SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION – SECOND DEPARTMENT

Basante Fitzgerald Grant,

Plaintiff-Appellant,

v.

Global Aircraft Dispatch, Inc.,

Defendant-Respondent.

NOTICE OF MOTION FOR LEAVE TO APPEAR AS *AMICUS CURIAE*

Appellate Division
Docket No. 2021-03202

PLEASE TAKE NOTICE that, upon the accompanying affirmation of Stephanie Schuster, dated April 29, 2022, and the exhibit thereto, the undersigned will move this Court at the Courthouse, 45 Monroe Place, Brooklyn, New York, on May 16, 2022, at 10:00 a.m., for an order granting leave the Retail Litigation Center, Inc., the Chamber of Commerce of the United States of America, the National Federation of Independent Business Small Business Legal Center, the National Retail Federation, the Restaurant Law Center, the New York State Restaurant Association, the Business Council of New York State, Inc., and the Business Council of Westchester to appear as *amicus curiae* in support of Defendant-Respondent and for submission of the enclosed brief and arguments for consideration.

PLEASE TAKE FURTHER NOTICE that, pursuant to C.P.L.R. § 2214(b), answering papers, if any, shall be served upon the undersigned at least seven days prior to the return date of this motion.

Respectfully submitted,

MORGAN, LEWIS & BOCKIUS LLP

Dated: **April 29, 2022**

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Counsel for Proposed
Amici Curiae

SUPREME COURT OF THE STATE OF NEW YORK
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Appellate Division
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AFFIRMATION OF SERVICE

I, Stephanie Schuster, affirm under the penalties of perjury that the foregoing was filed with the Clerk of the Court for the Appellate Division using the New York State Courts Electronic Filing system, which will automatically service counsel of record.

Dated: April 29, 2022

SUPREME COURT OF THE STATE OF NEW YORK
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AFFIRMATION IN SUPPORT OF MOTION

Stephanie Schuster, an attorney admitted to practice law before the Courts of the State of New York, hereby affirms the following under penalty of perjury:

1. I am a partner at Morgan, Lewis & Bockius LLP, counsel for the Retail Litigation Center, Inc., the Chamber of Commerce of the United States of America, the National Federation of Independent Business Small Business Legal Center, the National Retail Federation, the Restaurant Law Center, the New York State Restaurant Association, the Business Council of New York State, Inc., and the Business Council of Westchester (collectively, the "proposed *amici*").

2. I submit this affirmation in support of the proposed *amici*'s motion for leave to appear as *amici curiae* in support of Defendant-Respondent.

3. Attached as Exhibit A is the brief the proposed *amici* seek leave to submit in this as *amici curiae*.

4. The proposed *amici* are trade and business associations representing members who collectively employ hundreds of thousands of workers in New York. They have a unique perspective, based on their members' first-hand experiences, on why the legal issues in this case have enormous practical significance for employers across many industries. *Amici* include:

- The Retail Litigation Center, Inc. ("RLC") is the only trade organization solely dedicated to representing the United States retail industry in the courts. The RLC's members include many of the country's largest and most innovative retailers. Collectively, they employ millions of workers throughout the United States, provide goods and services to tens of millions of consumers, and account for tens of billions of dollars in annual sales. The RLC seeks to provide courts with retail-industry perspectives on important legal issues impacting its members, and to highlight the potential industry-wide consequences of significant pending cases. Since its founding in 2010, the RLC has participated as *amicus curiae* in more than 175 judicial proceedings of importance to retailers.
- The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry

sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community.

- The National Federation of Independent Business ("NFIB") is the nation's leading small business association, representing members in Washington, D.C., and all fifty states. Its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. The NFIB Small Business Legal Center ("Legal Center") is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. To fulfill its role as the voice for small business, the Legal Center frequently files *amicus* briefs in cases that will impact small businesses.
- The National Retail Federation ("NRF") is the world's largest retail trade association and the voice of retail worldwide. The NRF's membership includes retailers of all sizes, formats and channels of distribution, as well as

restaurants and industry partners from the United States and more than 45 countries abroad. In the United States, the NRF represents the breadth and diversity of an industry that is the nation's largest sector employer with more than 52 million employees and contributes $3.9 trillion annually to GDP. NRF has filed briefs in support of the retail community on topics stemming from the pandemic, including workers' compensation and COVID-19 vaccine policies.

- The Restaurant Law Center ("Law Center") is the only independent public policy organization created specifically to represent the interests of the food service industry in the courts. This labor intensive industry is comprised of over one million restaurants and other foodservice outlets employing 15 million people—approximately 10 percent of the U.S. workforce. Restaurants and other foodservice providers are the second largest private-sector employers in the United States. Through amicus participation, the Law Center provides courts with perspectives on legal issues that have the potential to significantly impact its members and their industry. The Law Center's *amicus* briefs have been cited favorably by state and federal courts.
- The New York State Restaurant Association ("NYSRA") is a not-for-profit employer association that represents food service establishments throughout New York State. Founded in 1935, the NYSRA is the oldest and most

comprehensive professional organization for restaurant management in New York. It provides a forum for restaurants to exchange ideas and information, participate in creative problem-solving, and receive education. The NYSRA has over 10,000 members representing nearly every type of dining establishment in New York State. NYSRA participates through *amicus* briefs in cases such as this one with a significant impact on our industry. Most NYSRA members are covered by the New York Labor Law section that is the subject of this case.

- The Business Council of New York State, Inc., is the leading business organization in New York State, representing the interests of large and small firms throughout the state. Our membership is made up of roughly 3,500 member companies, local chambers of commerce and professional and trade associations. Though 72 percent of our members are small businesses, we also represent some of the largest and most important corporations in the world. Combined, our members employ more than 1.2 million New Yorkers. We serve as an advocate for employers in the state's political and policy-making arenas, working for a healthier business climate, economic growth, and jobs. We also provide important benefits to our members' employees with group insurance programs and serve as an information resource center for our members.

- The Business Council of Westchester is the county's largest and most prestigious business membership organization representing more than 1,000 members, including multinational corporations, hospitals, universities, biotech pioneers, not-for-profits, entrepreneurs and companies of all sizes. As the most influential economic development and advocacy organization in Westchester, The Business Council of Westchester's members enjoy unparalleled access to today's top thought leaders, diverse business development opportunities and lawmakers at all levels of government.

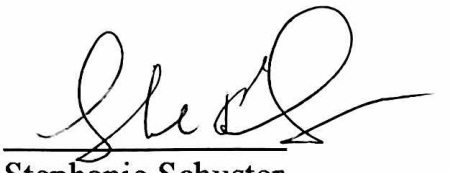
5. The proposed *amici* respectfully submit that the brief attached as Exhibit A will be helpful to the Court in its resolution of this appeal.

6. The issues presented in this appeal are of significant importance to the proposed *amici* and their members. In particular, this appeal presents the question whether Labor Law § 191 is privately enforceable. Until 2019, New York and federal courts were unanimous that no private right of action exists for technical violations of Section 191. The First Department's contrary decision in *Vega v. CM & Assocs. Constr. Mgmt., LLC*, 175 A.D.3d 1144 (1st Dep't 2019), changed that. More than 100 suits have been filed, and countless others threatened to be filed, by plaintiffs who, relying on *Vega*, claim that manual workers who are paid in full every two weeks are entitled to seek, as liquidated damages, an extra payment equal to half of all wages they had already been paid for up to six full years.

7. Because *Vega* is the only New York appellate decision addressing whether there is a private right of action for technical violations of Section 191, federal courts have reflexively relied upon it as the only indication of New York law. But now, this Court can provide much-needed guidance for the federal courts and New York trial courts to curb the onslaught of lawsuits *Vega* erroneously permitted.

8. The potential *amici*, therefore, request permission to appear as *amici curiae* and submit the brief attached as Exhibit A for the Court's consideration.

Dated: April 29, 2022



Stephanie Schuster

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION – SECOND DEPARTMENT

Basante Fitzgerald Grant,

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Appellate Division
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Dated: April 29, 2022

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

Besante Fitzgerald Grant,

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v.

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Appellate Division
Docket No. 2021-03202

BRIEF OF *AMICI CURIAE* THE RETAIL LITIGATION CENTER, INC., THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, THE NATIONAL RETAIL FEDERATION, THE RESTAURANT LAW CENTER, THE NEW YORK STATE RESTAURANT ASSOCIATION, THE BUSINESS COUNCIL OF NEW YORK STATE, INC., AND THE BUSINESS COUNCIL OF WESTCHESTER IN SUPPORT OF RESPONDENT

MORGAN, LEWIS & BOCKIUS LLP

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INTRODUCTION AND STATEMENTS OF INTEREST

Amici are trade and business associations representing members who collectively employ hundreds of thousands of workers in New York. Based on their members' first-hand experiences, these associations have a unique perspective on the legal issues in this case and the enormous practical significance the Court's resolution of those issues will have for employers across many industries. *Amici* include:

- The Retail Litigation Center, Inc. ("RLC") is the only trade organization solely dedicated to representing the United States retail industry in the courts. The RLC's members include many of the country's largest and most innovative retailers. Collectively, they employ millions of workers throughout the United States, provide goods and services to tens of millions of consumers, and account for tens of billions of dollars in annual sales. The RLC seeks to provide courts with retail-industry perspectives on important legal issues impacting its members, and to highlight the potential industry-wide consequences of significant pending cases. Since its founding in 2010, the RLC has participated as *amicus curiae* in more than 175 judicial proceedings of importance to retailers.
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and jobs. We also provide important benefits to our members' employees with group insurance programs and serve as an information resource center for our members.

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* * *

The court below rightly held that no private right of action exists for violations of Labor Law § 191. R10–11. Amici urge this Court to affirm. Adopting Plaintiff's contrary view of the statute would authorize workers who had been paid in full every two weeks to seek, as liquidated damages, an extra payment equal to half of all wages they had already been paid for up to six full years. This threatens all New York employers—and especially, small businesses—with massive and ruinous liability for using the most common (biweekly) pay cycle in the country.

Properly interpreted, the statutory text and context of Section 191 reveal no express right of action for such claims. Such a reading also avoids the serious constitutional problems posed by subjecting employers to liquidated damages that are vastly disproportionate to any actual damages that could possibly be caused by a biweekly rather than weekly pay cycle. Moreover, fundamental separation-of-powers principles further compel a finding that no implied right of action exists for frequency of pay claims.

ARGUMENT

I. The Issues In This Case Have Tremendous Importance For Employers Throughout New York Because Plaintiff's Reading Of The Statute Threatens Ruinous Liability For Widespread And Reasonable Conduct.

In 2019, the First Department held that Labor Law § 198(1-a) creates an express private right of action, and in response plaintiffs have sought liquidated damages (plus interest and attorneys' fees) when an employer pays manual workers on anything other than a weekly basis. *Vega v. CM & Assocs. Constr. Mgmt., LLC*, 175 A.D.3d 1144, 1145 (1st Dep't 2019). *Vega*'s holding upset the near-unanimous rulings of federal and New York trial courts that no such right of action exists.[1] This triggered a tidal wave of class action litigation claiming untimely payment to

[1] *See, e.g.*, *Coley v Vannguard Urban Improvement Ass'n*, 2018 WL 1513628, at *13 (E.D.N.Y. Mar. 29, 2018); *Hussain v. Pak. Int'l Airlines Corp.*, 2012 WL 5289541, at *3 (E.D.N.Y. Oct. 23, 2012); *Hunter v. Planned Bldg. Servs.*, 2018 WL 3392476, at *2–3 (N.Y. Sup. Ct. Queens Cnty. June 11, 2018); *Gardner v. D&D Elec. Constr. Co.*, 2019 WL 3765345, at *3–4 (N.Y. Sup. Ct. N.Y. Cnty. Aug. 7, 2019).

"manual workers" and seeking colossal amounts of damages. For employers of all sizes, this liability would be devastating, especially given the purported availability of liquidated damages and the six-year limitations period. *See* Lab. Law § 198(3) (creating six-year statute of limitations).

Consider a few examples, which, for simplicity's sake, assume that the hypothetical employers have been paying their manual workers the current New York City minimum wage ($15 per hour) on a biweekly rather than weekly basis and that all workers receive compensation for 40 hours per week, 52 weeks per year. On Plaintiff's theory, 26 of those weeks' wages throughout the entire six-year limitations period were paid one week late and therefore must be paid again—as liquidated damages, even though the manual workers already received 100% of the wages earned. No matter the employer's size, the effect of this legal regime would be crippling.

First, consider Employer A, a small employer with 7 full-time employees, all of whom meet the "manual worker" definition and all of whom were paid in full on a biweekly basis. Under the assumptions above, Employer A faces liability of $655,200—nearly $100,000 for each member of its workforce:

7 x $15/hour x 40 hours/week x 26 weeks/year x 6 years = $655,200

Such liability will easily bankrupt a small business. According to one recent survey, 72% of New York small businesses have *total annual revenues*—not profits—under $1 million.[2] Businesses like these cannot absorb a financial hit that exceeds more than half of their total annual revenue.

Next, consider Employer B, a significantly larger employer with 999 employees—all of whom are paid in full on a biweekly basis and all of whom, a plaintiff alleges, are "manual workers." Section 191 creates a waiver process whereby the Commissioner of Labor can authorize certain employers to pay manual workers biweekly or semi-monthly rather than weekly. Lab. Law § 191(a)(ii). But only businesses that employ at least 1,000 employees are eligible. So Employer B is not large enough to qualify for a statutory waiver, and Employer A is even further from being able to qualify. Employer B's potential liability under Plaintiff's reading of Section 191 is nearly *nine figures*:

> 999 x $15/hour x 40 hours/week x 26 weeks/year x 6 years = $93,506,400

Now consider the broader exposure for employers throughout New York. Even if Employer B is one of only *ten* similarly sized companies employing 999 manual workers, their collective liability on Plaintiff's view would be almost one

[2] Empire State Development, Annual Report on the State of Small Businesses 3 (2002), https://esd.ny.gov/sites/default/files/2020-ESD-ANNUAL-REPORT-SMALL-BUSINESS.pdf.

billion dollars. And that's to say nothing of the potential liability of the many other employers with manual workers who are large enough to qualify for the statutory waiver but may not have done so.

These hypotheticals accurately capture the catastrophic implications of Plaintiff's interpretation of Sections 191 and 198. In one recent case, for instance, a court awarded a *single* maintenance worker and cleaner, $119,906.25 in liquidated damages on this type of claim for just a *three-year* period (the extent of his employment) even though he had been paid in full, but on a biweekly basis. *Williams v. Miracle Mile Props. 2 LLC*, No. 20-cv-3127, 2022 WL 1003854, at *9 (E.D.N.Y. Feb. 1, 2022). Had he been able to assert claims for the entire six-year limitations period, this one worker's share of liquidated damages just for himself would have been over $200,000. Adding more workers through joinder or class certification would multiply damages accordingly.

Such amounts are eye-popping in any context, but here they would be imposed simply because an employer issued 26 paychecks per year rather than 52 in keeping with the most common pay cycle in the United States (bi-weekly pay).[3] Yet under Plaintiff's legal theory, an employer's adherence to the predominant pay cycle

[3] U.S. Bureau of Labor Statistics, Current Employment Statistics, Length of Pay Periods in the Current Employment Statistics Survey (May 3, 2021), https://www.bls.gov/ces/publications/length-pay-period.htm (explaining that 43% of American employers use a biweekly pay cycle, as compared to 33.3% who pay weekly, 19% who pay semimonthly, and 4.7% who pay monthly).

effectively entitles employees to time-and-a-half pay—the premium for overtime work—stretching up to six years into the past, despite the fact that all wages were paid.

With this magnitude of exposure, it is not surprising that *Vega* has created a boom in Section 191 lawsuits. *Amici* have identified roughly 150 cases raising Section 191 claims since the start of 2019—many involving small businesses, such as Nuccio's Bakery in Brooklyn, Tu Casa Restaurant in Queens, and the Parents Association of Yeshiva & Mesifta Torah Vodaath, Inc of Brooklyn.[4] This does not

[4] *Abreu v. Monarch Realty Holdings, LLC*, No. 21-cv-2418 (S.D.N.Y.); *Acevedo v. Trader Joe's East Inc.*, No. 22-cv-2024 (S.D.N.Y.); *Adduci v. Swissport USA Inc.*, No. 22-cv-1172 (E.D.N.Y.); *Al Zinnah v. Pep Boys—Manny, Moe & Jack of Del., Inc.*, No. 701394/2020 (Queens Cnty. Sup. Ct.); *Al Zinnah v. Pep Boys—Manny, Moe & Jack of Del., Inc.*, No. 20-cv-1544 (E.D.N.Y.); *Almonte v. Gabrielli Truck Sales Ltd.*, No. 805777/2021E (Bronx Cnty. Sup. Ct.); *Alvarado v. Zyara Rest. Corp.*, No. 21-cv-3432 (E.D.N.Y.); *Alvarez v. Happy Caterpillar Clubhouse, LLC*, No. 718286/2019(Queens Cnty. Sup. Ct.); *Anderson v. Flat Rate Movers, Ltd.*, No. 35487/2019E (Bronx Cnty. Sup. Ct.); *Andrade v. Simply Nat. Snacking LLC*, No. 21-cv-6320 (E.D.N.Y.); *Angeles v. Buy Buy Baby, Inc.*, No. 22-cv-1002 (E.D.N.Y.); *Arias v. Allair Sheet Metal Corp.*, No. 502201/2020 (Kings Cnty. Sup. Ct.); *Ayad v. PLS Check Cashers of N.Y., Inc.*, No. 20-cv-1039 (E.D.N.Y.); *Birthwright v. Advance Stores Co.*, No. 22-cv-593 (E.D.N.Y.); *Bisnaugh v. MacAndrews & Forbes Group LLC*, No. 151464/2020 (N.Y. Cnty. Sup. Ct.); *Brito v. Quest Diagnostics Inc.*, No. 21-cv-7019 (E.D.N.Y.); *Cabrera v. Rose Hill Asset Mgmt. Corp.*, No. 20-cv-2699 (S.D.N.Y.); *Caccavale v. Hewlett-Packard Co.*, No. 20-cv-974 (E.D.N.Y.); *Carroll v. Amico Corp.*, No. 21-cv-6631 (E.D.N.Y.); *Caul v. Petco Animal Supplies, Inc.*, No. 20-cv-3534 (E.D.N.Y.); *Cedeno v. WV Constr. Inc.*, No. 21-cv-2594 (E.D.N.Y.); *Chambers v. Cougar Express, Inc.*, No. 508683/2020 (Bronx Cnty. Sup. Ct.); *Chaparro v. Lazo*, No. 21-cv-3335 (E.D.N.Y.); *Chumil v. Tu Casa #2 Rest. Corp.*, No. 20-cv-4016 (E.D.N.Y.); *Cinto v. Nuccios Bakery, Inc.*, No. 19-cv-7229 (E.D.N.Y.); *Clark v. Woodvalley Contractors Corp.*, No. 21-cv-6302 (E.D.N.Y.); *Clarke v. Sunrise Senior Living Mgmt. Inc.*, No. 21-cv-3762 (E.D.N.Y.); *Clemons v. Enter. Holdings Inc.*, No. 20-cv-5259 (E.D.N.Y.); *Cohen v. Petro, Inc.*, No. 20-cv-2409 (E.D.N.Y.); *Colon v. P.C. Richard & Son Long Island Corp.*, No. 602021/2022 (Suffolk Cnty. Sup. Ct.); *Confusione v. Autozoners*, LLC, No. 21-cv-1 (E.D.N.Y.); *Contini v. Fekkai*, No. 156267/2020 (N.Y. Cnty. Sup. Ct.); *Cosaj v. 111-32 76th Ave. LLC*, No. 21-cv-1464 (E.D.N.Y.); *Cumberbatch v. Target Corp.*, No. 22-cv-1236 (S.D.N.Y.); *Davis v. Banana Republic LLC*, No. 21-cv-6160 (E.D.N.Y.); *De Los Santos v. J. Hardware Distrib. Corp.*, No. 35316/2019E (Bronx Cnty. Sup. Ct.); *DeMaria v. Five Guys Enters., LLC*, No. 21-cv-3688 (E.D.N.Y.); *Diallo v. NYC Froyo*

Partners LLC, No. 21-cv-9222 (S.D.N.Y.); *Diaz v. Parents Ass'n of Yeshiva & Mesifta Torah Vodaath, Inc.*, No. 21-cv-4102 (E.D.N.Y.); *Diaz v. Pep Boys—Manny, Moe & Jack of Del. Inc.*, No. 21239/2020E (Bronx Cnty. Sup. Ct.); *Dickens v. Scrap King Metro & Iron Inc.*, No. 21-cv-2673 (E.D.N.Y.); *Dilbert v. Armonk Senior Care LLC*, No. 35261/2019E (Bronx Cnty. Sup. Ct.); *Elhassa v. Hallmark Aviation Servs. LP*, No. 21-cv-9768 (S.D.N.Y.); *Ellison v. Sera Security Servs. LLC*, No. 31442/2019E (Bronx Cnty. Sup. Ct.); *Espinal v. Hill Enter. Inc.*, No. 21-cv-4973 (E.D.N.Y.); *Figueroa v. United Am. Sec. LLC*, No. 613892/2020 (Nassau Cnty. Sup. Ct.); *Fitzpatrick v. Boston Market Corp.*, No. 21-cv-9618 (S.D.N.Y.); *Ford v. Broadway Internal Med. P.C.*, No. 20-cv-1635 (E.D.N.Y.); *Francis v. Target Corp.*, No. 20-cv-5986 (E.D.N.Y.); *Fuentes v. Rosemary B. Desloge MD PC*, No. 150004/2020 (N.Y. Cnty. Sup. Ct.); *Gabriel v. Homyn Enters. Corp.*, No. 20-cv-2232 (E.D.N.Y.); *Garcia v. Parkchester Pizza Palace Inc.*, No. 32659/2019E (Bronx Cnty. Sup. Ct.); *Garcia v. W Servs. Grp. LLC*, No. 22-cv-1959 (S.D.N.Y.); *Gashi v. Herbert Slepoy Corp.*, No. 21-cv-5932 (E.D.N.Y.); *Gonzalez v. Cheesecake Factory Rest., Inc.*, No. 21-cv-5017 (E.D.N.Y.); *Gordon v. BlueTriton Brands Inc.*, No. 22-cv-2138 (S.D.N.Y.); *Graham v. Sportime Clubs, LLC*, No. 20-cv-2645 (E.D.N.Y.); *Grant v. Wakefern Food Corp.*, No. 21-cv-8590 (S.D.N.Y.); *Guzman v. Party City Corp.*, No. 22-cv-666 (S.D.N.Y.); *Heath v. One of Kind Transport Inc.*, No. 21-cv-6920 (E.D.N.Y.); *Henriquez v. Century Carriers Inc.*, No. 21-cv-6205 (E.D.N.Y.); *Hernandez v. Sharp Mgmt. Corp.*, No. 20-cv-4415 (S.D.N.Y.); *Hernandez v. Sweet Cake Box, Inc.*, No. 20-cv-439 (E.D.N.Y.); *Hess v. Bed Bath & Beyond, Inc.*, No. 21-cv-4099 (S.D.N.Y.); *Hibbert v. Christmas Tree Shops, LLC*, No. 21-cv-10531 (S.D.N.Y.); *Hossain v. Emu Health Servs. LLC*, No. 20-cv-2854 (E.D.N.Y.); *Hughes v. Love Conquers All Inc.*, No. 20-cv-2697 (S.D.N.Y.); *Ibrahim v. Nature's Grill LLC*, No. 20-cv-2849 (E.D.N.Y.); *Jackson v. Madison Security Grp., Inc.*, No. 21-cv-8721 (S.D.N.Y.); *James v. Brownstone NYC Mgmt. Corp.*, No. 21-cv-5926 (E.D.N.Y.); *Jean-Pierre v. Walgreen Co.*, No. 21-cv-1452 (E.D.N.Y.); *Juarez v. Torres*, No. 22-cv-1027 (S.D.N.Y.); *Kandic v. Greenstar Mgmt. Inc.*, No. 22-cv-776 (S.D.N.Y.); *Kingston v. Buy Buy Baby*, No. 603184/2021 (Nassau Cnty. Sup. Ct.); *Lall v. Harvic Int'l Ltd.*, No. 20-cv-3293 (S.D.N.Y.); *Laroche v. Huntington Power Equip. Inc.*, No. 21-cv-7156 (E.D.N.Y.); *Leeman v. Best Buy Stores, L.P.*, No. 20-cv-156 (E.D.N.Y.); *Lema v. Fitzcon Excavation Inc.*, No. 20-cv-2311 (E.D.N.Y.); *Levy v. Endeavor Air, Inc.*, No. 21-cv-4387 (E.D.N.Y.); *Lichtenstein v. Bed Bath & Beyond Inc.*, No. 154074/2020 (N.Y. Cnty. Sup. Ct.); *Lin v. Beyond Rest. Inc.*, No. 716431/2020 (Queens Cnty. Sup. Ct.); *Linary v. Lincoln Controls Inc.*, No. 810121/2021E (Bronx Cnty. Sup. Ct.); *Ling v. Twinkling Spa Inc.*, No. 717166/2020 (Queens Cnty. Sup. Ct.); *Mabe v. Wal-Mart Assocs., Inc.*, No. 20-cv-591 (N.D.N.Y.); *Malloy v. Mgmt. 26 Inc.*, No. 20-cv-1633 (E.D.N.Y.); *Mariano v. Simone Prop. Mgmt., Inc.*, No. 20-cv-10933 (S.D.N.Y.); *Marquina v. Monroe Coll. Ltd.*, No. 151839/2022 (N.Y. Cnty. Sup. Ct.); *Marrero v. Ryer Realty Holdings 2108 LLC*, No. 20-cv-603 (S.D.N.Y.); *Martin v. Innovative Lab Solutions NY, LLC*, No. 21-cv-2980 (E.D.N.Y.); *Martin v. Nat. Organics, Inc.*, No. 22-cv-509 (E.D.N.Y.); *Mathis v. Wavecrest Mgmt. Grp., LLC*, No. 31392/2020E (Bronx Cnty. Sup. Ct.); *McDonald v. Specialty Parking, L.L.C.*, No. 718511/2019 (Queens Cnty. Sup. Ct.); *McSpirit v. CoventBridge, Inc.*, No. 20-cv-5754 (S.D.N.Y.); *Medina v. Bobcat of N.Y. Inc.*, No. 25727/2020E (Bronx Cnty. Sup. Ct.); *Mestre v. Brook Hosp. Mgmt. LLC*, No. 31440/2019E (Bronx Cnty. Sup. Ct.); *Mohammed v. All Am. School Bus Corp.*, No. 21-cv-6816 (E.D.N.Y.); *Morian v. All. Ground Int'l, LLC*, No. 527226/2019 (Kings Cnty. Sup. Ct.); *Mormon v. Clear Brook Mgmt. Inc.*, No. 20-cv-2695 (S.D.N.Y.); *Narsingh v. Prasad Mgmt. LLC*, No. 20-cv-1533 (E.D.N.Y.); *Nativedad Mias v. Katz*, No. 702726/2020 (Queens Cnty. Sup. Ct.); *Oldacre v. ECP-PF CT Operations Inc.*, No. 22-

include the unknowable number of Section 191 claims that are settled without litigation. Yet even with all these pending and threatened cases, there have been virtually no final judgments and no appellate decisions beyond *Vega* itself.

Many defendants facing such astronomical damages claims are forced to settle under threat that an adverse ruling could result in bankruptcy. The pressure to settle

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cv-88 (W.D.N.Y.); *Otero v. 7000 Bay Parkway Owners Corp.*, No. 521408/2019 (Kings Cnty. Sup. Ct.); *Paul v. Dollar Tree Stores, Inc.*, No. 510896/2021 (Bronx Cnty. Sup. Ct.); *Perez v. Mechanical Serv. Corp. of N.Y.*, No. 21-cv-2467 (S.D.N.Y.); *Portillo v. Grey Hawk Flooring Inc.*, No. 22-cv-183 (E.D.N.Y.); *Quito v. JT Renovation N.Y. Inc.*, No. 21-cv-6439 (E.D.N.Y.); *Rasberry v. On Point Sys. & Mgmt. Inc.,* No. 21-cv-6195 (E.D.N.Y.); *Rath v. Jo-Ann Stores, LLC*, No. No. 21-cv-791 (W.D.N.Y.); *Rivera v. Swimjim, Inc.*, No. 22017/2020E (Bronx Cnty. Sup. Ct.); *Rodriguez v. 99 Cents Hot Pizza Inc.*, No. 22-cv-1711 (E.D.N.Y.); *Rodriguez v. Brooklyn Solarworks LLC*, No. 516080/2020 (Kings Cnty. Sup. Ct.); *Rodriguez v. Lowe's Home Centers, LLC*, No. 20-cv-1127 (E.D.N.Y.); *Rodriguez v. Oakdale Academy Campus Inc.*, No. 152226/2021 (Richmond Cnty. Sup. Ct.); *Rodriguez v. Tiny Footsteps, Inc.*, No. 719066/2019 (Queens Cnty. Sup. Ct.); *Rojas v. Aqua Design Grp. Inc.*, No. 523982/2020 (Kings Cnty. Sup. Ct.); *Rollins v. Worldwide Flight Servs., Inc.*, No. 22-cv-1274 (E.D.N.Y.); *Roman v. Wheels on the Bus Inc.*, No. 21-cv-6377 (E.D.N.Y.); *Rosario v. Icon Burger Acquisition LLC*, No. 21-cv-4313 (E.D.N.Y.); *Ross v. P.F.N.Y. LLC*, No. 22-cv-314 (E.D.N.Y.); *Roundtree v. Aerotek, Inc.*, No. 21-cv-5434 (S.D.N.Y.); *Sahadeo v. Fine Spine Chiropractic P.C.*, No. 22-cv-1474 (E.D.N.Y.); *Samuels v. TCPRNC LLC*, No. 800091/2022E (Bronx Cnty. Sup. Ct.); *Sangar v. FCS Grp. LLC*, No. 20-cv-840 (E.D.N.Y.); *Seecharan v. S.G.M.C. LLC*, No. 22-cv-1080 (E.D.N.Y.); *Sevilla v. House of Salads One LLC*, No. 20-cv-6072 (E.D.N.Y.); *Sharoubim v. Wal-Mart Assocs.*, No. 21-cv-2903 (E.D.N.Y.); *Shaw v. ProCore, LLC*, No. 21-cv-3883 (S.D.N.Y.); *Silva v. Victoria's Secret Store*, No. 20-cv-9745 (S.D.N.Y.); *Simmons v. Expressive Lighting Inc.*, No. 20-cv-367 (E.D.N.Y.); *Singh v. PANDJ Trucking Corp.*, No. 22-cv-1083 (E.D.N.Y.); *Sorin v. Peloton Interactive, Inc.*, No. 20-cv-5729 (E.D.N.Y.); *Sorto v. Diversified Maint. Sys. LLC*, No. 21-cv-463 (E.D.N.Y.); *St. Catherine v. Lidl US LLC*, No. 22-cv-1641 (E.D.N.Y.); *St. John v. Adesa Inc.*, No. 22-cv-1257 (E.D.N.Y.); *Suquilanda v. Competitive Ventures Inc.*, No. 21-cv-1454 (E.D.N.Y.); *Thomas v. Charter Commc'ns Holding Co.*, LLC, No. 21-cv-2751 (E.D.N.Y.); *Torres v. 1100 Jefferson Assocs.*, No. 21-cv-862 (S.D.N.Y.); *Turkaj v. Lantower Realty L.P.*, No. 20-cv-2539 (S.D.N.Y.); *Umadat v. Costco Wholesale Corp.*, No. 21-cv-4814 (E.D.N.Y.); *Valentin v. Pirgos Food Corp.*, No. 21-cv-5781 (S.D.N.Y.); *Vasconcelo v. Edco Supply Corp.*, No. 506591/2021 (N.Y. Sup. Ct. Kings Cnty.); *Wilcher v. Vilano Emp't Servs., Inc.*, No. 21-cv-5930 (E.D.N.Y.); *Williams v. Sunrise Senior Living Mgmt. Inc.*, No. 603289/2022 (N.Y. Sup. Ct. Nassau Cnty.); *Wright v. Skywest Airlines Inc.*, No. 22-cv-914 (E.D.N.Y.); *Yunganaula v. D.P. Grp. Gen. Contractors/Developers Inc.*, No. 21-cv-2015 (E.D.N.Y.); *Zhu v. King Chef Yang's Corp.*, No. 717293/2020 (N.Y. Sup. Ct. Queens Cnty.).

is considerable given the potential damages, particularly because many courts narrowly construe the statute's good-faith exception to liquidated damages. But now, this Court can provide much-needed guidance for the federal courts and New York trial courts to curb the onslaught of lawsuits *Vega* erroneously permitted.

II. Construing Section 198(1-a) As Creating A Cause Of Action Distorts The Statutory Language And Leads To Constitutional Problems.

In contrast to the other enforcement mechanisms, Section 198(1-a) provides no viable remedy for Section 191 pay-frequency violations. Plaintiff latches onto Section 198(1-a)'s liquidated damages remedy. But for two reasons, this theory only confirms that Section 198(1-a) cannot do the work that Plaintiff asks of it.

A. The Text And Context Of Section 198(1-a) Show That It Does Not Provide Liquidated Damages For Violations Of Section 191.

The statutory text of Section 198(1-a) illustrates why it is a poor fit for wage-frequency claims. *Vega* rests on the provision's use of the word "underpayment." The court thought that an underpayment occurs "[t]he moment that an employer fails to pay wages in compliance with section 191(1)(a)." *Vega*, 175 A.D.3d at 1145. Because the court read each missed weekly paycheck as an "underpayment" at the time, it went on to assume that Section 198(1-a) provides liquidated damages. *Id.* at 1146.

The First Department's interpretation is untenable. Read as a whole, the provision's liquidated damages remedy contemplates an "underpayment"—at most—when an employer has failed to pay its employees as the parties had agreed.

Section 198(1-a) permits the Commissioner of Labor to bring a legal action when an employee is "paid less than the wage to which he or she is entitled," and in that legal action the Commissioner may "collect such claim" by "assess[ing] against the employer the full amount of any such underpayment, and an additional amount as liquidated damages, unless the employer proves a good faith basis for believing that its underpayment of wages was in compliance with the law." Lab. Law § 198(1-a). But if the employer has already paid the wage to which the employee was entitled, as and when agreed and just a week later than Section 191 requires, there is no "underpayment" for the Commissioner to collect.

Nor are there any possible liquidated damages under the statutory language stating that "[l]iquidated damages shall be calculated by the commissioner as no more than one hundred percent of the total amount of *wages found to be due*." *Id.* (emphasis added). But, again, no wages remain "due" at the time of the Commissioner's legal action if the only violation was pay in accordance with the agreed-upon pay schedule rather than on a more frequent, weekly basis. Without any "wages found to be due," there is no "underpayment" in the statute's sense of the term and, therefore, no basis for liquidated damages.

The remaining language in Section 198(1-a) leads to the same conclusion for any potential private actions:

> In any action instituted in the courts upon a wage claim by an employee or the commissioner in which the employee prevails, *the court shall allow such employee to recover the full amount of* <u>*any underpayment*</u>, all reasonable attorney's fees, prejudgment interest as required under the civil practice law and rules, and, unless the employer proves a good faith basis to believe that its underpayment of wages was in compliance with the law, *an additional amount as liquidated damages equal to one hundred percent of the total amount of the wages found* <u>*to be due*</u>, except such liquidated damages may be up to three hundred percent of the total amount of the wages found to be due for a willful violation of section one hundred ninety-four of this article.

Lab. Law § 198(1-a) (emphases added). As with the prior text, there is no "underpayment" to "recover" in a Section 191 scenario when the employee was paid in full on the agreed-upon pay cycle. Nor can there be any "wages found to be due." The employee received all that he or she was owed, even if half of those wages were paid on an agreed-upon schedule one week later than Section 191 sets forth.

Vega glossed over this textual interpretation problem by analogizing to federal law to find that liquidated damages should be available in cases of late paychecks. *Vega*, 175 A.D.3d at 1145-46. To that end, the court compared Section 198(1-a) to Section 16(b) of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 216(b), as interpreted by the U.S. Supreme Court in *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697 (1945). For several reasons, the FLSA, which sets the national standard for

minimum wage and overtime pay, cannot support a private right of action for pay-frequency claims under the New York Labor Law.

To start, there is no FLSA requirement to pay certain employees on a weekly basis when the employer and employee have contractually agreed to a biweekly pay period. *See*, *e.g.*, *Rogers v. City of Troy*, 148 F.3d 52, 55 (2d Cir. 1998) ("The [FLSA] does not specify *when* [the required minimum] wage must be paid."); 29 C.F.R. § 778.106 ("There is no requirement in the [FLSA] that overtime compensation be paid weekly.").

The scenario in *Brooklyn Savings Bank*, moreover, was very different from a pay-frequency claim. The employers in that case had wrongly held onto wages and overtime pay to which employees were entitled; the employees were *not* paid all amounts due, as and when agreed. *Brooklyn Savings Bank*, 324 U.S. at 700–01. That complete failure to compensate employees posed a serious risk "to maintenance of the minimum standard of living 'necessary for health, efficiency, and general well-being of workers.'" *Id.* at 707. But those policy concerns do not extend to a requirement that certain employees receive weekly rather than biweekly compensation, which again Congress chose not to make a requirement under the FLSA.

Another important difference is the two statutes' remedial structures. The FLSA permits liquidated damages but does not permit prejudgment interest when

liquidated damages are awarded. *Id.* at 715. The New York Legislature took a different approach and expressly authorized "prejudgment interest" in addition to liquidated damages. Lab. Law § 198(1-a). As courts rightly observed pre-*Vega*, this shows that Section 198(1-a)'s liquidated damages "provision is geared to afford relief for unpaid wages, not for late-paid wages." *E.g.*, *Belizaire v. RAV Investigative & Sec. Servs.*, 61 F. Supp. 3d 336, 360 n.22 (S.D.N.Y. 2014). And it also shows that liquidated damages "constitute a penalty," while prejudgment interest is the remedy imposed "to compensate a plaintiff for the loss of use of money." *Reilly v. Natwest Markets Grp.*, 181 F.3d 253, 265 (2d Cir. 1999). Thus, if Section 198(1-a) can be read to authorize any private right of action for biweekly payments (and as explained above, it cannot), the only appropriate remedy for the weeklong lost use of money would be prejudgment interest. Because *Brooklyn Savings Bank* analyzes the differently worded FLSA (not the Labor Law) and sought to provide remedies for truly unpaid wages (not wages paid on a different pay cycle), it provides no ground for extending Section 198(1-a) liquidated damages to pay-frequency violations under Section 191.[5]

[5] *Vega* took out of context the Second Circuit's statement in *Rana v. Islam*, 887 F.3d 118, 123 (2d Cir. 2018), that "there are no meaningful differences" between the two statutes' liquidated damages provisions. The Second Circuit expressed that position to *limit* courts' ability to impose "duplicative liquidated damages for the same course of conduct" under both statutes. *Id.* An approach intended to avoid excessive liquidated damages hardly counsels in favor of using the FLSA provision—which affords no remedy for the type of weekly-pay claim at issue here—to justify expanding the New York provision.

As Defendant explains in detail, the language, history, and purpose of Labor Law Article 6, and Section 198(1-a) specifically, show that the liquidated damages remedy applies to unlawful deductions from wages in violation of Section 193 and of Section 198(1-a) itself. When an employer impermissibly reduces a manual worker's wages and thus pays the worker less than she is owed, Section 198(1-a) entitles the worker to recover the difference and an additional amount as liquidated damages. Trying to extend that remedy to an employee who receives what she is owed, but on an agreed-upon schedule that might be one week later than the Section 191 schedule, is a misconstruction of great proportion.

B. Plaintiff's Contrary Reading Of Section 198(1-a) Would Authorize Unconstitutionally Excessive Monetary Penalties.

Although the statutory design, standing alone, is enough to discredit Plaintiff's reading of Section 198(1-a), the constitutional implications of Plaintiff's reading provide a further strike against it. Were Plaintiff correct that Section 198(1-a) entitles manual workers to liquidated damages for all wages not paid within a week, the punitive effect of this arrangement would offend the Fourteenth Amendment's Due Process Clause as construed by the Supreme Court.

As Defendant explains (at 51–54), courts have long recognized that liquidated damages under Section 198(1-a) "constitute a penalty." *Carter v. Frito-Lay, Inc.*, 74 A.D.2d 550, 551 (1st Dep't 1980), *aff'd*, 52 N.Y.2d 994 (1981). That remains so even after the 2009 and 2010 amendments. In fact, the 2010 legislative history

reaffirms the Legislature's desire that these liquidated damages serve as a "deterrent" and notes that the 2010 amendment increased the available "penalties" (from 25% to 100%) to increase the liquidated damages' deterrent effect. N.Y. Spons. Memo., 2010 S.B. 8380, Leg. 233, Reg. Sess. (Oct. 28, 2010).[6] The 2010 amendment also added the express provision for prejudgment interest, further confirming that liquidated damages are intended for something other than compensating for the loss of use of money. *See* 2010 N.Y. Laws p. 1450; *see also Reilly v. Natwest Markets Grp.*, 181 F.3d 253, 265 (2d Cir. 1999) (noting, even before the 2010 amendment, that "[p]re-judgment interest and liquidated damages under the Labor Law are not functional equivalents" because the former "compensate[s] a plaintiff for the loss of use of money" while the latter "'constitute a penalty' to deter an employer's willful withholding of wages due") (citations omitted).

Because liquidated damages under Section 198(1-a) further "deterrence and retribution" rather than merely "redress[ing] the concrete loss that the plaintiff has suffered," they are subject to substantive limitations under the U.S. Constitution. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003) ("While States possess discretion over the imposition of punitive damages, it is well established that there are procedural and substantive constitutional limitations on these awards.").

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6 https://www.nysenate.gov/legislation/bills/2009/S8380.

Specifically, "[t]he Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor." *Id.* Courts consider "three guideposts" when assessing the constitutionality of a punitive damages award: "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." *Id.* at 418.

Plaintiff's attempt to apply Section 198(1-a)'s liquidated damages remedy to pay-frequency violations under Section 191 would clearly run afoul of these constitutional limitations. First, there is no "reprehensibility" in fully paying employees on a biweekly rather than weekly basis. As noted above, biweekly pay periods are the most common pay periods in the country. Accordingly, one cannot fairly say that adhering to a biweekly pay cycle shows "indifference to or a reckless disregard of the health or safety of others." *Campbell*, 538 U.S. at 419.

Second, and worse still, the ratio between the liquidated damages Plaintiff seeks and any potential actual harm is well beyond constitutional bounds. Although the Supreme Court has not set a clear line between excessive and permissive ratios, it has observed that, "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due

process" and that even awards of punitive damages "more than four times the amount of compensatory damages might be close to the line." *Id.* at 425.

Liquidated damages here would blow way past that line, and easily reach upwards of 100 times the amount of any compensatory damages. Consider again a worker who receives $15 per hour for 40 hours per week—$600—on a biweekly rather than weekly basis. The amount of actual harm the worker suffers from the one-week delay is likely to be negligible. The amount of interest that the employee could earn on $600 over the course of one week in today's market would be under $1. Even at the statutory prejudgment interest rate of 9% annually, *see* C.P.L.R. § 5004, which equals a daily rate of about 0.025% (0.09 / 365), one week's interest on $600 would be just $1.05 ($600 x 0.00025 x 7). Even if one imagines that the worker for some reason needed to borrow $600 for a given week because of the one-week delay, the borrowing costs would be a tiny fraction of the $600 sum that plaintiffs seek as liquidated damages. Imagine that the employee had to pay an extraordinarily high interest rate of 50% per year to borrow $600 for one week.[7] The daily rate for such borrowing would be about 0.14% (0.5 / 365), and the total interest charged to borrow $600 at this rate for 7 days would be just $5.88 ($600 x .0014 x 7). In other words, the $600 liquidated damages for the one-week delay would be

[7] This hypothetical is highly unrealistic. Even with credit cards (whose payment cycles are longer than 7 days), APRs are typically far below 25%. *See*, *e.g.*, U.S. News Staff, Average Credit Card APR (Dec. 1, 2021, 9:00 a.m.), https://money.usnews.com/credit-cards/articles/average-apr.

over 100 times the theoretical harm caused by the delay, even under extremely generous assumptions. Under any imaginable scenario, then, the ratio between liquidated damages and actual harm would exceed 100:1, in violation of the Due Process Clause of the Fourteenth Amendment. *See*, *e.g.*, *Thomas v. iStar Fin., Inc.*, 652 F.3d 141, 149 (2d Cir. 2011) (finding a ratio of 5.7:1 problematic); *Gomez v. Cabatic*, 159 A.D.3d 62, 71 (2d Dep't 2018) (reducing punitive damages, on $500,000 compensatory damages award, from $1.2 million to $500,000). Even more troubling, Plaintiff's theory would subject 26 pay periods per year, over 6 years, to this treatment. These factors magnify the damages beyond all constitutionally acceptable parameters.

As for the third goalpost—comparing liquidated damages to the civil penalties authorized or imposed in comparable cases—it is significant that the Department of Labor's enforcement practice for pay-frequency violations is nowhere as severe as Plaintiff's proposal. As Defendant describes (at 18–19), the Department of Labor does not seek liquidated damages for such violations, but instead imposes proportionally modest penalties. *See*, *e.g.*, *Ram Hotels, Inc.*, PR 08-078, slip op. at 2 (Indus. Bd. of Appeals Oct. 11, 2011), https://industrialappeals.ny.gov/system/files/documents/2020/02/pr-08-078.pdf (penalty of $100 for over three years of manual-worker weekly pay violations); *Hudson Valley Mall Dental*, PR 12-034, slip op. at 1 (Indus. Bd. of Appeals Aug. 7. 2014), https://industrialappeals.ny.gov/

system/files/documents/2020/02/pr-12-034.pdf (penalty of $100 for purported weekly pay violations for three dental assistants). This administrative practice confirms that the liquidated damages Plaintiff seeks are unconstitutionally excessive when assessed against the Supreme Court's three guideposts.

It is well settled that "[w]here the language of a statute is susceptible of two constructions, the courts will adopt that which avoids … constitutional doubts or other objectionable results." *Matter of Jacob*, 86 N.Y.2d 651, 667 (1995). Although *Amici* do not think Section 198(1-a) is even fairly susceptible of Plaintiff's construction, that construction is, at a minimum, not the only possible one. The better interpretation, for reasons stated here and in Defendant's brief, is that Section 198(1-a) does not provide a right of action to obtain liquidated damages for biweekly payments in violation of Section 191. But, for present purposes, the key point is that the Court should also adopt that reading because it is the only reading that avoids significant constitutional doubts and draconian penalties.

III. Separation-Of-Powers Principles Reinforce That Section 191 Is Properly Enforced By The Department Of Labor Rather Than Private Plaintiffs.

Not only should this Court reject *Vega*'s erroneous and troublesome conclusion that Section 198(1-a) provides an *express* right of action, but the Court also should decline to find an *implied* right of action. To conclude otherwise would disregard the Legislature's manifest choice about how violations of Section 191 are to be enforced. Defendant already explains (at 37–46) why there is no implied right

of action here, but *amici* merely wish to underscore why fundamental separation-of-powers principles forbid the judiciary from recognizing an implied right of action.

The paramount factor in any inquiry into whether an implied right of action exists is whether private lawsuits "are incompatible with the enforcement mechanism chosen by the Legislature." *Sheehy v. Big Flats Cmty. Day, Inc.*, 73 N.Y.2d 629, 634–35 (1989). This factor "typically turns on the legislature's choice to provide one particular enforcement mechanism to the exclusion of others—a choice that should be respected by the courts." *Ortiz v. CIOX Health LLC*, 37 N.Y.3d 353, 360 (2021). For violations based on anything other than a "failure to pay wages … found to be due"—like payment on a biweekly rather than weekly cadence—the Legislature elected to vest the Department of Labor with authority to enforce the Labor Law via civil penalties. Lab. Law § 218(1). The Legislature, moreover, directed specific civil penalties for such violations: no more than $1,000 for a first offense; no more than $2,000 for a second offense; and no more than $3,000 for any subsequent violation. *Id.* The Department of Labor may not order an employer to pay employees additional, unearned wages. *See id.*

An implied right of action for liquidated damages is anathema to the enforcement mechanism the Legislature chose in Section 218. For, on Plaintiff's theory, an employee would have the right to 1.5 times the wages he actually earned

when the wages he actually earned were, in fact, *already paid in full*. Unlike the modest civil penalties envisioned by the Legislature, the potential exposure for windfall damages on Plaintiff's theory is massive for all businesses and potentially ruinous for small businesses who are statutorily ineligible for an exemption from the weekly pay requirement. *See supra*, pp. 7–10. It is for the Legislature, not the courts, to decide whether to permit private suits for such significant sums over pay-frequency violations.

CONCLUSION

The Supreme Court's judgment should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION – SECOND DEPARTMENT

Basante Fitzgerald Grant,

Plaintiff-Appellant,

v.

Appellate Division
Docket No. 2021-03202

Global Aircraft Dispatch, Inc.,

Defendant-Respondent.

AFFIRMATION OF SERVICE

I, Stephanie Schuster, affirm under the penalties of perjury that the foregoing was filed with the Clerk of the Court for the Appellate Division using the New York State Courts Electronic Filing system, which will automatically service counsel of record.

Dated: April 29, 2022