No. 18-40246

In The

United States Court of Appeals for the Fifth Circuit

STATE OF NEVADA; STATE OF TEXAS,

Plaintiffs-Appellees,

CHIPOTLE MEXICAN GRILL, INCORPORATED; CHIPOTLE SERVICES, L.L.C.,

Petitioners-Appellees,

v.

UNITED STATES DEPARTMENT OF LABOR,

Defendant,

CARMEN ALVAREZ, AND HER COUNSEL,

Respondent-Appellant.

On Appeal from the United States District Court
Eastern District of Texas, No. 4:16-cv-731

BRIEF OF *AMICUS CURIAE* RESTAURANT LAW CENTER IN SUPPORT OF PETITIONERS-APPELLEES

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CERTIFICATE OF INTERESTED PARTIES

State of Nevada, et al. v. United States Department of Labor, No. 18-40246

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Plaintiffs-Appellees:

- State of Nevada
- State of Texas

Petitioners-Appellees:

- Chipotle Mexican Grill, Incorporated
- Chipotle Services, L.L.C.

Defendant:

- United States Department of Labor

Respondent-Appellants:

- Carmen Alvarez
- Joseph M. Sellers
- Justin M. Swartz
- Miriam R. Nemeth
- Melissa L. Stewart

- Glen D. Savits

Amicus Curiae:

- Restaurant Law Center

Counsel:

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- John C. Sullivan and David Austin R. Nimocks of the State of Texas

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- Laura H. Hallmon and Brian C. Newby of Cantey Hanger LLP

For Defendant:

- Officials from the Department of Justice
- Officials from the Department of Labor

For Respondent-Appellants:

- Matthew S. Hellman and Benjamin M. Eidelson of Jenner & Block LLP

For *Amicus Curiae* Restaurant Law Center:

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/s/ Paul DeCamp

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INTEREST OF THE *AMICUS CURIAE*

Amicus curiae Restaurant Law Center ("Law Center") is a public policy organization, headquartered at 2055 L Street, N.W., Suite 700, Washington, D.C. 20036, and affiliated with the National Restaurant Association ("National Association"), the largest trade association representing the restaurant and foodservice industry (the "Industry") in the world. The National Association was founded in 1919 and launched the Law Center, its affiliate, in 2015. The Industry is comprised of over one million restaurants and other foodservice outlets employing almost 14.7 million people—approximately 10 percent of the U.S. workforce. National Association members have locations that operate throughout the United States and this judicial Circuit, including corporate-owned food service establishments, franchisees, and independent operators. The Law Center routinely advocates on matters of labor relations policy and represents the interests of the National Association members in labor and workforce matters before the courts.

Many National Association members, including members doing business in the states that fall within the jurisdiction of this Circuit, employ exempt managers and supervisors classified as exempt from federal overtime laws but whose salaries do not meet the threshold set forth in the Department of Labor's enjoined and invalidated 2016 Final Rule. These members are potentially subject to the same type of lawsuit initiated by Respondent-Appellant if this Court does not affirm the

District Court's decision. In addition, these members have a broader interest in knowing whether they may rely on federal court injunctions when establishing their pay practices, or whether they remain subject to private litigation premised on their failure to comply with a new Department of Labor standard even after a court invalidates and enjoins that standard nationwide.

The Law Center, a District of Columbia corporation, has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

No party or party's counsel authored this brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting this brief. No person other than the *amicus curiae,* its members, or its counsel contributed money that was intended to fund preparing or submitting this brief.

All parties have consented to the filing of this brief.

ARGUMENT

I. LITIGATION UNDER THE FAIR LABOR STANDARDS ACT PRESENTS A RISK OF SIGNIFICANT ABUSE BY PLAINTIFFS' LAWYERS.

The Fair Labor Standards Act (the "FLSA"), when handled properly, can help to achieve many salutary results in the workplace and throughout the economy. Protecting wage rates, discouraging unfair competition, and reducing unemployment are all part of what the FLSA at its best can deliver. The 40-hour workweek and the concept of premium pay for overtime have been part of the

fabric of American labor for eighty years, as have the statutory overtime exemptions. *See, e.g.*, *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1142 (2018) ("[T]he FLSA has over two dozen exemptions in § 213(b) alone, including the one at issue here. Those exemptions are as much a part of the FLSA's purpose as the overtime-pay requirement.").

But the law has a darker side, imposing substantial, and potentially ruinous, consequences on businesses that, with no bad intent, run afoul of the statute and its hundreds of pages of regulations. *See, e.g.*, 29 U.S.C. § 216(b) (authorizing collective actions by similarly situated workers and allowing successful plaintiffs to recover unpaid minimum wage and overtime, plus an equal amount in liquidated damages, as well as attorneys' fees and costs of suit). When wielded in a cynical and predatory manner, the FLSA enables plaintiffs' lawyers to bully businesses into paying extortionate settlements.

The law's asymmetrical remedy provisions deny employers who prevail in FLSA lawsuits an opportunity to recover the expenses they incur in defending the litigation, most significantly their attorneys' fees. *See id.* Filing an FLSA lawsuit, especially a collective action—and, as is increasingly common, a pendent Rule 23 class action under state law substantively mirroring the FLSA along with the federal claim—threatens to impose substantial expense on an employer regardless of whether its pay practices comply with the law. Defending an FLSA lawsuit

vigorously, even when the case is wholly unmeritorious, can strain or even bankrupt an employer, particularly a small or medium-sized restaurant lacking a six-figure or seven-figure rainy day litigation fund.

While comprehensive data regarding litigation costs are not readily available, anecdotally the National Association's members that have been through wage and hour litigation report that for FLSA cases involving ten or fewer employees, the cost of paying attorneys to defend the matter through trial normally exceeds the amount of wages and liquidated damages in controversy. When coupled with the risk of paying the plaintiffs' attorneys' fees in the event of a loss at trial, restaurants rarely find it cost-effective to contest these cases, instead often opting for the personally distasteful but economically rational approach of settling the matter as quickly as possible.

With class and collective actions, the stakes are much higher. According to one report, from 2007 through 2015 the average wage and hour settlement was $6.9 million, with a median over that same period of $2.2 million. NERA Economic Consulting, *Trends in Wage and Hour Settlements: 2015 Update* at 1 (2015), available at http://www.nera.com/content/dam/nera/publications/2015/PUB_Wage_and_Hour_Settlements_0715.pdf (last visited July 12, 2018). In the period from January 2014 through March 2015, the food and food service industry

had among the highest average settlement values for wage and hour cases, at approximately $7 million. *See id.* at 13.

Not surprisingly, given the much greater potential exposure presented by class and collective actions as compared to non-class cases, the National Association's members report, again anecdotally, that it is common to spend between $75,000 and $400,000 defending an FLSA collective action during just the first year of the litigation. Contested wage and hour class cases often take two to three years to resolve, with some cases lasting much longer. The near certainty that a wage and hour class case results in, at a minimum, very substantial—but unrecoverable—defense costs even for an employer that has fully complied with the law merely amplifies the pressure employers face when presented with an FLSA collective action complaint or demand letter threatening such an action. *See, e.g.*, *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011) ("Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims"; noting "the risk of 'in terrorem' settlements that class actions entail" (citation omitted)).

As a result, basic fairness demands that employers have an ability to ascertain what the law requires of them so that they may pay their employees properly and in a manner that avoids this type of costly and potentially very unfair litigation. Congress intended the FLSA to protect workers; it never meant the

statute to operate as a club to bludgeon restaurants and other employers into paying large settlements, consisting in large part of attorneys' fees, when they have done nothing wrong.

II. BASED ON ALL AVAILABLE INFORMATION, EMPLOYERS COULD ONLY CONCLUDE THAT THE 2016 FINAL RULE NEVER WENT INTO EFFECT.

Here, the law was clear: in order for an employer to treat an employee as overtime-exempt, the employee needed, *inter alia*, to receive payment of at least $455 per week on a salary basis. *See* 29 C.F.R. §§ 541.100(a)(1) (salary requirement for the executive exemption), 541.200(a)(1) (salary requirement for the administrative exemption), 541.300(a)(1) (salary requirement for the professional exemption). In 2016, the Department of Labor issued a Final Rule that would have increased that minimum weekly salary to $913, *see* Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees, 81 Fed. Reg. 32,391 (May 23, 2016), but the District Court enjoined that rule before it became effective. That should have ended the matter, subject to the Department's opportunity to pursue an appeal in this Court.

The District Court's injunction ruling spoke with a clarity already addressed in the Appellees' briefing. Tellingly, virtually everyone, from the Department of Labor to the plaintiffs' bar to the media, read the injunction order the same way the District Court intended it: as blocking the 2016 Final Rule from going into effect.

The day the injunction issued, for example, the Department issued a statement to the public declaring that the decision "has the effect of delaying a fair day's pay for a long day's work for millions of hardworking Americans." Brakkton Booker, *Federal Judge Blocks Obama Administration's Overtime Pay Rule* (Nov. 22, 2016) (quoting Department of Labor statement), available at https://www.npr.org/sections/thetwo-way/2016/11/22/503081151/federal-judge-blocks-obama-administrations-overtime-pay-rule (last visited July 12, 2018). The Department's statement makes sense only if it viewed the injunction not merely as limiting the *Department's* ability to take action with respect to the rule, but rather as preventing the rule from becoming effective at all. Ten days later, the Department filed a motion in this Court seeking expedited briefing and oral argument in its appeal from the injunction. In that motion, the Department acknowledged that "[t]he Final Rule *was due to take effect* on December 1, 2016" and that the injunction "blocks implementation and enforcement of an important Final Rule that *was due to take effect* on December 1, 2016." Appellants' Motion for Expedited Briefing and Oral Argument, *State of Nevada v. United States Department of Labor*, Fifth Circuit No. 16-41606, at 2, 4 (Dec. 2, 2016) (emphases added).

The Executive Director of the National Employment Law Project, a prominent plaintiff-side advocacy group, reacted to the injunction by lamenting that the "decision today postpones the effective date of the long-awaited overtime

protections for the nearly 12.5 million workers who have been working long hours for low pay." Christine Owens, National Employment Law Project Press Statement, *Judge Enjoins Overtime Rule, Delays Critical Win for U.S. Workers* (Nov. 22, 2016), available at https://www.nelp.org/news-releases/judge-enjoins-overtime-rule-delays-critical-win-for-u-s-workers/ (last visited July 12, 2018). She observed that "for the time being, workers will continue to work longer hours for less pay[.]" *Id.*

Both the general media and the legal press described the effect of the injunction in a similar manner. Reuters, for instance, began its story as follows: "A federal judge on Tuesday blocked an Obama administration rule to extend mandatory overtime pay to more than 4 million salaried workers from taking effect . . . ." Daniel Wiessener and Robert Iafolla, *Judge Blocks Obama Rule Extending Overtime Pay to 4.2 Million U.S. Workers* (Nov. 22, 2016), available at https://www.reuters.com/article/usa-employment-overtime-idUSL1N1DN25W (last visited July 12, 2018). The story said that "[t]he rule . . . was to take effect Dec. 1" and indicated that "[i]t was expected to touch nearly every sector of the U.S. economy and have the greatest impact on nonprofit groups, retail companies, hotels and restaurants, which have many management workers whose salaries are below the new threshold." *Id.* *See also* Jess Krochtengel, *Blocked Overtime Rule Leaves Employers with Pay Dilemma*, EMPLOYMENT LAW360 (Nov. 23, 2016)

("the nationwide injunction . . . stopped a rule change that would have reclassified 4.2 million workers as nonexempt form overtime rules"; employers are "now legally off the hook for increasing pay or overtime compensation in line with the rule change"); Jonnelle Marte, *Judge Halts Federal Rule That Would Have Expanded Overtime Pay to Millions of Workers*, Washington Post (Nov. 22, 2016), available at https://www.washingtonpost.com/news/get-there/wp/2016/11/22/judge-halts-federal-rule-that-would-have-expanded-overtime-pay-to-millions-of-workers/?utm_term=.320111834574 (last visited July 12, 2018) ("A Texas judge ruled Tuesday to put the brakes on federal rules that would have expanded overtime pay to more than 4 million workers."; the "rule . . . was supposed to take effect next week"); Ben Penn and Tyrone Richardson, *Government to Appeal Decision Blocking Overtime Rule*, DAILY LABOR REPORT (Dec. 1, 2016) (quoting Rep. Bobby Scott (D-Va.), as saying: "The overtime rule would have raised the salary for more people entitled to time-and-a-half pay.").

Thus, from the standpoint of an employer trying in good faith to comply with the law, the only reasonable conclusion to draw from the court's ruling, the Department's statements, and the consistent body of reporting on the story was that the 2016 Final Rule did not go into effect. The blocking of the Final Rule, in turn, left the $455 weekly salary threshold in place for the pertinent overtime exemptions. Employers seeking to comply with the FLSA would quite properly

have believed that they were under no legal obligation as of the date of the injunction to modify their pay practices to reflect the blocked Final Rule.

III. IF THE DISTRICT COURT LACKS THE POWER TO ENFORCE ITS RULING THROUGH CONTEMPT, THEN FUTURE INJUNCTIONS INVALIDATING REGULATIONS WILL HAVE NO PRACTICAL FORCE OR EFFECT.

The lawsuit Respondent-Appellant and her counsel filed premised on the fantasy that the 2016 Final Rule somehow actually went into effect was especially cruel and opportunistic. Unlike many other wage and hour cases, there is literally nothing that anyone could reasonably have expected the employer to have done differently with respect to its overtime exemption decisions in order to comply with the FLSA. Waiting until roughly six months had passed since the District Court issued its injunction, during which time employers across the country—including the Department of Labor—properly understood that the 2016 Final Rule never went into effect, Respondent-Appellant and her counsel decided to play a game of "gotcha!" There is simply no way to spin her case as anything other than a brazen attempt to swipe money from an entirely innocent employer on the off chance that a federal judge in a different, strategically chosen district might opt to countenance this willful disregard for the injunction. From the perspective of those who elected to bring the suit, it probably seemed costless; because the FLSA does not generally allow prevailing employers to recover fees, at worst the case would result in a minor expenditure of time with no return on the investment.

For the Court to appreciate just how pernicious this conduct was, it is important to consider the messages it sends to employers and to future litigants. First, the effort to circumvent the injunction caused the defendant in that case to have to face the choice of paying a quick extortionate settlement or to begin incurring substantial legal fees to fight back. Second, word of the new lawsuit quickly spread, causing substantial uncertainty and concern among the employer community, including many restaurants, regarding whether they were suddenly going to start facing claims for not modifying their pay practices to comply with a regulation that the entire country had properly understood to be enjoined. Until the District Court entertained the contempt motion, the very real possibility emerged that a wave of copycat lawsuits would pop up across the country asserting a similar theory, in all likelihood leading in many instances to substantial settlements, unless and until one or more defendants pressed forward to a potentially Pyrrhic victory on the merits. There would be rampant and unseemly forum shopping, at least with respect to employers operating in multiple judicial districts, coupled with significant inefficiency and burden on the federal courts caused by the repeated presentation of the same central legal issue in a multitude of proceedings.

If the District Court is unable to punish this conduct through contempt, then the lesson going forward is that plaintiffs' lawyers are free to disregard nationwide injunctions against the Department invalidating regulations or other legal

interpretations, seeking opportunistic settlements against employers who acted in good-faith reliance on an injunction. And the occurrence of such lawsuits would inevitably send the message that a federal injunction concerning the Department's interpretations does not, as a practical matter, relieve employers of complying with the Department's *invalid and enjoined* FLSA interpretation, because failure to act as though that interpretation has become law can subject an employer to private litigation to enforce the interpretation. In response to that risk, litigants bringing future challenges to the Department's interpretations would need to consider pursuing a defendant class action naming the entire plaintiffs' bar, in addition to the Department, to ensure that the court's ruling on the legal issue actually has practical and meaningful effect.

To avoid these deleterious consequences, the District Court must, at a minimum, be able to require the lawyers who bring these types of suits in clear contravention of a nationwide injunction to make whole the defendant or defendants who suffer financial injury as a result, including with respect to incurring attorneys' fees. Only the court's contempt power can stop these shenanigans.

CONCLUSION

For these reasons, the District Court should be affirmed.

Respectfully submitted,

/s/ Paul DeCamp

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July 13, 2018

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Rule 29(a)(5) of the Federal Rules of Appellate Procedure because it contains 2,727 words, excluding the parts of the brief exempted by Rule 32(f).

This brief complies with the typeface requirements of Rule 32(a)(5)(A) and the type-style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word Times New Roman 14-point font.

/s/ Paul DeCamp
Counsel for *Amicus Curiae*
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July 13, 2018

CERTIFICATE OF SERVICE

I hereby certify that on this date, an electronic copy of the foregoing was filed with the Clerk of this Court using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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Restaurant Law Center

July 13, 2018