No. 12-20605

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

IN RE WELLS FARGO BANK, N.A.

WELLS FARGO BANK, N.A., ET AL.,

Petitioners,

v.

RAYMOND RICHARDSON, ET AL.,

Respondents.

On Petition for Writ of Mandamus from the United States
District Court for the Southern District of Texas, Houston Division
MDL No. 4:11-MD-2266

BRIEF FOR NATIONAL WOMEN'S LAW CENTER AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS AND IN OPPOSITION TO THE ISSUANCE OF THE WRIT OF MANDAMUS OVERTURNING THE DISTRICT COURT'S ORDER

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STATEMENT OF INTERESTED PARTIES

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

1. Those persons and attorneys listed by the Petitioner in its principal opening brief;

2. Those persons and attorneys listed by the Respondent in its response brief;

3. Those persons and attorneys listed by the Chamber of Commerce of the United States of America in its *amicus curiae* brief;

4. Those persons and attorneys listed by the Securities Industry and Financial Markets Association in its *amicus curiae* brief;

5. Those persons and attorneys listed by the American Association of Retired People in its *amicus curiae* brief;

6. Fatima Goss Graves and Devi Rao of the National Women's Law Center; and

7. The National Women's Law Center.

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INTEREST OF AMICUS CURIAE

The National Women's Law Center (NWLC) is a non-profit legal advocacy organization dedicated to the advancement and protection of women's rights and opportunities and the corresponding elimination of sex discrimination from all facets of American life. Since 1972, NWLC has worked to secure equal opportunity in the workplace. This includes not only the right to a workplace that is free from all forms of discrimination and harassment, but also access to effective means of enforcing that right and remedying such conduct. NWLC has played a leading role in the passage and enforcement of federal civil rights laws and in numerous amicus briefs involving sex and race discrimination in employment before the United States Supreme Court, federal courts of appeals, and state courts.

NWLC files this brief with the consent of all parties.[1]

BACKGROUND AND SUMMARY OF ARGUMENT

i. Congress enacted the Equal Pay Act of 1963 ("EPA") as an amendment to the Fair Labor Standards Act ("FLSA"), making it illegal for employers to pay unequal wages to men and women who perform substantially equal work. At that time, one-third of employers in one study openly maintained "'a double standard pay scale for men and women.'" Deborah Thompson

[1] No party, counsel for a party, or person, other than NWLC and its attorneys, authored this brief in whole or in part, or made a monetary contribution intended to fund preparation or submission of this brief.

Eisenberg, *Shattering the Equal Pay Act's Glass Ceiling*, 63 SMU L. Rev. 17, 29 (2010) (*quoting* 109 Cong. Rec. 9199 (1963) (statement of Rep. Green) (debating passage of the EPA)). In enacting the EPA, Congress created a "broadly remedial" statute that was up to the task of taking on the endemic problem of wage discrimination. *Corning Glass Works v. Brennan*, 417 U.S. 188, 208 (1974).

In doing so, Congress relied on the enforcement mechanisms available under the FLSA, including a private right of action that may be pursued individually or as a collective action. *See* 29 U.S.C. § 216(b); *Anderson v. State Univ. of N.Y.*, 169 F.3d 117, 119-20 (2d Cir. 1999), *vacated on other grounds*, 528 U.S. 1111 (2000); 7B Charles Alan Wright et al., *Federal Practice and Procedure* § 1807 (3d ed. 2012). Through this private right of action under the EPA and the FLSA employees in a collective action may receive two years of back pay, or three if the violation is willful, with the owed wages calculated from the date the employee affirmatively opted into the suit.

ii. Under the collective action mechanism in the FLSA (and therefore the EPA), an employee may bring an action on behalf of "himself . . . and other employees similarly situated." 29 U.S.C. § 216(b).[2] Employees who want to participate in the lawsuit must then file a written consent to become a party, *id.*,

[2] The collective action mechanism is also available to plaintiffs under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621-34, another amendment to the FLSA.

typically after the court has provided notice of the claims to potential class members, *see Hoffman-La Roche Inc. v. Sperling*, 493 U.S. 165, 169-70 (1989).

Similar to other claims under the FLSA, district courts around the country have overwhelmingly applied a two-step approach to resolving putative EPA collective action claims, and courts of appeals have upheld that use of discretion. *See, e.g.*, *Mooney v. Aramco Servs. Co.*, 54 F.3d 1207, 1213-14 (5th Cir. 1995) (discussing two-step approach in ADEA case and holding district court using approach did not abuse its discretion in finding that the opt-in plaintiffs were not similarly situated), *overruled on other grounds by Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003); *see also Moore v. Publicis Groupe SA*, ____F. Supp. 2d____, No. 11 Civ. 1279, 2012 WL 2574742, at *9 (S.D.N.Y. June 29, 2012) (collecting cases in Second Circuit); *Collins v. Dollar Tree Stores, Inc.*, 788 F. Supp. 2d 1328, 1334-35 (N.D. Ala. 2011) (collecting cases in Eleventh Circuit). Under this approach, a court first addresses whether notice should be issued to potential plaintiffs, and, if so, individuals are given the opportunity to opt into the suit. At the initial "notice" stage, the court must determine whether plaintiffs are "similarly situated" under § 216(b), such that notice of the action should be given to potential class members. *See Mooney*, 54 F.3d at 1213-14. At the second "joinder" stage, "the court has much more information on which to base its decision, and makes a factual determination on the similarly situated question." *Id*. at 1214. After the

completion of discovery, the court re-examines the collective action, makes a more searching evidentiary inquiry, and decides whether the members of the collective action are sufficiently similarly situated to the initial plaintiff to proceed together.

iii. The well-established two-step approach to collective actions is crucial to achieving the goals of the EPA. First, the FLSA expressly provides that the limitations period continues to run for each individual even after a collective action complaint is filed. The EPA's limitations rule coupled with its two-year limit on back pay therefore means that each day the statute of limitations continues to run—before the employee receives the basic notice of the suit and affirmatively opts in—represents another day of unrecoverable lost wages.

In addition, a properly functioning collective action tool ensures that employees' efforts to vindicate their rights are not stymied by the secrecy that surrounds wages in the workplace. By banding together through collective action, women workers can be notified in a timely way of systemic pay discrimination practices. The two-step process is thus essential to promptly alerting women workers to the problem of wage discrimination and their legal protections, so that they may receive the full amount of the back pay owed them.

Petitioners Wells Fargo and Wachovia ("Wells Fargo") would have this court grant the writ of mandamus to provide "guidance" on this well-established process for collective actions. And the guidance it seeks would effectively mean

that the majority of courts have been abusing their case management discretion in applying the two-step process for collective actions under the FLSA, and that an extremely severe version of Federal Rule of Civil Procedure 23's certification requirements should apply. Such a ruling would disturb decades of established case law, profoundly undermine the availability of collective actions and, in so doing, thwart the central purpose of the EPA: protecting women workers from wage discrimination.

ARGUMENT

I. THE TWO-STEP APPROACH, WITH ITS PROMPT AND EFFECTIVE NOTICE STANDARD, IS CRUCIAL FOR COLLECTIVE ACTIONS UNDER THE EPA.

A. With the EPA, Congress Chose to Replicate the Collective Action Mechanism in the FLSA, Not Rule 23's Class Action Scheme.

The collective action mechanism in § 216(b) was the only means through which women could challenge pervasive discriminatory compensation structures typical of the American workplace at the time of the EPA's passage in 1963. By amending the FLSA to include the EPA, Congress chose to replicate the FLSA collective action mechanism for EPA claims. In doing so, it did not intend to subject EPA claims to Rule 23's requirements for certifying class actions. Indeed, it could not have done so—the version of Rule 23 in effect before 1966 did not require a certification motion, and it was not judicial practice to require one. *See* Scott A. Moss & Nantiya Ruan, *The Second-Class Class Action: How Courts*

Thwart Wage Rights by Misapplying Class Action Rules, 61 Am. U. L. Rev. 523, 547 (2012). Thus, until the 1970s, courts properly characterized § 216(b) as a liberalized joinder rule. *See id.* at 542.

It was not until the rise of modern Rule 23 and its additional certification requirements as the "predominate form of aggregate litigation" that courts began conceiving of § 216(b)'s collective action mechanism as akin to a Rule 23 class action. *Id.* at 543. But when the modern Rule 23 was enacted in 1966, three years after the EPA was passed, the Rule's advisory committee notes unequivocally stated 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 to the 1966 Amendments, at 39 F.R.D. 98, 104; *see also Kuhn v. Phila. Elec. Co.*, 487 F. Supp. 974, 977 (E.D. Pa. 1980) (citing same).

Had Congress wished to apply the modern Rule 23 to systemic actions under the EPA or other provisions of the FLSA it could have amended the statutory scheme to do away with the § 216(b) collective action procedure. It did not do so. Although Congress has modified the collective action mechanism over the years, *see, e.g.*, Portal-to-Portal Act of 1947, Pub. L. No. 80-49, 61 Stat. 84 (1947) (codified at 29 U.S.C. § 251), and likewise modified the EPA, *see, e.g.*, Education Amendments of 1972, Pub. L. No. 92-318, § 916(b)(1), 86 Stat. 235, 375 (codified as amended at 29 U.S.C. § 213(a)(1)), its intent to enable collective actions under

these statutes has never wavered. This court should honor Congress's clear approach for claims under the EPA and the FLSA more broadly.

With Title VII of the Civil Rights Act of 1964 ("Title VII"), Congress made a different choice. Just one year after it passed the EPA, Congress prohibited employment discrimination on the basis of race, color, religion, sex, and national origin with Title VII. *See* 42 U.S.C. § 2000e *et seq*. These employment-related proscriptions did not amend the FLSA and the specialized collective action rules of § 216(b) did not apply. *See id*. Nor did Congress attempt to merge Title VII's broader prohibitions with the EPA's ban on sex discrimination. Rather, the two statutes have operated separately with independent enforcement for half a century. Most courts in turn have applied Rule 23 to Title VII, but not to the EPA.[3]

[3] Indeed, in a number of cases, courts have analyzed Title VII class action claims under Rule 23 separate and apart from EPA collective action claims under § 216(b). *See, e.g.*, *Jarvaise v. Rand Corp.*, 212 F.R.D. 1, 4-5 (D.D.C. 2002) (granting motion for certification under Rule 23 and issuing notice under § 216(b)); *Rollins v. Ala. Cmty. Coll. Sys.*, No. 2:09cv636, 2010 WL 4269133, at *3-12 (M.D. Ala. Oct. 25, 2010) (denying motion for certification under Rule 23 and refusing to issue notice under § 216(b)); *Rochlin v. Cincinnati Ins. Co.*, No. IP00-1898, 2003 WL 21852341, at *9-12, *14-16 (S.D. Ind. July 8, 2003) (decertifying class under Rule 23 but issuing notice under § 216(b)); *Cf. Ebbert v. Nassau County*, No. 05-CV-5445, 2007 WL 2295581, at *2-5 (E.D.N.Y. Aug. 9, 2007) (granting motion for certification under Rule 23 for New York State Equal Pay Act claim and issuing notice under § 216(b) on EPA claim).

B. The Opt-In Structure of the Collective Action Mechanism Requires Potential Plaintiffs to Receive Prompt Notice.

As courts facing EPA collective action claims have noted, the benefits of an opt-in collective action structure are plenty: "'[t]he judicial system benefits by efficient resolution in one proceeding of common issues of law and fact arising from the same alleged discriminatory activity.'" *Moore*, 2012 WL 2574742, at *8 (quoting *Hoffmann-La Roche*, 493 U.S. at 170); *Collins*, 788 F. Supp. 2d at 1331 (same); *see also Garner v. G.D. Searle Pharm. & Co.*, 802 F. Supp. 418, 422 (M.D. Ala. 1991); *Rehwaldt v. Elec. Data Sys. Corp.*, No. 95-876, 1996 WL 947568, at *3 (W.D.N.Y. Mar. 28, 1996). Because employees must affirmatively choose to opt into a collective action, these benefits "'depend on employees receiving accurate and timely notice concerning the pendency of the collective action, so that they can make informed decisions about whether to participate.'" *Ebbert v. Nassau County*, No. 05-CV-5445, 2007 WL 2295581, at *2 (E.D.N.Y. Aug. 9, 2007) (quoting *Hoffman-La Roche*, 492 U.S. at 170); *see also Rehwaldt*, 1996 WL 947568, at *3; *Bonilla v. Las Vegas Cigar Co.*, 61 F. Supp. 2d 1129, 1139 (D. Nev. 1999) (FLSA case); *Douglas v. GE Energy Reuter Stokes*, No. 1:07CV077, 2007 WL 1341779, at *3 (N.D. Ohio Apr. 30, 2007) (same). The first stage of the two-step process employed by the district court in this case is structured to provide this timely notice.

C. The Limits on Back Pay Under the EPA Make the Two-Step Approach to Collective Action Claims Crucial.

The limits on back pay available for EPA violations reinforce the need for timely notice under § 216(b) afforded by the two-step process. Claims under the EPA, along with the rest of the FLSA, must be filed within two years after the cause of action accrues, or within three years in the case of a willful violation. *See Ikossi-Anastasiou v. Bd. of Supervisors of La. State Univ.*, 579 F.3d 546, 552 (5th Cir. 2009) (citing 29 U.S.C. § 255(a)). Thus, courts may award only two years of back pay to the plaintiff for EPA violations, unless a willful violation is found. *See Hill v. J. C. Penney Co.*, 688 F.2d 370, 374 (5th Cir. 1982) (reversing district court on decision to award two, but not three, years of back pay). This time period is calculated retrospectively from the date the employee affirmatively opts into the suit, and not from the earlier date the collective action complaint is filed. *See* 29 U.S.C. § 256 (providing that opt-in plaintiff's claim commences not upon lawsuit's filing but "on the subsequent date . . . written consent is filed").

Courts adopting the two-step approach in EPA collective actions have balanced this unique feature of EPA and other FLSA claims with a prompt notice standard. *See, e.g.*, *Rochlin v. Cincinnati Ins. Co.*, No. IP00-1898, 2003 WL 21852341, at *15 (S.D. Ind. July 8, 2003) (holding, in context of EPA claim, that "the stricter Rule 23 test is irrelevant and unnecessary"). Altering this approach would entirely undermine the ability for potential plaintiffs to receive "accurate

and timely notice concerning the pendency of the collective action." *Hoffman-La Roche*, 493 U.S. at 170.

A contrary rule—one that delays notice to potential members of the collective action—would frustrate the "broadly remedial" purposes of EPA. If, to merely provide notice for collective actions under § 216(b), courts demand a substantial evidentiary showing akin to that required for Rule 23 certification, plaintiffs would spend significant time "procuring dozens of worker affidavits; taking multiple depositions; requesting and reviewing discovery documents; and writing the motion itself"—all before taking the initial step of notifying employees of their potential claims. Moss & Ruan, *supra*, at 566. In addition, "as with any major motion, the attorneys can spend months briefing and arguing the motion, plus additional months waiting for the court's decision. During this time, the two-year statute of limitations period 'clock' keeps ticking for each potential member until she joins the action, resulting in unrecoverable lost wages." *Id.* at 566-67. Not only that, but the efficiency gains of the collective action process will be lost as courts become weighed down in the morass of certification motions. *See Hoffmann-La Roche*, 493 U.S. at 170 (noting benefits to the judicial system of the collective action mechanism). In sum, a Rule 23-like certification standard for collective actions would frustrate the benefits that currently accrue to both

individuals and the courts by coupling the EPA's limit on back pay with a prompt notice standard.

D. A Stringent Front-End Standard for Issuing Notice of Collective Actions Would Allow for Strategic Gaming by Employers.

The rule proposed by Wells Fargo, and the inherent delay that will accompany it, could have the unfortunate consequence of incentivizing strategic gaming by employers. Because the statute of limitations clock continues to run until a plaintiff files an opt-in notice with the court—which, of course, can only happen after the employee receives notice—an employer could minimize its exposure and even moot employees out of the collective action through strategic delay. To illustrate, if after an employee files a collective action complaint she or another member of the putative class leaves the company, they would not continue to accrue lost wages, and each day that the clock continues to run would represent another day of unrecoverable back wages. The high turnover rates for hourly employees coupled with a lengthy process akin to a Rule 23 class certification would undoubtedly lead to a loss in back pay for certain employees. *See* Thomas E. Willging et al., *An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges*, 71 N.Y.U. L. Rev. 74, 102 (1996) (reporting that in three-quarters of cases, courts in the study's sample ruled on class certification within between 7.6 and 15.8 months); Mel Kleiman, *How to Find and Recruit the Best Hourly Employees*, TLNT, Oct. 29, 2010, http://www.tlnt.com/2010/10/29/how-to-find-

and-recruit-the-best-hourly-employees/ (turnover rates for hourly workers historically run from seventy to 120 percent per year in most industries). This structure would encourage employer foot dragging: the longer it would take to issue notice, the less back pay the employees will be able to recover. In short, the EPA and FLSA approach to back pay only works in a scheme where employees receive prompt notice. This unique characteristic of claims under the EPA and the FLSA is completely inconsistent with delaying notice, thus making it more difficult for potential class members to learn of the suit and their ability to opt in.

II. COLLECTIVE ACTIONS ARE CENTRAL TO ACHIEVING THE PURPOSES OF THE EPA AND THE FLSA BY ENSURING THAT WORKERS RECEIVE INFORMATION NECESSARY TO ASSERT THEIR RIGHTS.

Notice to potential plaintiffs that a collective action has been brought on their behalf under the EPA serves the critical purpose of alerting workers to pay discrimination that they otherwise may have insufficient information to recognize. As Justice Ginsburg has noted, compensation discrimination is often "hidden from sight." *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 649 (2007) (Ginsburg, J., dissenting) *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (codified at 42 U.S.C. § 2000e-5(e)). In the absence of "an established compensation system," employees frequently remain in the dark about the decision-making process, and "records of the reasons underlying pay decisions rarely exist." Eisenberg, *supra*, at 50. Information about wages and

any rationale for disparities between employees' wages lies directly, and often exclusively, with the employer. If an employee learns of pay disparities at all, it is likely through "information suggestive of discrimination [that] trickles in piecemeal, in anecdotal fashion, through the sharing of experiences with colleagues." Deborah L. Brake & Joanna L. Grossman, *The Failure of Title VII as a Rights-Claiming System*, 86 N.C. L. Rev. 859, 891 (2008).

This problem is exacerbated by common workplace policies forbidding workers from discussing wages or salaries, which further obscure employer pay policies and practices. *See* H.R. Rep. No. 110-237, at 7 (2007) (House Report on the Lilly Ledbetter Fair Pay Act of 2007); Leonard Bierman & Rafael Gely, *"Love, Sex and Politics? Sure. Salary? No Way": Workplace Social Norms and the Law*, 25 Berkeley J. Emp. & Lab. L. 167, 171 (2004). One-third of private sector employers have rules prohibiting employees from discussing pay with their co-workers. *Id.* at 168; Rafael Gely & Leonard Bierman, *Pay Secrecy/Confidentiality Rules and the National Labor Relations Act*, 6 U. Pa. J. Lab. & Emp. L. 121, 125 (2003) (reporting results of online survey). In a recent survey of private and public sector employees, fifty percent of respondents, and sixty-one percent of private sector employees, reported that discussing pay was prohibited or discouraged in their workplace. Only twenty-seven percent of those surveyed reported that pay information was public. *See* Press Release, Institute for Women's Policy Research,

Pay Secrecy and Paycheck Fairness (Nov. 16 2010), http://myopenworkplace.com/wpcontent/uploads/2010/11/PressRelease_PaySecrecy_16Nov2010.pdf. And labor cases confirm that many employers maintain formal or informal policies prohibiting discussions of compensation.[4]

Even when conversations about pay are not explicitly prohibited by an employer, an informal "code of silence" surrounding pay in many workplaces poses a substantial practical barrier to gaining information about coworkers' compensation. Bierman & Gely, *supra*, at 175. The difficulty in learning about coworkers' pay rates is heightened for new employees, who typically lack the knowledge of workplace culture and the informal connections with coworkers that allow some workers ultimately to penetrate the code of silence regarding compensation. Without access to data for pay practices across an organization, it is difficult for individuals to recognize or confirm discrimination.

Moreover, unless an employer actually cuts an employee's pay, the decision to grant her a particular salary is seldom understood to be adverse, unlike a firing or a refusal to hire an employee. Pay discrimination often occurs not because a

[4] Examples of such policies include rules explicitly prohibiting discussions of wages, *e.g.*, *NLRB v. Vanguard Tours, Inc.*, 981 F.2d 62, 66 (2d Cir. 1992); *Jeannette Corp. v. NLRB*, 532 F.2d 916, 918 (3d Cir. 1976), a broad confidentiality policy that could be construed to cover discussions of wages, *Cintas Corp. v. NLRB*, 482 F.3d 463, 465-66 (D.C. Cir. 2007), manager statements that employees could not discuss wages, *NLRB v. Main Street Terrace Care Ctr.*, 218 F.3d 531, 534 (6th Cir. 2000); *Wilson Trophy Co. v. NLRB*, 989 F.2d 1502, 1511 (8th Cir. 1993), and a prohibition against opening paychecks on the work site, *id.* at 1510.

female employee is denied a raise, but because male employees receive larger raises. "Having received a pay increase, the female employee is unlikely to discern at once that she has experienced an adverse employment decision." *Ledbetter*, 550 U.S. at 650 (Ginsburg, J., dissenting). When an employee does not recognize a pay decision as adverse, she is less vigilant for indicators of discrimination. For example, she is unlikely to seek an explanation from the employer, evaluate it for pretext, or make particular note of any comments suggestive of stereotyping or bias. This further obscures individuals' ability to identify and challenge pay discrimination. Collective actions, and the prompt notice inherent in the two-step process, help overcome these information barriers by providing potential plaintiffs with notice of possible pay discrimination.

CONCLUSION

For the foregoing reasons, the courts should deny the petition for a writ of mandamus.

Date: December 20, 2012

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE PURSUANT TO RULE 32(a)(7)

I hereby certify the following:

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 3,998 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in Times New Roman 14-point font.

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