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**BY ECF**

Honorable Thomas J. McAvoy
U.S. District Court for the Northern District of New York
U.S. Courthouse and Federal Building
15 Henry Street
Binghamton, NY 13901

Re: *Bridget Mabe v. Wal-Mart Associates, Inc.*, No. 1:20-cv-00591

Dear Judge McAvoy:

This firm represents 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, and the Business Council of Westchester (collectively, "*Amici*"). We write to respond to Plaintiff's May 2, 2022 letter (ECF No. 51) urging the Court to "disregard" *Amici*'s motion for leave to file an *amicus* brief (ECF No. 49). As explained below, Plaintiff's arguments lack merit and merely underscore the importance of certifying the Court's March 24, 2022 order for interlocutory appeal.

*First*, Plaintiff wrongly asserts that *Amici* do not offer "unique information or perspective." ECF No. 50 at 2. "Amicus briefs are frequently welcome concerning legal issues that have potential ramifications beyond the parties directly involved." *Earth Island Inst. v. Nash*, 2019 WL 6790682, at *2 (E.D. Cal. 2019). So, too, here. *Amici's* members include hundreds of New York employers from various industries who collectively employ millions of New York workers—retailers alone employ almost 2 million workers in New York, even though not all of these workers are "manual workers." ECF No. 49 ¶ 1; Retail's Impact in New York, National Retail Federation (2020), https://cdn.nrf.com/sites/default/files/2020-09/new-york-2020-retails-impact.pdf.

*Amici* thus have a unique vantage point that enables them to offer valuable context to the Court beyond that provided by the parties. Their members' broad, real-world experiences can inform the Court on the enormous practical significance of the legal question at issue in the Court's March 24 order and can highlight the importance of obtaining immediate review from the Second Circuit and, potentially, the N.Y. Court of Appeals.

"Providing practical perspectives on the consequences of potential outcomes" and "[e]xplaining the broader … commercial context in which a question comes to the court" are classic, helpful, and appropriate roles of an *amicus*. *Prairie Rivers Network v. Dynegy Midwest Generation,*

*LLC*, 976 F.3d 761, 763 (7th Cir. 2020). That is precisely what *Amici* do in their proposed brief. For example, *Amici* show that, if Section 191 is privately enforceable, small businesses face potential liability that could easily put them out of business simply for using the most common (biweekly) pay cycle in the country. *See* ECF No. 49-1 at 5–6. *Amici* also show that even large employers face astonishing liability—again, for paying workers in full every two weeks as agreed—of nearly $1 billion. *See id.* at 6. This is relevant context not developed by the parties, who are focused on their particular interests in the outcome of this case.

*Second*, Plaintiff inaccurately portrays *Amici* as lacking a sufficient interest in this matter simply because "none of them are [sic] actual defendants in any claim filed under NYLL § 191 or NYLL § 198." ECF No. 51 at 2. That charge ignores the very nature of *Amici*'s activities. *Amici* are trade and business organizations that exist to represent the interests of their members. Courts regularly accept *amicus* briefs from such organizations because their unique perspective and broader interest (compared to individual parties) "helps ensure that there has been a complete and plenary presentation of difficult issues so that the court may reach a proper decision." *E.g.*, *C&A Carbone, Inc. v. County of Rockland*, 2014 WL 1202699, at *4 (S.D.N.Y. 2014) (cleaned up).

Plaintiff also overlooks that many of *Amici*'s members are defendants in cases involving claims under Section 191; many of *Amici*'s members have been threatened with such litigation; and all of *Amici*'s members who employ manual workers in New York are impacted by the prospect of financially ruinous Section 191 litigation. Thus, "it is fairly evident that the ultimate outcome" here "could prove dispositive" in future disputes involving the employers and interests *Amici* represent. *See id.*

*Third*, Plaintiff asserts that *Amici* "attempt to inject interest group politics into this matter." ECF No. 51 at 2. Plaintiff does not elaborate, but insofar as Plaintiff complains that *Amici*'s position aligns with Defendant's (rather than neither party's), it is well-settled that "there is no rule that amici must be totally disinterested." *James Square Nursing Home, Inc. v. Wing*, 897 F. Supp. 682, 683 n.2 (N.D.N.Y. 1995) (cleaned up). Indeed, by advocating for such a rule, Plaintiff would set up an impossible standard, for she simultaneously contends that *Amici* are too interested and not interested enough in this case, *see supra*, to be permitted to submit their *amicus* brief.

*Fourth*, that Defendant has its own counsel, *see* ECF No. 51 at 2, does not negate the value of *Amici*'s brief. "Even when a party is very well represented, an amicus may provide important assistance to the court," such as "explain[ing] the impact a potential holding might have on an industry or other group." *Neonatology Assocs. v. C.I.R.*, 293 F.3d 128, 132 (3d Cir. 2002).

*Fifth*, it is no issue that *Amici* did not file their brief within seven days of Defendant's brief. As Plaintiff correctly observes, *see* ECF No. 51 at 3, Federal Rule of Appellate Procedure 29 does not govern motions to file amicus briefs in the district courts. *See, e.g.*, *Auto. Club, Inc. v. Port Authority*, 2011 WL 5865296, at *1 (S.D.N.Y. 2011) ("[T]here is no governing standard, rule, or statute prescribing the procedure for obtaining leave to file an amicus brief in the district court."). FRAP 29's seven-day deadline makes sense in the context of appeals, where briefing schedules are set out sufficiently advance to give potential *amici* at least one month to prepare and submit a brief. *See, e.g.*, Fed. R. App. P. 31(a); 2d Cir. R. 31.2(a). That was not the case here.

*Finally*, contrary to Plaintiff's unexplained assertions, *see* ECF No. 51 at 3, the Court's consideration of *Amici's* brief would not prejudice Plaintiff or unduly delay this case. Plaintiff cannot claim prejudice because she responded to the substance of *Amici*'s brief right in her letter, *see id.* at 2–3, and *Amici* do not oppose Plaintiff's request for leave to further respond to their brief. Nor can

Plaintiff credibly claim undue delay. *Amici* filed their motion for leave last week, and with this filing, the motion is fully briefed and the proposed brief is before the Court.

Indeed, courts regularly consult *amicus* filings when deciding whether to certify an interlocutory appeal. *See, e.g.*, *Younger v. Hunter Mountain Ski Bowl, Inc.*, 1995 WL 170269, at *2 (N.D.N.Y. 1995) (considering *amicus* brief in support of motion to certify order for interlocutory appeal); *Mitre Sports Int'l Ltd. v. HBO, Inc.*, 2014 WL 12802684, at *1 n.1 (S.D.N.Y. 2014) (same); *Strougo v. Scudder*, 1997 WL 473566, at *3 (S.D.N.Y. 1997) (same); *U.S. ex rel. Fry v. Heath All.*, 2009 WL 485501 (S.D. Ohio 2009) (same); *Friends of the Earth, Inc. v. Laidlaw Envt'l Servs.*, 890 F. Supp. 470, 499 & n.1 (D.S.C. 1995) (same); *Broadbent v. Org. of Am. States*, 481 F. Supp. 907, 907 & n.1 (D.D.C. 1978) (same). *Amici* respectfully submit that their filing will aid the Court in its determination of whether an interlocutory appeal is warranted.

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For these reasons, and those stated in *Amici's* motion for leave, *Amici* respectfully request leave to submit their brief as *amici curiae*.

Thank you for your time and attention to this matter.

Respectfully submitted,

s/ Stephanie Schuster
Stephanie Schuster

cc: all counsel of record