Nos. 11-1684 & 11-1685

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

DANIEL KNEPPER,
Plaintiff-Appellant,

v.

RITE AID, ET AL.,
Defendants-Appellees.

JAMES FISHER,
Plaintiff-Appellant,

v.

RITE AID, ET AL.,
Defendants-Appellees.

On Appeal from the United States District Court
for the Middle District of Pennsylvania

CONSOLIDATED BRIEF FOR THE SECRETARY OF LABOR AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS

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INTEREST OF THE SECRETARY OF LABOR

Pursuant to Federal Rule of Appellate Procedure 29(a), the Secretary of Labor ("Secretary") submits this brief as *amicus curiae* on behalf of the Department of Labor ("Department") in support of the Plaintiffs-Appellants, who assert state law wage claims as a class, pursuant to the Class Action Fairness Act ("CAFA") of 2005, 28 U.S.C. 1332(d). The Secretary administers and enforces the Fair Labor Standards Act ("FLSA" or "Act"), *see* 29 U.S.C. 204, 211(a), 216(c), and 217, and has a significant interest in ensuring that it is interpreted correctly.

Specifically, the Secretary seeks to ensure that section 16(b) of the FLSA, 29 U.S.C. 216(b), which requires that employees "opt-in" to FLSA collective actions, is not interpreted to preclude "opt-out" class actions of state law wage claims. The text, history, and purpose of section 16(b) make clear that an FLSA opt-in collective action is not "inherently incompatible" with an opt-out class action involving state law wage claims, and should not be used to bar such actions. Private actions brought by employees under both the FLSA and state wage laws are envisioned by Congress and complement the Secretary's enforcement of minimum wage and overtime standards. *See Ervin v. OS Rest. Servs., Inc.*, 632 F.3d 971, 977 (7th Cir. 2011) ("Section 16(b) of the FLSA allows employees to bring collective actions to supplement the enforcement powers of the Secretary of Labor under the statute."); 29 U.S.C. 218(a) (FLSA "savings clause" for state law claims).

STATEMENT OF THE ISSUE

Whether the opt-in provision in section 16(b) of the FLSA is incompatible with an opt-out class action of state law wage claims.

STATEMENT OF THE CASE

1. The FLSA permits one or more employees to bring a collective action "in behalf of himself or themselves and other employees similarly situated" and requires the other employees

to opt in by giving written consent in order to participate in and be bound by the collective action. 29 U.S.C. 216(b). CAFA gives federal district courts jurisdiction over Rule 23 class actions where the parties are diverse and the amount in controversy exceeds $5,000,000 exclusive of interest and costs. *See* 28 U.S.C. 1332(d)(2). Rule 23 in turn provides that all members of the class are bound by any judgment affecting the class members unless they opt out. *See* Fed. R. Civ. P. 23(c)(2)(B).

2. In December 2008, employees who worked at Rite Aid stores throughout the United States filed a section 16(b) action against Rite Aid in the United States District Court for the Middle District of Pennsylvania (hereinafter "the FLSA action"). In July 2009, employees who worked at Rite Aid stores in Ohio brought a Rule 23 state wage law class action against Rite Aid in the United States District Court for the Northern District of Ohio; federal jurisdiction was based on CAFA. The Ohio action was transferred to the United States District Court for the Middle District of Pennsylvania. Also in July 2009, employees who worked at Rite Aid stores in Maryland brought a Rule 23 state wage law class action against Rite Aid in the United States District Court for the District of Maryland; federal jurisdiction was similarly based on CAFA. The Maryland district court dismissed the applicable Maryland wage law claims without

prejudice pursuant to the first-to-file rule, finding that the FLSA action in the Middle District of Pennsylvania raised "substantially similar" claims. In September 2010, the Maryland wage law class action was re-filed in the Middle District of Pennsylvania; CAFA served again as the basis of federal jurisdiction.

3. In February 2011, the District Court for the Middle District of Pennsylvania (Jones, J.) dismissed without prejudice both the Ohio and Maryland state law wage actions pursuant to Federal Rule of Civil Procedure 12(c), on the ground that a Rule 23 opt-out state wage class action is inherently incompatible with a section 16(b) opt-in collective action under the FLSA. *See Knepper v. Rite Aid Corp.*, 764 F. Supp. 2d 707, slip op. at 11-15 (M.D. Pa. 2011); *Fisher v. Rite Aid Corp.*, 764 F. Supp. 2d 700, slip op. at 9-13 (M.D. Pa. 2011).[1]

The district court viewed the legislative history of the FLSA's opt-in requirement as a codification of "'Congress's desire to: (1) control the volume of minimum wage and overtime

[1] The district court noted that its analysis in both cases was the same "because each action shares the same determinative issue." *Knepper*, slip op. at 7 n.4; *Fisher*, slip op. at 7 n.2. The Secretary addresses that determinative issue – whether the opt-in provision in section 16(b) of the FLSA is incompatible with an opt-out class action of state law wage claims – in one consolidated *amicus curiae* brief in the two appeals that have been consolidated in this Court for purposes of disposition (3d Cir. Nos. 11-1684 & 11-1685).

litigation by eliminating representative (i.e., opt-out) actions; and (2) increase each individual's knowledge and involvement in the action by ensuring th[at] no one's rights are litigated without their knowledge.'" *Knepper*, slip op. at 9 (quoting Rite Aid's brief in support of the motion to dismiss and citing *Hoffman-LaRoche, Inc. v. Sperling*, 493 U.S. 165, 173 (1989)). The district court noted that it had previously agreed with other courts, primarily within the Third Circuit, in holding that a dual-filed section 16(b) collective action and Rule 23 class action are "inherently incompatible." *Id.* at 12 (citing its prior decision in *Otto v. Pocono Health Sys.*, 457 F. Supp. 2d 522, 524 (M.D. Pa. 2006)). The question in this case was whether to extend that underlying reasoning to a state wage law class action filed separately, i.e., without an accompanying FLSA action. *Id.* The court determined that allowing a plaintiff to proceed in a separate action "in contravention of the important policies underlying the federal statute" would "'eviscerate the purpose of section 216(b)'s opt-in requirement,'" and that the procedural nuance of filing separately instead of in a dual action was a "distinction without a difference." *Id.* at 15 (quoting *Otto*, 457 F. Supp. 2d at 524).[2] Thus, the state law class actions were dismissed

[2] The Secretary agrees with the district court that there is no real difference in terms of applying the "inherent

without prejudice to re-filing in state court, "provided the statute of limitations or other procedural matters do not bar such initiation." *Id.* at 16.[3]

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incompatibility" theory to separately-filed actions. As Judge Wood reasoned in *Ervin*, where the Seventh Circuit recently concluded that section 16(b) does not preclude a Rule 23 state law wage class action or bar supplemental jurisdiction over such a class when brought in combination with an FLSA collective action, "[i]f there is a problem with combined actions . . . then the problem exists for all cases within the federal court's jurisdiction." 632 F.3d at 977.

[3] Although the subsequent proceedings are not currently before this Court, they are instructive as to the consequences of affirming the district court's decisions. Plaintiffs re-filed the Maryland action in Maryland state court, whereupon Rite Aid removed that action to the United States District Court for the District of Maryland under CAFA; the case is pending before the same district judge who previously dismissed the Maryland state law class action pursuant to the first-filed rule. Rite Aid moved to dismiss the action pursuant to the law of the case, arguing that the district judge already ruled that the case is substantially similar to the FLSA case in the Middle District of Pennsylvania, where that district court found the opt-out state law class action to be inherently incompatible with "the opt-in scheme governing the FLSA claims Plaintiff had chosen to pursue" in the FLSA action. *See Fisher v. Rite Aid Corp.*, No. 11-cv-00984 (D. Md.), Mem. in Support of Mot. Dism. at 3 (Apr. 26, 2011). Rite Aid claims that the "only reasonable reading" of the Pennsylvania district court's dismissal of the state claims without prejudice to re-filing in state court "provided that . . . other procedural matters do not bar such initiation" is that "Plaintiff could have filed his own individual claim in Maryland state court." *Id.* at 11 (emphasis in original). It thus contends that Plaintiffs are unable to bring an opt-out state wage law class action in either a federal or state court. *Compare De Asencio v. Tyson Foods, Inc.*, 342 F.3d 301, 310 (3d Cir. 2003) (presuming that the opt-out state wage law class action could be re-filed in state court if the federal court lacked jurisdiction). The Secretary submits that section 16(b) of the FLSA does not speak to or bar such a state court action for the same reasons articulated in this brief regarding state

ARGUMENT

SECTION 16(B) OF THE FLSA IS NOT INCOMPATIBLE WITH AND DOES NOT PRECLUDE STATE LAW WAGE CLASS ACTIONS

A. Nothing in the Text of Section 16(b) Precludes State Law Wage Class Actions.

1. The starting point for analyzing whether section 16(b) was intended to preclude a state law wage class action must be its text. *See United States v. Lavin*, 942 F.2d 177, 184 (3d Cir. 1991) ("[T]he most authoritative indicators of what Congress intended are the words that it chose in drafting the statute."). As the Seventh Circuit stated in *Ervin*, which analyzed whether section 16(b) bars dual actions, the analysis must flow through the text. *See* 632 F.3d at 977 ("In our view, the [district] court jumped too quickly to congressional intent. Before taking that step, we must examine the text of the FLSA itself.").

Section 16(b) provides:

> Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the

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wage law class actions brought in federal court pursuant to CAFA.

> payment of wages lost and an additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.

29 U.S.C. 216(b) (emphasis added). By its terms, section 16(b) applies only to three specific FLSA provisions: minimum wage, overtime, and anti-retaliation; no other provisions of the FLSA or state laws are mentioned. *See id.* Further, section 16(b) authorizes employees to bring claims on behalf of themselves and others who are similarly situated only for violations of those three FLSA provisions specifically identified. *See id.* Likewise, section 16(b)'s opt-in requirement applies only to "any such action" – in other words, only to actions brought for violations of those FLSA provisions specifically identified. *Id.* There is nothing in the text of section 16(b) regarding state law wage claims. *See id.*

Numerous courts have acknowledged that the plain meaning of section 16(b) does not preclude state law wage claims from proceeding as a class action in federal court. For example, in *Ervin*, the Seventh Circuit concluded: "Nothing we find suggests that the FLSA is not amenable to state-law claims for related relief in the same federal proceeding. . . . That provision

providing that employees may bring actions against their employers makes no mention of state wage and labor laws." 632 F.3d at 977. The Seventh Circuit further stated that "[n]othing in the text of the FLSA or the procedures established by the statute suggests either that the FLSA was intended generally to oust other ordinary procedures used in federal court or that class actions in particular could not be combined with an FLSA proceeding." *Id.* at 974. In *Damassia v. Duane Reade, Inc.*, 250 F.R.D. 152, 162 (S.D.N.Y. 2008), the court noted that "by its own terms, the opt-in requirement of Section 216(b) applies only to wage claims brought under the substantive provisions of the FLSA." The court further noted that "Congress has only spoken with regard to FLSA wage claims, not wage claims generally, and has expressed no policy preference with respect to whether to certify a class for state law wage claims." *Id.* And in *Klein v. Ryan Beck Holdings, Inc.*, No. 06 Civ. 3460, 2007 WL 2059828, at *6 (S.D.N.Y. July 20, 2007), the court concluded that "[t]he FLSA guarantees merely that all collective actions brought *pursuant to it* be affirmatively opted into. It does not guarantee that employers will never face traditional class actions pursuant to state employment law." (Emphasis in original.) Significantly, a district court in Pennsylvania stated that "Congress acted only with respect to *federal* claims . . . and did not preempt or limit the remedies available

through state law. . . . [N]othing in the plain text of the FLSA reflects Congressional intent to limit the substantive remedies available to an employee under state law, nor to limit the procedural mechanism by which such a remedy may be pursued." *Lehman v. Legg Mason, Inc.*, 532 F. Supp. 2d 726, 731 (M.D. Pa. 2007) (emphasis in original); *see McLaughlin v. Liberty Mut. Ins. Co.*, 224 F.R.D. 304, 308 (D. Mass. 2004) ("By enacting an opt-in regime for the FLSA, Congress sought to limit the scope of collective actions under federal law. I should not, however, infer from that restriction on *federal* remedies a concomitant restriction on *state* remedies. Nothing in the statute limits available remedies under state law.") (emphases in original; internal citations omitted).

2. Indeed, the FLSA does not purport to preclude state regulation of employees' wages. Rather, the FLSA contains a "savings clause" which makes clear that states and localities may enact wage laws that are broader and more protective than the Act:

> No provision of this chapter or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this chapter or a maximum work week lower than the maximum workweek established under this chapter, and no provision of this chapter relating to the employment of child labor shall justify noncompliance with any Federal or State law or municipal ordinance establishing a higher standard than the standard established under this chapter.

29 U.S.C. 218(a). Numerous courts have recognized that section 18(a)'s savings clause demonstrates Congress' intent to allow state wage laws to coexist with the FLSA. *See, e.g., Ervin*, 632 F.3d at 977 (section 18(a) preserves state and local laws); *Williamson v. Gen. Dynamics Corp.*, 208 F.3d 1144, 1151 (9th Cir. 2000) (section 18(a) demonstrates that the FLSA is not the exclusive remedy for wage payment and that Congress did not intend to occupy the entire field); *Overnite Transp. Co. v. Tianti*, 926 F.2d 220, 221-22 (2d Cir. 1991) (per curiam) (Congress' intent to have state wage regulation coexist with the federal scheme can be found in section 18(a)). The FLSA's express embrace of more protective state wage law remedies in section 18(a) undercuts the assertion that state wage law class actions are impermissible because of section 16(b). *Cf. Wang v. Chinese Daily News, Inc.*, 623 F.3d 743, 760 (9th Cir. 2010) (the FLSA does not preempt state wage law class actions that are parallel to the FLSA), *petition for cert. filed*, 79 U.S.L.W. 3594 (U.S. Mar. 31, 2011) (No. 10-1202); *De Asencio*, 342 F.3d at 308 n.10 (Congress did not preempt state law claims in the FLSA).

B. The History of Section 16(b) Provides No Support for Disallowing State Law Wage Class Actions.

1. Courts endorsing the "inherent incompatibility" doctrine have mischaracterized the history and purpose of the

opt-in provision in section 16(b) in two primary ways: (1) by assuming that Congress' intent was to apply the opt-in scheme to all wage actions, not just FLSA actions; and (2) by assuming that Congress specifically rejected the opt-out procedure in favor of the opt-in procedure. The history of section 16(b)'s opt-in provision does not bear out these assumptions.

2. Section 16(b) originally permitted an employee to bring a collective action on behalf of similarly situated employees, or to "designate an agent or representative" to bring a representative action on behalf of similarly situated employees. *See* Fair Labor Standards Act of 1938, Pub. L. No. 75-718, § 16(b), 52 Stat. 1060, 1069 (1938). It was silent on whether employees who were not named plaintiffs were required to opt in or out of a collective or representative action. *See id.*

The opt-in provision was added in 1947 by the Portal-to-Portal Act ("Portal Act"). The impetus for the Portal Act was the Supreme Court's decision in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 690-93 (1946), that time spent by employees performing certain preliminary activities was compensable time under the FLSA. Concerned by what it perceived as a wave of employee lawsuits following *Mt. Clemens* that were a threat to the financial well-being of U.S. industry, Congress enacted the Portal Act to overrule its compensable time holding. *See* Portal Act, Pub. L. No. 80-49, § 1, 61 Stat. 84, 84-85 (1947). The

Portal Act also eliminated representative actions (actions by non-employees as agents of employees); collective actions remained permissible, although they became subject to an express opt-in requirement. *See id.*, § 5, 61 Stat. at 87. Specifically, the Portal Act provided that collective actions could be brought "by any one or more employees for and in behalf of himself or themselves and other employees similarly situated," and that an employee shall not be a party to a collective action "unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought." *Id.*, § 5(a), 61 Stat. at 87. As the Seventh Circuit has explained, "[t]his action was designed to eliminate lawsuits initiated by third parties (typically union leaders) on behalf of a disinterested employee (in other words, someone who would not otherwise have participated in the federal lawsuit)." *Ervin*, 632 F.3d at 978.

Significantly, the plain text of the Portal Act made clear that the opt-in requirement "shall be applicable only with respect to actions commenced under the Fair Labor Standards Act of 1938." Portal Act, § 5(b), 61 Stat. at 87. Moreover, the reports issued by Congress in connection with its enactment contain no suggestion of any intent to preclude state wage law class actions. *See* Regulating the Recovery of Portal-to-Portal Pay, and for Other Purposes, H.R. Rep. 80-71 (1947); Exempting

Employers from Liability for Portal-to-Portal Wages in Certain Cases, S. Rep. No. 80-48 (1947); Portal-to-Portal Act of 1947, H.R. Conf. Rep. No. 80-326 (1947).

Further, Congress' enactment of the opt-in provision for FLSA collective actions cannot be construed as a choice against, or relegation of, the opt-out process of Rule 23 given that, at the time, Rule 23 did not contain an opt-out provision. Indeed, "[a]ddition of the opt-in rule brought FLSA section 216(b) into conformity with the Rule 23 opt-in requirement in effect at the time, and made explicit what courts at the time had already [inferred] from the statute." Andrew C. Brunsden, *Hybrid Class Actions, Dual Certification, and Wage Law Enforcement in the Federal Courts*, 29 Berkeley J. Emp. & Lab. L. 269, 280 (2008).[4] The modern opt-out version of Rule 23 was not enacted until 1966 – almost 20 years after passage of the Portal Act. *See* Linder, *Origins of the Portal-to-Portal Act* at 174-75.

Additionally, the Advisory Committee Notes accompanying the 1966 amendments to Rule 23 state that "[t]he present provisions of 29 U.S.C. § 216(b) are not intended to be affected by Rule 23, as amended." Fed. R. Civ. P. 23 Advisory Committee Notes

[4] "[E]ven before the 1947 amendments, the courts limited participation in FLSA actions to named plaintiffs, intervenors, and consenters who joined the action before the trial on the merits." Marc Linder, *Class Struggle at the Door: The Origins of the Portal-to-Portal Act of 1947*, 39 Buff. L. Rev. 53, 169 (1991).

(1966). The fact that the Rule 23 amendments specifically considered the FLSA's opt-in process and saw no need to reconcile it and Rule 23's opt-out process, and that Congress has not seen fit to address this issue since, further confirms that Rule 23 class actions are compatible with the opt-in provision in section 16(b). *See Shady Grove Orthopedic Assoc. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1438 (2010) ("Congress . . . has ultimate authority over the Federal Rules of Civil Procedure; it can create exceptions to an individual rule as it sees fit – either by directly amending the rule or by enacting a separate statute overriding it in certain instances.").

3. Although not essential to this Court's holding in *De Asencio*, *see infra*, this Court expressed a view of section 16(b)'s history that the Secretary respectfully submits is not fully accurate. Thus, in *De Asencio*, this Court stated that "the Portal-to-Portal Act amendment changed participation in an FLSA class from 'opt-out' to 'opt-in.'" 342 F.3d at 306. However, as discussed in the preceding paragraphs, there was never an opt-out scheme in section 16(b), and there was no provision for a Rule 23 opt-out class when Congress enacted the opt-in requirement in 1947; therefore, there is no basis to infer congressional disapproval of opt-out wage actions by virtue of the passage of the Portal Act.

In addition, this Court stated in *De Asencio* that, with the passage of the Portal Act, "Congress chose to limit the scope of representative actions for overtime pay and minimum wage violations." 342 F.3d at 310. As discussed above, however, there is no basis for concluding that Congress made that "choice" for anything other than FLSA actions. By the same token, this Court has acknowledged that "in the absence of contrary congressional mandates, class actions in federal court are governed by Fed. R. Civ. P. 23." *Id.* at 311 n.16. The Supreme Court recently stated that "Rule 23 unambiguously authorizes *any* plaintiff, in *any* federal civil proceeding, to maintain a class action if the Rule's prerequisites are met." *Shady Grove*, 130 S. Ct. at 1442 (emphases in original).

4. The district court misconstrued the legislative history of section 16(b) by relying in part on language in *Hoffman-La Roche*, 493 U.S. at 173, describing Congress' intent in creating the FLSA opt-in procedure as "limiting private FLSA plaintiffs to employees who asserted claims in their own right and freeing employers of the burden of representative actions." *Hoffman-La Roche*, however, does not support the district court's conclusion that Congress meant to "control the volume of minimum wage and overtime litigation by eliminating representative (i.e., opt out) actions." *Knepper*, slip op. at 9. In *Hoffman-La Roche*, the Supreme Court concluded that courts may facilitate notice to

potential plaintiffs in FLSA collective actions; state law actions were not at issue. *See* 493 U.S. at 170-74. In so deciding, the Supreme Court discussed the addition of the opt-in provision to the FLSA, and its full discussion is instructive:

> In 1938, Congress gave employees and their "representatives" the right to bring actions to recover amounts due under the FLSA. No written consent requirement of joinder was specified by the statute. In enacting the Portal-to-Portal Act of 1947, Congress made certain changes in these procedures. In part responding to excessive litigation spawned by plaintiffs lacking a personal interest in the outcome, the representative action by plaintiffs not themselves possessing claims was abolished, and the requirement that an employee file a written consent was added. The relevant amendment was for the purpose of limiting private FLSA plaintiffs to employees who asserted claims in their own right and freeing employers of the burden of representative actions. Congress left intact the "similarly situated" language providing for collective actions, such as this one. The broad remedial goal of the statute should be enforced to the full extent of its terms.

Id. at 173 (internal citations omitted). The Supreme Court thus reaffirmed the "broad remedial" purpose of the FLSA and made clear that the opt-in requirement applies only to "private FLSA plaintiffs"; the Court said nothing regarding state law wage class actions. *Id.*

C. <u>The Text and Legislative History of CAFA Provide No Support for Precluding Rule 23 State Law Wage Class Actions from Proceeding in Federal Court.</u>

1. Even if there were a question whether Congress intended to preclude opt-out wage class actions due to its enactment of the opt-in provision in section 16(b), CAFA firmly answered that

question in the negative when it was enacted in 2005.[5] As mentioned above, CAFA gives federal district courts jurisdiction over Rule 23 class actions where the parties are diverse and the amount in controversy exceeds $5,000,000 exclusive of interest and costs. *See* 28 U.S.C. 1332(d)(2). Significantly, although CAFA specifically excludes certain types of class actions, it does not exclude state law wage class actions from its grant of jurisdiction to federal courts. *See* 28 U.S.C. 1332(d)(9) (excluding certain securities and corporate governance class actions).

2. Not only does the text of CAFA not preclude state wage law class actions, but the legislative history shows that Congress chose explicitly not to exempt such actions. Senator Kennedy offered an amendment to the bill that would have exempted state wage and civil rights class actions. *See* 151

[5] The 1990 codification of the caselaw concepts of pendent and ancillary jurisdiction as "supplemental jurisdiction" – with no indication that Congress intended to limit federal court jurisdiction over state law wage claims when brought as opt-out class actions – further demonstrates Congress' refusal to preclude federal court proceedings based on the difference between opt-in and opt-out wage actions. *See* 28 U.S.C. 1367. As this Court recognized in *De Asencio*, with the 1990 legislation, Congress broadened district courts' ability to exercise supplemental jurisdiction over state law claims, stating that supplemental jurisdiction was unavailable only where federal law "expressly provided otherwise" or based on the statute's enumerated exceptions. 342 F.3d at 307. This Court observed that, in the FLSA, Congress did not expressly preempt state law wage claims. *Id.* at 308 n.10.

Cong. Rec. 1704 (2005).[6] The amendment was designed to address Senator Kennedy's concern that under CAFA, plaintiffs removed to federal court would be less able to vindicate their rights under protective state laws because federal rules for class certification are more stringent and federal courts interpret state laws narrowly. 151 Cong. Rec. 1828-30 (2005) (statement of Sen. Kennedy). Senator Sessions spoke against Senator Kennedy's amendment, disputing his assessment that federal courts are less hospitable to vindicating workers' rights under state wage laws by setting forth numerous examples of federal courts certifying opt-out state wage law class actions under Rule 23. *Id.* at 1830 (Statement of Sen. Sessions). Senator Kennedy's amendment was rejected by a vote of 59 to 40. *Id.* at 1831-32. The fact that Congress did not take the opportunity in CAFA to exclude state wage law class actions significantly weakens the notion that Congress intended the opt-in scheme in section 16(b) to apply to all wage-and-hour actions proceeding in federal court.

3. It must be presumed that Congress would have carved out state wage law class actions from CAFA's grant of federal

[6] In relevant part, the amendment would have exempted from the bill's definition of "class action" any "class action or collective action brought to obtain relief under State or local law for failure to pay the minimum wage, overtime pay, or wages for all time worked, failure to provide rest or meal breaks, or unlawful use of child labor." 151 Cong. Rec. 1704 (2005).

jurisdiction if Congress truly believed they were incompatible with FLSA collective actions, or that it would have legislated an opt-in provision for such state wage law class actions if it felt that was the only type of wage claim to which employers should be subjected. *See Kern v. Siemens Corp.*, 393 F.3d 120, 128 (2d Cir. 2004) ("[T]he language of the FLSA suggests that, should Congress seek to authorize certification of 'opt-in' classes, it can do so with unambiguous language[.]"). Absent such evidence of congressional intent, there is no basis for concluding that Rule 23 state wage law class actions cannot proceed in federal court by invoking CAFA diversity jurisdiction. *See generally Landsman & Funk, P.C. v. Skinder-Strauss Assoc.*, 640 F.3d 72, 85 (3d Cir.) (finding diversity jurisdiction under CAFA by following the rule that "'§ 1332 applies to all causes of action, whether created by state or federal law, unless Congress expresses a clear intent to the contrary'") (quoting *Gottlieb v. Carnival Corp.,* 436 F.3d 335, 340 (2d Cir. 2006)), *reh'g en banc granted*, 2011 WL 1879624 (3d Cir. May 17, 2011). More broadly, CAFA and its legislative history show that, contrary to the underpinnings of the "inherent incompatibility" doctrine, Congress has evinced no antipathy toward opt-out state law wage class actions in federal court.

D. The Weight of Relevant Caselaw Rejects the Incompatibility Theory.

Appellate courts have held that there is no incompatibility between a section 16(b) opt-in collective action and a Rule 23 opt-out state wage law class action that prevents certification of, or the exercise of supplemental jurisdiction over, state wage law class claims. The rationale of these holdings applies equally to the question whether state wage law class actions can proceed in federal court under CAFA jurisdiction.

1. In *Ervin*, the Seventh Circuit squarely addressed whether the asserted "incompatibility" between section 16(b)'s opt-in provision and Rule 23's opt-out process prevented Rule 23 class certification of the state law wage claims, holding that "[n]othing in the text of the FLSA or the procedures established by the statute suggests either that the FLSA was intended generally to oust other ordinary procedures used in federal court or that class actions in particular could not be combined with an FLSA proceeding." 632 F.3d at 974. As noted above, the Seventh Circuit concluded that section 16(b) does not mention state wage laws or suggest that state law wage claims cannot proceed together with an FLSA collective action; it further recognized that section 18(a) of the FLSA expressly preserves more protective state wage laws. *See id.* at 977. The Seventh Circuit rejected the argument that the congressional intent

behind the opt-in requirement and "the idea that disinterested parties were not supposed to take advantage of the FLSA" are undermined when employees proceed as part of a state law wage class action in federal court. *See id.* at 978. The court concluded that "there is nothing in the FLSA that forecloses these possibilities" given that any employee who is in the Rule 23 opt-out class only (the employee did not opt in to the FLSA collective action and did not opt out of the state wage law class action) "is not part of the FLSA litigating group," "will not be entitled to a single FLSA remedy," and "will receive only the relief that is prescribed under the law governing her part of the case." *Id.* The Seventh Circuit thus found nothing in the text of, or intent behind, section 16(b) that prevented a state wage law class action from proceeding in federal court alongside an FLSA collective action. *Id.* at 977-78.

2. The Seventh Circuit in *Ervin* also rejected the argument that the difference between section 16(b)'s opt-in provision and Rule 23's opt-out process prevents supplemental jurisdiction over state wage law class claims under 28 U.S.C. 1367. *See* 632 F.3d at 979-81. In so holding, the Seventh Circuit joined the D.C. Circuit and the Ninth Circuit. *See id.* at 979 (citing *Lindsay v. Gov't Employees Ins. Co.*, 448 F.3d 416, 420-24 (D.C. Cir. 2006); *Wang*, 623 F.3d at 761-62). The D.C. Circuit determined that neither section 16(b)'s text nor the intent

behind its enactment prohibited the exercise of supplemental jurisdiction over a Rule 23 opt-out state law class action. *See Lindsay*, 448 F.3d at 421-22. It specifically rejected the argument that a "conflict" between section 16(b)'s opt-in provision and Rule 23's opt-out provision precluded the exercise of supplemental jurisdiction and, although acknowledging the difference between the two provisions, stated that "we doubt that a mere *procedural* difference can curtail section 1367's *jurisdictional* sweep." *Id.* at 424 (emphases in original); *see Wang*, 623 F.3d at 761-62 (following *Lindsay* and rejecting argument that an opt-in FLSA collective action prevents supplemental jurisdiction over a related state law class action).[7]

3. In *De Asencio*, this Court did not base its holding on any "inherent incompatibility" between section 16(b)'s opt-in process and Rule 23's opt-out procedure, but instead held that the district court should not have exercised supplemental jurisdiction over the state law wage claims because the exception to supplemental jurisdiction at 28 U.S.C. 1367(c)(2)

[7] The issue whether the opt-in requirement of section 16(b) conflicts with and therefore precludes Rule 23 class certification of and the exercise of supplemental jurisdiction over opt-out state law wage claims is currently pending before the Second Circuit in *Shahriar v. Smith & Wollensky Restaurant Group, Inc.*, No. 10-1884. The Secretary has submitted her position as *amicus curiae* in that case as well.

applied and the state law claims would predominate over the FLSA claims for reasons specific to the facts of that case. *See* 342 F.3d at 309-12. First, this Court noted that the state law claim at issue was not based on a statute that paralleled the FLSA but was instead based on a statute that provides a remedy when employers breach a contract to pay earned wages. *See id.* at 309-10. Pennsylvania courts had never addressed whether the employees' theory of liability was permissible and, therefore, the state law claim presented novel legal issues that would require more proof and testimony as compared to the "more straightforward" FLSA claim. *Id.* Second, although this Court acknowledged that the "predominance" inquiry under 28 U.S.C. 1367(c)(2) goes to the types of claims involved and not the number of claimants involved, it was concerned that the large disparity in numbers between the FLSA opt-in class and the Rule 23 opt-out class would substantially transform the case "by causing the federal tail represented by a comparatively small number of plaintiffs to wag what is in substance a state dog." *Id.* at 311.

Thus, as mentioned above, this Court did not perceive the difference between a Rule 23 opt-out action and an FLSA section 16(b) opt-in action to be dispositive, noting that "the interest in joining these actions is strong." *De Asencio*, 342 F.3d at 310. Instead, it instructed courts to conduct a case-by-case

analysis of supplemental jurisdiction when presented with a combined FLSA/Rule 23 action, looking at "the scope of the state and federal issues, the terms of proof required by each type of claim, the comprehensiveness of the remedies, and the ability to dismiss the state claims without prejudice to determine whether the state claim constitutes the real body of the case." *Id.* at 312. Further, this Court noted in *De Asencio* that "[a] federal court could have subject matter jurisdiction over two federal claims [including, for example, an FLSA overtime claim], one requiring opt-in and the other opt-out." *Id.* at 310 n.14. In sum, *De Asencio* was a case-specific application of the supplemental jurisdiction factors in 28 U.S.C. 1367(c) rather than a "rigid rule" precluding state wage law class actions from proceeding in federal court. *See Ervin*, 632 F.3d at 981 (agreeing with both the D.C. Circuit in *Lindsay* and the Ninth Circuit in *Wang*, which interpreted this Court's decision in *De Asencio* to stand for this limited proposition rather than a rule precluding the use of supplemental jurisdiction in cases combining an FLSA collective action with a state wage law class action).[8] Therefore, if this Court agrees with the Secretary that the FLSA section 16(b) opt-in provision is not "inherently

[8] This Court's decision in *De Asencio* certainly did not foreshadow the subsequent proceedings in this case, where the plaintiffs have effectively been barred from bringing their state law wage claims in either federal or state court.

incompatible" with the Rule 23 opt-out process, it need not overrule *De Asencio*.

4. Despite this Court's narrow, fact-specific ruling in *De Asencio*, most district courts within the Third Circuit have adopted the "inherent incompatibility" theory. *See, e.g., Otto*, 457 F. Supp. 2d at 524 (dismissing Rule 23 opt-out state wage law class claims as incompatible with a FLSA section 16(b) opt-in action); *but see Dare v. Comcast Corp.*, No. 09-4175, 2010 WL 2557678, at *1 (D.N.J. June 23, 2010) (ruling that *De Asencio* does not stand for the proposition that an FLSA opt-in collective action and a state wage law opt-out class action are "inherently incompatible," and denying a motion to sever state wage law class claims). District courts within the Third Circuit are at odds as to whether the "inherent incompatibility" doctrine applies where the state law class actions have CAFA as an independent jurisdictional basis. *Compare Jackson v. Alpharma, Inc.*, No. 07-3250, 2008 WL 508664, at *5 (D.N.J. Feb. 21, 2008) (finding the "inherent incompatibility" cases among district courts in the Third Circuit inapplicable where CAFA serves as an independent basis of original jurisdiction, noting that *De Asencio* countenanced a federal court having subject matter jurisdiction over two federal claims, one requiring opt-in and the other opt-out) *with Burkhart-Deal v. Citifinancial, Inc.*, No. 7-1747, 2008 WL 2357735, at *2 (W.D. Pa. June 5, 2008)

(dismissing state law class claims invoking CAFA jurisdiction based on "inherent incompatibility" in accordance with Third Circuit district court caselaw, "[a]bsent clear guidance from our Court of Appeals"). The Secretary's position is that the FLSA does not preclude state wage law class actions, whether they are brought in federal court under CAFA or supplemental jurisdiction, or whether they are brought in state court.

5. The district court decisions of Judge Jones that are on appeal here primarily rely on his earlier decision in *Otto*, failing to acknowledge that three appellate courts (Seventh, Ninth, and D.C. Circuits) have now determined that Rule 23 opt-out state law wage class actions are not incompatible with FLSA section 16(b) opt-in collective actions.[9] Indeed, one of the cases the district court cited as adopting the "inherent incompatibility" doctrine, *McClain v. Leona's Pizzeria, Inc.*, 222 F.R.D. 574 (N.D. Ill. 2004), is no longer good law in light of the Seventh Circuit's holding in *Ervin.* Moreover, the district court erroneously stated that a circuit court had held that Rule 23 and section 16(b) are incompatible, providing no citation to such a case. *See Knepper*, slip op. at 12. To the extent the district court was referring to *LaChapelle v. Owens-Illinois, Inc.*, 513 F.2d 286 (5th Cir. 1975), which it cited in

[9] Significantly, the district court did not rely on this Court's decision in *De Asencio* for its incompatibility holding.

a footnote in *Otto*, that case is inapposite. In *LaChapelle,* the Fifth Circuit held that suits under the Age Discrimination in Employment Act ("ADEA"), which provides that private actions to enforce the ADEA must be brought in accordance with FLSA section 16(b), cannot be brought as Rule 23 class actions because the Rule 23 "opt out" provision is "irreconcilable" with the section 16(b) "opt in" provision. 513 F.2d at 289. As the Fifth Circuit noted, however, this is consistent with the well-established principle that "16(b) precludes pure Rule 23 class actions in FLSA suits." *Id.* at 288 (emphasis added). In the cases on appeal here, the plaintiffs are not trying to bring an FLSA suit as a Rule 23 class action. Instead, they have invoked original jurisdiction under CAFA to bring state law wage class actions as contemplated by Congress. This is permissible because such actions are not incompatible with FLSA section 16(b).[10]

[10] The Department's position that section 16(b) does not bar opt-out state wage law class actions should be given deference. *See Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1335-36 (2011) (according *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), deference to the Department's position set forth in, *inter alia*, an amicus brief); *Christensen v. Harris County*, 529 U.S. 576, 587 (2000) (Department's opinion letters, policy statements, agency manuals, and enforcement guidelines are due "respect" under *Skidmore* to the extent they have the "power to persuade"); *Skidmore*, 323 U.S. at 140 (courts and litigants may properly rely on the "body of experience and informed judgment" of the Department as the agency that administers the Act; the weight of deference accorded to agency's position depends upon, *inter alia*, the "thoroughness

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's decisions.

Respectfully submitted,

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evident in its consideration" and the "validity of its reasoning"); *Madison v. Resources for Human Dev.*, 233 F.3d 175, 186 (3d Cir. 2000) (Department's informal interpretations are "entitled to respect" under *Skidmore* to the extent they are persuasive).

CERTIFICATIONS OF COMPLIANCE

I hereby certify that:

1. As an attorney representing an agency of the United States, I am not required to be a member of the bar of this Court. *See* 3d Cir. L.A.R. 28.3, Committee Comments.

2. This brief complies with the type-volume requirements of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,857 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

3. 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. 32(a)(6) because this brief has been prepared in a monospaced typeface using Microsoft Office Word 2003, Courier New 12-point font containing no more than 10.5 characters per inch.

4. The text of the electronic version of this brief is identical to the text of the paper copies of this brief.

5. A virus scan using McAfee VirusScan Enterprise v.8.0.0 was performed on the electronic version of the brief. No virus was detected.

Date: June 28, 2011

s/Laura Moskowitz_____
LAURA MOSKOWITZ
Attorney

CERTIFICATE OF SERVICE

I hereby certify that on June 28, 2011, I electronically filed the foregoing Consolidated Brief for the Secretary of Labor as *Amicus Curiae* in Support of Plaintiffs-Appellants with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system, and sent ten (10) paper copies to the Clerk of Court by pre-paid overnight delivery.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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