appeals for the D.C. Circuit, and the appellate courts of the District of Columbia, Maryland, and Virginia. MWELA's member attorneys frequently represent employees in Fair

Labor Standards Act cases, and have a strong interest in ensuring that the FLSA is interpreted and enforced in a manner that best effectuates the goals of protecting employees, particularly low-wage employees who bear the brunt of FLSA violations.

## **ARGUMENT**

### **I. Pervasive Violations of the Fair Labor Standards Act Harm Low-Wage Workers, Their Families, and Their Communities.**

Breaches of the FLSA are ubiquitous in a variety of industries and locations across the United States. The nation's lowest-wage workers, who benefit most directly from the FLSA's protections, suffer as a result of these transgressions, as do their families and communities.

#### **A. Violations of Federal Wage-and-Hour Laws Are Widespread.**

Alarming numbers of employers are non-compliant with the wage and hour requirements of the FLSA. In 2008, the U.S. Department of Labor found FLSA violations in 19,000 of the 24,500 cases it investigated nationwide (78%), identifying 52,000 employees who had not received overtime pay to which they were entitled, 34,000 employees who did not receive compensation for hours they had worked, and 1,600 employees who were denied the federal minimum wage. *See* UNITED STATES DEPARTMENT OF LABOR, WAGE AND HOUR COLLECTS OVER

1.4 BILLION IN BACK WAGES FOR OVER 2 MILLION EMPLOYEES SINCE 2001 2  
(2008).<sup>2</sup>

The same year, a study by the National Employment Law Project (NELP) of over 4,000 workers in New York, Chicago, and Los Angeles found that 26% of respondents had been paid less than the minimum wage during the previous week and 76% were not compensated for overtime hours. *See* NATIONAL EMPLOYMENT LAW PROJECT, *BROKEN LAWS, UNPROTECTED WORKERS 2* (2009) (hereinafter “BROKEN LAWS”).<sup>3</sup> Less easily-identified infractions were also common. Employers frequently required employees to work “off the clock” – that is, to perform tasks without receiving payment after the employees had clocked out for the day. *Id.* at 3, 8. Sixty-nine percent of workers who were legally entitled to a meal break were required to work during at least part of that break. *Id.* at 3.

Further evidence of illegal employer activity abounds. Over half of the workers who participated in a 2003 survey in Fairfax County, Virginia, reported not being paid for work they had done and not receiving any breaks. *See* Siobhan McGrath, *A SURVEY OF LITERATURE ESTIMATING THE PREVALENCE OF LABOR LAW*

---

<sup>2</sup> Available at [www.dol.gov/whd/statistics/2008FiscalYear.pdf](http://www.dol.gov/whd/statistics/2008FiscalYear.pdf) (viewed Feb. 28, 2010).

<sup>3</sup> Available at [nelp.3cdn.net/319982941a5496c741\\_9qm6b92kg.pdf](http://nelp.3cdn.net/319982941a5496c741_9qm6b92kg.pdf) (viewed Feb. 28, 2010).

VIOLATIONS IN THE U.S. 2 (2005) (hereinafter “LITERATURE SURVEY”).<sup>4</sup> In 2002, the U.S. Government Accountability Office concluded through a series of interviews with non-profit organizations, local government agencies, and temporary staffing companies that the majority of day laborers in areas of New York, Illinois, California, and Virginia had been denied wages to which they were entitled. *Id.* at 4. A nationwide investigation of nursing homes in 2000 revealed that only 40% adhered to federal minimum wage, child labor, and overtime standards. *Id.* at 15. Another national study, in 1998, discovered that FLSA compliance was only 39% in the garment industry, only 35% in the hotel industry, only 5% in the restaurant industry, and almost 0% in the forestry industry. *Id.* at 4.

Poultry processing plants are among the most notorious perpetrators of FLSA violations.<sup>5</sup> A report based on 1997 data estimated that over 60% of poultry plants failed to pay overtime to chicken catching crews, 51% failed to pay for job-related tasks, 30% failed to provide compensation for legally-mandated breaks, and 54% charged employees for protective gear and uniforms. *Id.* at 2; *see also* U.S.

DEPARTMENT OF LABOR, POULTRY PROCESSING COMPLIANCE SURVEY FACT SHEET

---

<sup>4</sup> Available at [nelp.3cdn.net/1ef1df52e6d5b7cf33\\_s8m6br9zf.pdf](http://nelp.3cdn.net/1ef1df52e6d5b7cf33_s8m6br9zf.pdf) (viewed Feb. 28, 2010).

<sup>5</sup> The food manufacturing industry more generally also has high rates of non-compliance. NELP’s 2008 study found that, in food manufacturing, violation rates with respect to minimum wage, overtime, off-the-clock, and meal break laws were 18.5%, 51.9%, 66%, and 66.8% respectively. *See* BROKEN LAWS at 31-37.

2 (2001). The situation grew starker in 2000. Remarkably, 100% of poultry plants surveyed by the U.S. Department of Labor that year were not in compliance. *See* NATIONAL IMMIGRATION LAW CENTER, FACTS ABOUT IMMIGRANT WORKERS 2 (2007).<sup>6</sup> Employee victories in recent FLSA lawsuits, including the Appellees' victory in this case, confirm that the problem continues to this day. *See, e.g.*, News Release, U.S. Department of Labor, Tyson Foods Found in Violation of Fair Labor Standards Act (Nov. 5, 2009).<sup>7</sup>

**B. FLSA Violations Push Low-Wage Workers Deeper Into Poverty.**

Low-wage workers face serious hardship when their employers defy the FLSA. NELP concluded through its 2008 study that surveyed workers lost an average of \$51, or 15%, of their \$339 average weekly paycheck as a result of wage and hour violations. *See* BROKEN LAWS at 50. “Wage theft” of this sort “depresses the already meager earnings of low-wage workers” so that they have a more difficult time purchasing food, shelter, and clothing. *Id.* “[L]ow-income people . . . need every dollar of their paychecks” so that they can afford the basic necessities of life. *State v. McKenzie*, 532 N.W.2d 210 (Minn. 1995).

---

<sup>6</sup> Available at [www.nilc.org/immsemplymnt/resrch\\_employnt/factsaboutimmigrantworkers\\_2007-04.pdf](http://www.nilc.org/immsemplymnt/resrch_employnt/factsaboutimmigrantworkers_2007-04.pdf) (viewed Feb. 28, 2010).

<sup>7</sup> Available at [www.dol.gov/opa/media/press/esa/esa20091232.htm](http://www.dol.gov/opa/media/press/esa/esa20091232.htm) (viewed Feb. 28, 2010).

Workers suffer even when their employers pay them the full amount due but fail to do so on time, such as when payment is the eventual result of successful litigation under the FLSA. When an employer temporarily reduces or withholds payment, poor employees “are not likely to have sufficient resources to maintain their well-being and efficiency until such sums are paid at a future date,” a point that the Supreme Court recognized in one of its seminal FLSA decisions. *Brooklyn Sav. Bank v. O’Neil*, 324 U.S. 697, 708 (1945). Justice Marshall elsewhere articulated the essence of the problem:

Many workers, particularly those at the bottom of the pay scale, will suffer severe and painful economic dislocations from even a temporary loss of wages. . . . Like many of us, they may be required to meet substantial fixed costs on a regular basis and lack substantial savings to meet those expenses while not receiving a salary. The loss of income for even a few weeks may well impair their ability to provide the essentials of life – to buy food, make mortgage or rent payments, or procure medical services.

*Arnett v. Kennedy*, 416 U.S. 134, 220 (1974) (Marshall, J. dissenting); *see also* Deborah Maranville, *Workplace Mythologies & Unemployment Insurance: Exit, Voice, and Exhausting All Reasonable Alternatives to Quitting*, 31 HOFSTRA L.REV. 459, 478 (2002) (“most workers have little or no savings, and live from paycheck to paycheck”); Craig Becker, *The Check is in the Mail: Timely Payment Under the Fair Labor Standards Act*, 40 UCLA L. REV. 1241 (1993) (discussing how, for low-wage workers, subsistence depends on timely payment). Temporary but repeated financial shortfalls compel some workers to take out short-term loans

on onerous terms. *See generally, e.g.*, CENTER FOR RESPONSIBLE LENDING, WEALTH-STRIPPING PAYDAY LOANS TROUBLE COMMUNITIES OF COLOR (2008);<sup>8</sup> CENTER FOR RESPONSIBLE LENDING, PHANTOM DEMAND: SHORT-TERM DUE DATES GENERATE NEED FOR REPEAT PAYDAY LOANS, ACCOUNTING FOR 76% OF TOTAL VOLUME (2009) (hereinafter “PHANTOM DEMAND”);<sup>9</sup> Creola Johnson, *Payday Loans: Shrewd Business or Predatory Lending?*, 87 MINN. L. REV. 1 (2002). With interest rates as high as 400%, reliance on these loans pushes families deeper into debt and poverty. *See* PHANTOM DEMAND at 2.<sup>10</sup>

Women and minorities disproportionately endure these hardships because they are especially likely to be the victims of FLSA violations. *See generally* BRENNAN CENTER FOR JUSTICE, UNREGULATED WORK IN THE GLOBAL CITY:

---

<sup>8</sup> Available at <http://www.responsiblelending.org/payday-lending/research-analysis/az-payday-communities-of-color-10-2-final.pdf>. (viewed Feb. 28, 2010)

<sup>9</sup> Available at [www.responsiblelending.org/payday-lending/research-analysis/phantom-demand-final.pdf](http://www.responsiblelending.org/payday-lending/research-analysis/phantom-demand-final.pdf) (viewed Feb. 28, 2010).

<sup>10</sup> This vicious cycle operates as follows:

The payday loan product, which routinely comes with a 400 percent annual percentage rate (APR) sticker, requires a short-term balloon payment that can account for 25-50 percent of a borrower’s entire take home income. Devoting this substantial share of a paycheck to repaying a payday loan . . . leaves most borrowers inadequate funds for their other obligations, compelling them to take a new payday loan almost immediately. . . . [P]ayday borrowers . . . are effectively locked in a cycle of debt.

PHANTOM DEMAND at 2.



EMPLOYMENT AND LABOR LAW VIOLATIONS IN NEW YORK CITY (2007) (finding that immigrants and minorities are particularly affected by labor law violations in a wide range of industries). Foreign-born workers, particularly those who lack legal immigration status,<sup>11</sup> face minimum wage violations at more than twice the rate of their U.S.-born counterparts and also are more frequently subject to overtime violations. *See* BROKEN LAWS at 42, 45. Immigrant women, whether legally-present or not, experience minimum wage violations more often than immigrant men. *Id.* at 43. Among U.S.-born workers, African-Americans are three times as likely as Caucasians to suffer minimum wage violations. *Id.* at 48.

---

<sup>11</sup> It is worth noting that many courts have determined that the Supreme Court’s decision in *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 US 137 (2002), which prevented undocumented immigrant employees from recovering certain damages under the National Labor Relations Act, does not preclude such employees from recovering damages under the FLSA at least with respect to work already performed. *See Madeira v. Affordable Hous. Found., Inc.*, 469 F.3d 219, 243 (2d Cir. 2006) (noting that “a number of district courts have concluded, even after *Hoffman Plastic*, that [federal immigration law] does not preclude . . . FLSA awards”); *Galaviz-Zemora v. Brady Farms*, 230 F.R.D. 499, 501 (W.D.Mich. 2005); *Flores v. Amignon*, 233 F.Supp.2d 462 (E.D.N.Y. 2002), *cited in Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1069 n. 12 (9th Cir. 2004); *Zeng Liu v. Donna Karan, Intern. Inc.*, 207 F.Supp.2d 191 (S.D.N.Y. 2002); *see also, e.g. Rivera*, 364 F.3d at 1069 (holding that *Hoffman* did not preclude undocumented immigrant from recovering damages under Title VII); *Montoya v. SCCP Painting Contractors, Inc.*, 530 F.Supp.2d 746, 751 (D.Md. 2008) (affirming, post-*Hoffman*, that “the FLSA affords relief regardless of immigration status”). This Court has not addressed the issue and need not do so for purposes of this appeal.

The public at large stands to lose when poor workers become poorer. A family that can no longer support itself as the result of a handful of missed paychecks or improper wage reductions may file for consumer bankruptcy or resort to government assistance, at a cost to the public fisc. *See Sniadach v. Family Fin. Corp. of Bay View*, 395 U.S. 337, 342 n.9 (1969) (citation omitted). Other families may stay above water financially but will spend less money even on basic necessities, undermining economic development within their communities. *See BROKEN LAWS* at 50. Indeed, one of the justifications for passing the FLSA was to bolster the purchasing power of the poor. The FLSA’s protections, President Roosevelt explained in 1937, would help “reduce the lag in the purchasing power of industrial workers and . . . strengthen and stabilize the markets for the farmers’ products.” S. REP. NO. 75-884 at 2 (1937), *quoted in* Patrick M. Anderson, *The Agricultural Employee Exemption from the Fair Labor Standards Act of 1938*, 12 *HAMLIN L. REV.* 649, 650 (1989). The withholding of wages in violation of FLSA “robs local communities of [consumer] spending, and ultimately limits economic growth.” *See BROKEN LAWS* at 50.

## **II. Liquidated Damages Awards Play A Crucial Role in Compensating Injured Employees and Deterring Wage Theft.**

Robust enforcement of the FLSA via public and private litigation is critical to ensuring that low-wage workers attain a minimum level of subsistence. Success on the merits and awards of back wages, however, cannot alone guarantee that

these suits effectively carry out their compensatory and deterrent functions.

Liquidated damages awards have a critical role to play.

**A. Liquidated Damages Compensate Employees for Non-Payment, Under-Payment, and Late Payment of Wages.**

Primarily, liquidated damages awards compensate employees from the severe but difficult-to-measure injuries that flow from delays in payment. *See Brooklyn Sav. Bank*, 324 U.S. at 707 (“the liquidated damages provision . . . constitutes compensation for the retention of a workman’s pay which might result in damages too obscure and difficult of proof for estimate other than by liquidated damages”); *see also Reich v. S. New England Telecomm. Corp.*, 121 F.3d 58, 71 n.4 (2d Cir. 1997) (liquidated damages are “a means for compensating employees for losses they might suffer by reason of not receiving their lawful wage at the time it was due”)(citation omitted).

The FLSA’s liquidated damages provision “constitutes a Congressional recognition that failure to pay the statutory minimum on time may be so detrimental to maintenance of the minimum standard of living . . . , and to the free flow of commerce, that double payment must be made in order to insure restoration of the worker to that minimum standard of well-being.” *Brooklyn Sav. Bank*, 324 U.S. at 707. The law creates a strong presumption in favor of doubling damages so that the “intangible . . . but nonetheless very real” harm employees

suffer when they are paid late does not go unremedied. *Thompson v. Sawyer*, 678 F.2d 257, 281 (D.C. Cir. 1982).

### **B. Liquidated Damages Promote Compliance with the FLSA.**

Liquidated damages awards under the FLSA also have a “deterrent effect.” *Brooklyn Sav. Bank*, 324 U.S. at 710.<sup>12</sup> For one, they make the cost to employers of violating the law greater than the cost of complying with the law – i.e. paying adequate wages on time. *See Note, Rule Porousness and the Design of Legal Directives*, 121 HARV. L. REV. 2134, 2135 (2008) (“[legal] directives are followed when the expected cost of noncompliance exceeds the expected benefit of noncompliance”). If an employer’s potential liability were no greater than the amount of wages he or she has withheld (perhaps adjusted for inflation), the employer would have no strong motive to make timely payment. *See Cornier v.*

---

<sup>12</sup> The Supreme Court stated in *Brooklyn Savings Bank* that FLSA’s “provision for liquidated damages is not punitive.” 324 U.S. at 718. Some courts have interpreted this statement to mean that Congress did not intend for liquidated damages to deter violations of the FLSA. *See, e.g., Lindsey v. Amer. Cast Iron Pipe Co.*, 810 F.2d 1094, 1102 (11th Cir. 1987) (“[Age Discrimination in Employment Act] liquidated damages punish and deter violators, while FLSA damages merely compensate”). However, a legal remedy may deter negligent or otherwise harmful conduct without serving as a “punitive” expression of moral opprobrium. *See, e.g., United States v. Ursery*, 518 U.S. 267, 291 (1996) (civil forfeiture statute deters illegal activity by “ensuring that individuals do not profit” from it, but this deterrence goal is “nonpunitive”). Indeed, the Supreme Court recognized in *Brooklyn Savings Bank* that liquidated damages are a “deterrent” while at the same time emphasizing that they were not “punitive.” 324 U.S. at 710.

*Paul Tulacz, DVM PC*, 30 P.3d 1210, 1212 (Or. Ct. App. 2001). Indeed, the employer might well find it profitable to build a “business strategy” out of violating the FLSA. *See* BROKEN LAWS at 5. Such a system of perverse incentives would be, in the words of one court, as illogical and counterproductive as the world of Alice in Wonderland. *Cornier*, 30 P.3d at 1212.

The need for liquidated damages as a deterrence tool is particularly pronounced because, in practice, many employees do not pursue meritorious wage claims either individually or as part of a collective action. *See generally* Craig Becker & Paul Strauss, *Representing Low-Wage Workers in the Absence of a Class: The Peculiar Case of Section 16 of the Fair Labor Standards Act and the Underenforcement of Minimum Labor Standards*, 92 MINN. L. REV. 1317 (2008). This is so for several reasons. Fear of employer reprisal, in the form of harassment, further non-payment or underpayment of wages, and other adverse action, silences many workers. *See Mitchell v. Robert DeMario Jewelry*, 361 U.S. 288, 292 (1960) (“[I]t needs no argument to show that fear of economic retaliation might often operate to induce aggrieved employees quietly to accept substandard conditions”); *see also, e.g.*, BROKEN LAWS at 24 (51% of surveyed workers who had experienced employer mistreatment did not complain because they feared losing their job). Such retaliation is itself unlawful, but it happens frequently

nonetheless. *See, e.g.*, LITERATURE SURVEY at 11 (citing survey findings that 48% of employees who reported workplace violations experienced retaliation).

Undocumented immigrant employees, in particular, often worry that their employers will have them deported if they assert their rights. *See, e.g.*, Kathleen Kim, *The Trafficked Worker as Private Attorney General: A Model for Enforcing the Civil Rights of Undocumented Workers*, 1 U. CHI. L. REV. 247, 307 (2009) (“Most undocumented immigrants are chilled from enforcing workplace rights”); HUMAN RIGHTS WATCH, BLOOD, SWEAT, AND FEAR 101 (2004) (quoting poultry worker’s account that his supervisors “have us under threat all the time . . . they’ll call the INS if we make trouble”).<sup>13</sup> Their anxiety is well-founded. *Singh v. Jutla & C, D & R’s Oil, Inc.* provides one recent example of an employer who reported an undocumented employee, the employer’s own nephew, to immigration authorities when the employee attempted to collect unpaid wages. 214 F. Supp.2d 1056 (N.D. Cal. 2002).<sup>14</sup>

---

<sup>13</sup> Available at [www.hrw.org/en/node/11869/section/1](http://www.hrw.org/en/node/11869/section/1) (viewed Feb. 28, 2010)

<sup>14</sup> This heightened ability to exploit foreign workers also contributes to economic incentives to employ them unlawfully. Thus, enforcement of the FLSA as Congress intended will also further another public policy interest: enforcement of the nation’s immigration laws. *See Singh*, 214 F.Supp. at 1062 (FLSA enforcement “discourages employers from hiring [undocumented] workers because it eliminates employers’ ability to pay them less than minimum wage or otherwise take advantage of their status”).

Limited English proficiency and knowledge of the law are also obstacles to asserting rights for many low-wage workers. *See Gentry v. Superior Court*, 165 P.3d 556, 566 (Cal. 2007) (recognizing that “[s]ome workers, particularly immigrants with limited English skills, may be unfamiliar with the overtime laws”). One study of recently-immigrated Korean workers in Los Angeles found that many were “uninformed about minimum wage and overtime laws and so were unaware that they were receiving less than what was mandated by law,” while others “were cognizant of such laws, [but] were unsure of how to pursue their complaints.” Daisy Ha, Comment, *An Analysis of KIWA’s Reform Efforts in the Los Angeles Korean American Restaurant Industry*, 8 *ASIAN L. J.* 111, 122 (2001). Unfamiliarity with American employment practices and limited English ability contributed to their lack of knowledge. *See id.* at 123. Of course, ignorance of one’s legal rights is not a problem that confronts only immigrants. “Even English-speaking or better educated employees may not be aware of the nuances of overtime laws.” *See Gentry*, 165 P.3d at 567.

Logistical difficulty in providing notice to potential plaintiffs is another factor leading to under-participation in FLSA collective action suits. “Because of high turnover in low-wage jobs and frequent changes of address among low-wage workers, the mailing list provided by employers for purpose of sending the notice will ordinarily contain many addresses that are no longer accurate.” *See Becker &*

Strauss at 1326. Thus, employees who are otherwise willing and able miss out on the opportunity to assert wage claims against their employers. Finally, simple “inertia” will prevent some employees from voicing their grievances, no matter how meritorious. *Ellis v. Edward D. Jones & Co.*, 527 F.Supp.2d 439, 444 (W.D. Pa. 2007).

The net result is that only fifteen to thirty percent of those who are eligible to participate in FLSA collective actions actually do so, such that the potential back pay award falls far short of the amount of unpaid wages. *See id.* Were liquidated damages no longer the norm, the resulting diminished potential recovery would discourage attorneys from representing employees seeking to prosecute FLSA violations. *See Daniel V. Dorris, Comment, Fair Labor Standards Act Preemption of State Wage-and-Hour Law Claims*, 76 U. CHI. L. REV. 1251, 1254 (2009).

Without legal representation, these would-be plaintiffs might abandon their claims altogether, so that the violations would go unaddressed. Employer defendants, meanwhile, would enjoy windfalls even when they were sued and lost; if only 15% of aggrieved employees pursued FLSA claims, employers would retain 85% of the value of unpaid wages. Liquidated damages awards address both problems by ensuring that the potential recovery in a FLSA lawsuit at least approaches, and perhaps exceeds, the total amount of wages an employer has wrongfully retained. Moreover, it may be only the relative certainty of liquidated damages that



will encourage workers to pursue claims, discourage employers from gaming the enforcement system, and thus begin to alter this nefarious calculus.

## CONCLUSION

When Labor Secretary Hilda M. Solis read the latest data on the persistent and pervasive violations of the FLSA, she pronounced that “we still have a major task before us.” *See* Steven Greenhouse, *Low-Wage Workers Are Often Cheated, Study Says*, N.Y. TIMES (Sept. 1, 2009). This task is not for private employers and government regulators alone; the judiciary also has a role to play in enforcing compliance with labor standards in the workplace. Courts must, first and foremost, bear in mind the remedial purpose of the FLSA when fashioning relief for violations of the Act. This involves awarding liquidated damages to successful plaintiffs in the vast majority of FLSA cases, and making an exception to this practice only when an employer has presented persuasive evidence of his or her reasonable, good faith attempts to follow the law.<sup>15</sup> Liquidated damages awards serve an important compensatory and deterrent function and, by enforcing them

---

<sup>15</sup> In the case at hand, the employer’s evidence of its reasonable, good faith efforts at compliance with the labor laws was exceedingly weak, a point that Appellees argue persuasively in their brief. Courts must not allow employers, like the Appellant, to avoid liquidated damages by referencing generic memoranda prepared by attorneys hired by their own trade association. Such attempts to justify illegal conduct are unreasonable at best, and the judiciary must reject them so as not to render meaningless the liquidated damages requirement of the FLSA.

courts effectuate Congress' intent to guarantee American workers an honest day's pay for an honest day's work.

Respectfully submitted,

/s/

---

Monisha Cherayil  
*Francis D. Murnaghan Appellate  
Advocacy Fellow*  
Public Justice Center  
One North Charles Street, Suite 200  
Baltimore, Maryland 21218  
410-625-9409

Counsel for *Amici Curiae*

Dated: March 1, 2010

## CERTIFICATE OF COMPLIANCE

1. This brief contains 4,556 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii)
2. 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. 33(a)(6) because this brief has been prepared in a proportionally-spaced typeface using Microsoft Office 2003 in Times New Roman 14-point font.
3. In making this certification, I have relied on the word count feature of the word-processing program used to prepare this brief.

## CERTIFICATE OF SERVICE

I hereby certify this 1<sup>st</sup> day of March 2010, the foregoing Brief of *Amici Curiae* was served on all counsel by the Court's electronic filing system and by first class mail.

/s/

---

Monisha Cherayil