CENTER *for* HEALTH LAW
and POLICY INNOVATION
HARVARD LAW SCHOOL

1585 Massachusetts Avenue
Cambridge, MA 02138
www.chlpi.org

December 5, 2018

Francis V. Kenneally
Clerk for the Commonwealth
Supreme Judicial Court
John Adams Courthouse
Suite 1-400
Pemberton Square
Boston, MA 02108

Re: *Gammella v. P.F. Chang's Chinese Bistro, Inc.*
Case No. SJC-12604

Dear Sir:

Enclosed for filing in the above-referenced matter please find the **Brief of Amicus Curiae Center for Health Law & Policy Innovation of Harvard Law School in Support of the Plaintiff-Appellant** in the above-referenced matter. Should you have any questions or concerns, please do not hesitate to contact me at 617-496-0901. Thank you for your attention in this matter.

Sincerely,

Kevin Costello
Director of Litigation

Enclosure

cc:

Lisa Stephanian Burton, Esq.
Danielle Y. Vanderzanden, Esq.
Nailah A. Freeman, Esq.
Ogletree Deakins
One Boston Place, Suite 3500
Boston, MA 02108

Stephen Churchill
FAIR WORK, P.C.
192 South St., Ste. 450
Boston, MA 02111

SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH OF MASSACHUSETTS

SJC-12604

FELICE GAMMELLA,

Plaintiff-Appellant,

v.

P. F. CHANG'S CHINESE BISTRO, INC.,

Defendant-Appellee.

ON DIRECT APPELLATE REVIEW FROM A JUDGMENT OF THE SUPERIOR COURT

BRIEF OF AMICUS CURIAE CENTER FOR HEALTH LAW & POLICY INNOVATION OF HARVARD LAW SCHOOL IN SUPPORT OF THE PLAINTIFF-APPELLANT

Center for Health Law & Policy
Innovation of Harvard Law School,

Dalia Deak
(Admission to Practice via Supreme Judicial Court Rule 3:03 pending)
Kevin Costello BBO# 669100
Center for Health Law & Policy Innovation
Harvard Law School
1585 Massachusetts Avenue
Cambridge, MA 02138
Boston, MA 02111
Tel: (617) 496-0901
kcostello@law.harvard.edu

Dated: DECEMBER 5, 2018

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

CORPRATE DISCLOSURE STATEMENT 1

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. This Court should take steps to ensure that the rights of future litigants and absent class members are protected. 5

II. The Wage Act's language and legislative purpose weigh heavily in favor of the Court rejecting attempts to prevent class certification appeals from being heard. 13

III. This Court should exercise its discretion and rule on Mr. Gammella's claims because they are well within recognized exceptions to the mootness doctrine. 17

a. This case and others like it are of public importance because they implicate the rights of employees across the Commonwealth under the Wage Act and the rights of individuals and absent class

members seeking relief through class actions. 19

b. This case is likely to arise again because defendants will use it as a blueprint to avoid collective actions under the Wage Act and class actions more broadly. 23

c. Mr. Gammella's claims and others like it are unlikely to obtain appellate review. 27

TABLE OF AUTHORITIES

Cases

Acting Superintendent of Bournewood Hosp. v. Baker, 431 Mass. 101 (2000) 17

Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997) . 21

Attorney Gen. v. Commissioner of Ins., 403 Mass. 370 (1988) 17

Bd. of Selectmen of Braintree v. Cty. Comm'rs of Norfolk, 399 Mass. 507 (1987) 19

Boelter v. Bd. of Selectmen of Wayland, 479 Mass. 233 (2018) 19

Camara v. Attorney Gen., 458 Mass. 756, 760 (2011) .. 15

Campbell-Ewald Co. v. Gomez, ___ U.S. ___, 136 S.Ct. 663 (2016) 8, 24

Cantell v. Comm'r of Correction, 475 Mass. 745 (2016) 8, 9

Crocker v. Townsend Oil Co., 464 Mass. 1 (2012) 14

Depianti v. Jan-Pro Franchising Int'l, Inc., 465 Mass. 607 (2013) 15

Dixon v. City of Malden, 464 Mass. 446, 452 (2013) .. 15

Eisen v. Carlisle and Jacquelin, 417 U.S. 156, 161 .. 22

Electronic Data Sys. Corp. v. Attorney Gen., 454 Mass. 63 (2009) 15

Hazel's Cup & Saucer, LLC v. Around The Globe Travel, Inc., 86 Mass. App. Ct. 164 (2014) 6

Lehigh Valley Coal Co. v. Yensavage, 218 F. 547, 553 (2d Cir. 1914) 15

Machado v. System4 LLC, 465 Mass. 508 (2013) 16, 21

Melia v. Zenhire, Inc., 462 Mass. 164 (2012) 13

Patel v. Martin, No. SJC-12500, 2018 WL 6186360, at *2 (Nov. 28, 2018) 6

Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985) 10

Reniere v. Alpha Mgmt. Corp., No. MICV2013-00560, 2014 WL 7009753 (Mass. Super. Nov. 21, 2014) 8

Salvas v. Wal-Mart Stores, Inc., 452 Mass. 337 (2008) 6, 16

Somers v. Converged Access, Inc., 454 Mass. 582, 591 (2009) 15

Spence v. Reeder, 382 Mass. 398 (1981) 23

Tze-Kit Mui v. Massachusetts Port Auth., 478 Mass. 710, 711 (2018) 15

Wilson v. Comm'r of Transitional Assistance, 441 Mass. 846 18

Wolf v. Commissioner of Pub. Welfare, 367 Mass. 293 (1975) 8, 22, 23, 28

Statutes

G. L. c. 149, § 148 14

G. L. c. 149, § 150 14

G. L. c. 151, § 1 14

G. L. c. 151, § 20 ..... 11, 13

G. L. c. 211, § 3 6

G. L. c. 231, § 113 6

G. L. c. 93A, § 9 11

Other Authorities

Arthur H. Jr. Travers & Jonathan M. Landers, The Consumer Class Action, 18 U. Kan. L. Rev. 811 (1970) 10

Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 Harv. L. Rev. 356, 497 Prefatory Note (1967) 21

David Cooper and Teresa Kroger, *Employers Steal Billions from Workers' Paychecks Each Year*, Economic Policy Institute (May 10, 2017) 20

John C. Jr. Coffee, *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. Chi. L. Rev. 877 (1987). 26, 27

Katherine S. Kattaya, *Class Actions 101: Mooting a Putative Class Action after* Campbell-Ewald Co. v. Gomez, Am. Bar Assoc. (Oct. 24, 2016).....25

Office of Attorney General Maura Healey, *The AG's Labor Day Report 2018: Protecting Massachusetts Workers*, (Aug. 31, 2018).....20

Richard P. Eckman, Douglas D. Hermann, Jan. P. Levine, Robin P. Summer, Lindsay D. Breedlove & Janine P. Yaniak, *It is Not All Bad News from the Supreme Court in* Campbell-Ewald v. Gomez, Pepper Hamilton, LLP (Jan. 25, 2016).....25

Risk-Preference Asymmetries in Class Action Litigation, 119 Harv. L. Rev. 587 (2005).....26

Stephen E. Fox, Gabrielle Levin & Abigail Pessen, *Offers of Judgment in Employment Litigation After* Campbell-Ewald *and* Fulton Dental, Strafford (Sep. 28, 2017).....25

Rules

Mass. R. Civ. P. 23 23

Treatises

1 William B. Rubenstein, *Newberg on Class Actions* (5th ed. 2018).....10, 11, 22

CORPRATE DISCLOSURE STATEMENT

The Center for Health Law and Policy Innovation of Harvard Law School (CHLPI) is a part of Harvard University, which is governed by the President and Fellows of Harvard College as a charitable corporation established under the laws and Constitution of the Commonwealth of Massachusetts and is an educational institution located in Cambridge, Massachusetts, with no other parent corporation. CHLPI does not issue stock, and so no publicly held corporation owns 10% or more of the amicus curiae party's stock.

INTEREST OF AMICUS CURIAE

CHLPI advocates for legal, regulatory, and policy reform to improve the health of vulnerable populations, with a focus on the needs of low-income people living with chronic illnesses and disabilities. CHLPI works with consumers, advocates, community-based organizations, health and social services professionals, food providers and producers, government officials, and others to expand access to high-quality health care and nutritious, affordable food; to reduce health disparities; to develop community advocacy capacity; and to promote more equitable and effective health care and food systems.

CHLPI is a clinical teaching program of Harvard Law School and mentors students to become skilled, innovative, and thoughtful practitioners as well as leaders in health, public health, and food law and policy.

In particular, CHLPI engages in impact litigation as one method to achieve its policy reform goals. Such work often takes the form of class action litigation, aggregating the widespread claims of a group of consumers into a single case or controversy appropriate for judicial review. CHLPI and its clients thus have a direct interest in the development of jurisprudence with respect to class claims, and in ensuring that courts retain primary focus in this area on protecting the rights of absent class members.

This brief is filed in accordance with Mass. R. App. P. 17 in response to the October 10, 2018 solicitation of the Supreme Judicial Court in this matter.

SUMMARY OF ARGUMENT

The second Question Presented in this matter raises vitally important issues related to the interests of absent class members in putative class action cases in Massachusetts. Left unaddressed, the

Defendant's tactics following the Superior Court's denial of class certification would establish a blueprint for future litigants that wrests control of the appellate interests of absent class members away from the plaintiff and transfers it into the hands of defendants. The prospective risk presented by these facts is that clearly erroneous denials of class certification will evade review in the future, as defendants will be able to manufacture mootness and destroy the ability to appeal simply by tendering an unaccepted check for individual relief to the plaintiff before an appeal is ripe. Regardless of the Court's ruling with respect to the first Question Presented, it should thus take steps to mitigate this prospective risk by offering guidance on the second question that recognizes the importance of allowing putative class plaintiffs to appeal class certification denials despite maneuvers similar to those of the Defendant here.

First, ruling on Mr. Gammella's appeal, without doing more to guide lower courts, would mean that future litigants facing erroneous class certification denials could see their appeal rights unfairly extinguished. This is because appellate courts,

following the mandatory authority of this Court, would be compelled dismiss cases like Mr. Gammella's without reaching the merits of the class certification denial. This outcome would deprive future litigants bringing meritorious class claims of the right to appeal on behalf of themselves and the absent class members they seek to represent.

Second, the Wage Act's language and legislative purpose express a policy preference for reaching the merits of this appeal and future ones like it, consequently rejecting Defendant's attempt to preempt appellate review of the Superior Court's class certification ruling. Recognizing the unique problems that low-wage workers face, including time, money, and risk of retaliation, the Legislature extended remarkable protection to this group. In so doing, the Legislature expressed a policy preference for protecting low-wage workers, especially in their role as absent class members. This Court has recognized as much, consistently holding that the purpose of the Wage Act is to protect employees and their rights. In the same vein, this Court should view the second Questions Presented through the lens of protecting future litigants suing under the wage laws.

Finally, this Court should exercise its discretion and reach the merits of this appeal, even if it affirms the Superior Court's conclusion that the Plaintiff's claims are technically moot. Prior decisions have emphasized that courts should reach the merits of cases that implicate matters of public importance, are likely to recur again, and may evade appellate review. Mr. Gammella's case and others like it fit squarely into each of these considerations: they implicate matters of public importance because they are class actions brought under the wage laws; they are likely to recur again because the practice of tendering a check to manufacture mootness will proliferate; and they will evade review because, absent guidance from this Court, a dismissal of this case would virtually guarantee the dismissal of future cases without an opportunity for meaningful appellate review.

ARGUMENT

I. This Court should take steps to ensure that the rights of future litigants and absent class members are protected.

The peculiar procedural circumstances presented in this case expose a risk for future litigants that

this Court should take steps to mitigate. Fundamental interests of future plaintiffs and the absent class members they seek to represent are in danger of vanishing absent protection from this Court. Without such steps, this Court might inadvertently create a back door exception to the normal presumption inherent in our system that decisions as significant as the denial of class certification ought to be subject to appellate review. *See Hazel's Cup & Saucer, LLC v. Around The Globe Travel, Inc.*, 86 Mass. App. Ct. 164, 166 (2014) (citing *Salvas v. Wal-Mart Stores, Inc.*, 452 Mass. 337, 361 (2008)) (observing that "a class certification order must be reversed if it is based upon legal error"); *Patel v. Martin*, No. SJC-12500, 2018 WL 6186360, at *2 (Nov. 28, 2018) ("When a final judgment enters in a civil case in the Superior Court under Mass. R. Civ. P. 54 [], a party aggrieved has the right to appeal from the judgment to a panel of the Appeals Court) (citing G. L. c. 231, § 113). *Cf.* G. L. c. 211, § 3 (affording the Supreme Judicial Court general superintendence power over all courts of inferior jurisdiction to correct and prevent errors and abuses, as necessary to the furtherance of justice).

The risk present in Mr. Gammella's case traces its origin to the Superior Court's denial of class certification. Ordinarily, Mr. Gamella would retain control over whether such a decision is appealed – either at an interlocutory stage or at judgment – and thus maintain some role in the protecting the interests of absent members of the putative class. The Defendant's tactic here – if sanctioned by the Court – would pull the rug out from under Mr. Gamella and future litigants like him, by transferring control of a class certification appeal from the plaintiff to the defendant. Mr. Gamella's role in protecting the rights of absent class members on appeal is too important to allow this procedural anomaly to gain approval -- even tacitly -- in this Court.

While discretion is afforded to lower courts in their findings, the very existence of appellate courts and appellate review is an acknowledgment that trial court errors sometimes occur. Because the procedural circumstances present here are likely to recur, future defendants could take advantage of a clearly erroneous denial of class certification and manufacture mootness by unilaterally tendering an unaccepted check to the plaintiff, foreclosing appeal. Such a finding of

mootness of the class claims would not otherwise be justified absent the erroneous denial. *See Wolf v. Commissioner of Pub. Welfare*, 367 Mass. 293, 297-298 (1975) (adopting the rule "that a class action is not mooted by the settlement or termination of the named plaintiff's individual claim").[1] Consequently, a future plaintiff - even one who refuses the tender of the defendant's check - will lose control over the ability to seek appellate review of her class certification denial. Without specific guidance from this Court, such appeals are at risk of being dismissed as moot.

This outcome is made all the more probable given the language in *Cantell v. Commissioner of Correction*. 475 Mass. 745 (2016). *Cantell* describes the plaintiff's claims as "not moot because the plaintiffs

---

[1] The underlying principle in cases like *Wolf* and those relied on by the Plaintiff-Appellant - *Campbell-Ewald Co. v. Gomez*, ___ U.S. ___, 136 S.Ct. 663 (2016) and *Reniere v. Alpha Mgmt. Corp.*, No. MICV2013-00560, 2014 WL 7009753 (Mass. Super. Nov. 21, 2014) - applies, despite the fact that class certification was not yet decided in those matters at the time of the defendant's unilateral attempt to moot the claims. The core issue implicated by the Appellant's effort to manufacture mootness here is the threat to the appellate interest of absent class members in a comprehensive review of a lower court's potentially erroneous class certification denial. Proper adjudication of such a threat should not turn on the outcome of the very decision for which review is sought.

brought this case as a putative class action, and the class action allegations contained in the amended complaint remain operative until a judge has considered and rejected them on their merits." 475 Mass. 745, 753 (2016). A dismissal in Mr. Gammella's case, when taken with the offhand statement in *Cantell*, would create a near certainty that, absent additional guidance from this Court, appellate courts would dismiss cases like Mr. Gammella's as moot because a "judge has considered and rejected [the class claims] on their merit." *Cantell*, 475 Mass. at 753. But because the circumstances *sub judice* were not present in *Cantell*, there was no occasion to consider the interests of absent class members in the appeal of an erroneous class certification denial. In the more well-developed facts here presented, the Court can recognize that even after a trial court judge has rejected the class claims on their merits, the interest of putative class members in the litigation is not wholly extinguished. The plaintiff's ability to seek review ought to remain. Otherwise, future litigants bringing meritorious class claims mistakenly rejected in the trial court would see their appeal

rights, and the interests of absent class members, severely undermined.

The consequences of this outcome are particularly worrying in the context of the traditional class case that aggregates hundreds or thousands of small claims. Consumer class actions, for example, often involve claims that are of little value separately, but are widespread. *See, e.g.*, Arthur H. Jr. Travers & Jonathan M. Landers, The Consumer Class Action, 18 U. Kan. L. Rev. 811, 813 (1970) (describing the lack of incentives for individual litigation given that the costs dwarf the amount at stake). Such claims are unlikely to be brought individually, and would greatly tax the judicial system in the event they were. 1 William B. Rubenstein, *Newberg on Class Actions* § 1:12 (5th ed. 2018) (describing the "injustice" that the 18th century English version of class actions, "Bills of Peace," sought to remedy); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 813 (1985) ("The plaintiff's claim may be so small, or the plaintiff so unfamiliar with the law, that he would not file suit individually, nor would he affirmatively request inclusion in the class if such a request were required by the Constitution."). Recognizing this, the

Legislature encouraged the use of class actions in order to ensure that these claims are reviewed and judicial economy is achieved. *See, e.g.*, G. L. c. 93A, § 9. Because these types of actions implicate significant numbers of people with little ability to otherwise seek redress, handing defendants a free pass to manufacture mootness in future cases like Mr. Gammella's would greatly jeopardize important rights.

Further, this outcome directly undermines the legislative preference for collective action, as expressed in the Wage Act itself, G. L. c. 151, § 20, as well as the due process protections for absent class members that are reflected in Rule 23. For instance, because absent class members are not directly involved in the litigation, both the class representative and class counsel are required to fairly and adequately represent absent class members' interests. *See* Rubenstein, *supra* § 1:5. Moreover, the court maintains "substantial supervisory authority over the quality of representation and specific aspects of the litigation so that it, too, may protect the interests of absent class members." *Id.* These safeguards recognize the risks to absent class

members, and the important role of the Legislature and the courts in protecting their interests.

Appellee's argument that the Court's concerns should be allayed because Mr. Gammella has been afforded the ability to argue the merits of class certification in this appeal is unpersuasive. Resp. Br. at 49-50. Indeed, the very reason that Mr. Gammella is able to argue his class certification question is precisely because this Court has not yet opined on the effect of Appellee's tactics or dismissed a similar case without comment.

If this Court were to dismiss Mr. Gammella's case, without doing more to guide lower courts, the risk to future litigants and absent class members facing manufactured mootness would become manifest, irrespective of P.F. Chang's current position. Because of this urgent risk, this Court should reach the merits of the second Question Presented and take steps to ensure that litigants facing erroneous class certification denials do not see their appeal interests eliminated.

II. The Wage Act's language and legislative purpose weigh heavily in favor of the Court rejecting attempts to prevent class certification appeals from being heard.

The Wage Act demonstrates a long-standing legislative preference for safeguarding employee rights – a preference that weighs heavily in favor of reaching the merits of this appeal and future cases like it. Over the course of its 140 year history, the Legislature has amended the Wage Act to "broaden[] the scope of employees covered, the type of eligible compensation, and the remedies available to employees whose rights have been violated." *Melia v. Zenhire, Inc.*, 462 Mass. 164, 171 (2012). Today, the Wage Act confers on employees a set of expansive protections, including a right to sue on behalf of others, G. L. c. 151, § 20; mandatory treble damages, G. L. c. 149, §

150; a public enforcement mechanism, *id.*;[2] a limit on defenses for employers, *id.*;[3] and a prohibition on waivers of employee rights through "special contracts," G. L. c. 149, § 148; G. L. c. 151, § 1. There can be little doubt that the Wage Act represents the Legislature's preference for shielding employees from "unscrupulous employers." *Melia*, 462 Mass. at 170 (quoting *Cumpata v. Blue Cross Blue Shield of Mass., Inc.*, 113 F. Supp. 2d 164, 167 (D. Mass. 2000)).

Massachusetts courts have regularly recognized this preference and used it to interpret the statute. This Court has "consistently held" that "the legislative purpose of the Wage Act . . . is to protect employees and their right to wages." *Crocker v. Townsend Oil Co.*, 464 Mass. 1, 13 (2012). *See also Tze-Kit Mui v. Massachusetts Port Auth.*, 478 Mass.

---

[2] As one Massachusetts Superior Court Justice put it, "[T]he Legislature wished to deter an employer from failing timely to pay wages and then, when a complaint was filed against it, effectively mooting the claim by then making payment." *Dobin v. CIOview Corp.*, No. CIV.A. 2001-00108, 2003 WL 22454602, at *7 (Mass. Super. Ct. Oct. 29, 2003). While the facts in *Dobin* differ somewhat from Mr. Gammella's case, the underlying principle is instructive. In enacting the Wage Act, the General Court was extraordinarily solicitous to the rights of plaintiffs, including by barring defensive maneuvering designed to moot claims before they could be fully adjudicated.

710, 711 (2018); *Electronic Data Sys. Corp. v. Attorney Gen.*, 454 Mass. 63, 70 (2009). Further, this Court has guided lower courts by stating that the Wage Act, should "be liberally construed, 'with some imagination of the purposes which lie behind' [it.]" *Depianti v. Jan-Pro Franchising Int'l, Inc.*, 465 Mass. 607, 620 (2013) (quoting *Lehigh Valley Coal Co. v. Yensavage*, 218 F. 547, 553 (2d Cir. 1914)). *See also Camara v. Attorney Gen.*, 458 Mass. 756, 760 (2011) (finding the Attorney General's interpretation of "special contracts" to be a "reasonable one" because it was "consistent with the statute's purpose, which is to protect employees and their right to wages").

This Court should view the questions presented here in the same light to both reach the merits of this appeal and to take steps that enable appellate review of class certification denials in the future. The Legislature has made clear that employers should not get a free pass when they violate the wage laws. Instead, they must "'suffer the consequences' of violating the statute[.]" *Dixon v. City of Malden*, 464 Mass. 446 (2013) (quoting *Somers v. Converged Access, Inc.*, 454 Mass. 582, 591 (2009)) (imposing strict liability on employers under the Wage Act). Yet, if

this Court allows the tactic deployed by the Appellee here to pass undisturbed, the consequences will be dire. Future defendants would be able to manufacture mootness and insulate themselves from the full scope of the Wage Act's consequences. This would, in turn, rob absent litigants of their appeal rights with the simple tender of a cashier's check to a single plaintiff, irrespective of the plaintiff's response and whether the class certification was in fact erroneous. *See* Section I, *supra*.

This outcome would clearly run afoul of the broad policy goals behind the Wage Act, which include "the deterrent effect of class action lawsuits and, unique to the employment context, the desire to allow one or more courageous employees the ability to bring claims on behalf of other employees who are too intimidated by the threat of retaliation and termination to exercise their rights under the Wage Act." *Machado v. System4 LLC*, 465 Mass. 508, 515 n.12 (2013). *See also Salvas*, 452 Mass. at 368-69 (instructing a lower court to exhaust alternatives for class certification before "essentially denying thousands of potentially meritorious, yet small, claims.") These well-established policy rationales underpin the right of

plaintiffs to bring collective actions on behalf of others. Viewed in concert with the fundamental right of appeal afforded to aggrieved parties in the normal course of litigation, such interests warrant the Court's action here. Allowing defendants to circumvent review with a unilateral tender would create a simple tool to extinguish the otherwise extant interests of plaintiffs and absent class members in their appeal.

III. This Court should exercise its discretion and rule on Mr. Gammella's claims because they are well within recognized exceptions to the mootness doctrine.

Given the potential consequences and the legislative preference for protecting employee rights, the instant case falls squarely within exceptions to the mootness doctrine. This Court has emphasized that if "the question is one of public importance, is very likely to arise again in similar circumstances, and where appellate review could not be obtained before the question would again be moot," an otherwise moot case may be heard. *Acting Superintendent of Bournewood Hosp. v. Baker*, 431 Mass. 101, 103 (2000) (quoting *Attorney Gen. v. Commissioner of Ins.*, 403 Mass. 370, 380 (1988)) (citations omitted).

In *Wilson v. Comm'r Of Transitional Assistance*, this Court considered a preliminary injunction preventing the Commissioner of Transitional Assistance from reducing the level of monthly benefits paid to the elderly, disabled, and children under the emergency aid program. 441 Mass. 846 (2004). The Court acknowledged that the case was moot, but nonetheless decided the appeal on its merits because it found that it implicated a matter of public importance, was likely to arise again, and would avoid appellate review. *Id.* at 850. In reaching this result, the Court found the circumstances to be sufficiently likely to arise again because the line item at issue had been unchanged for 8 years and was the subject of litigation for a second time. *Id.*

For the reasons that follow, this case, like *Wilson,* rises to the level that warrants proceeding even if the underlying claim is found to be technically moot. The doctrinal significance of the Appellee's effort to manufacture mootness, standing alone, warrant this Court's specific attention as a matter of public importance. *Supra,* Section I. Moreover, as argued above, the imbalance of power inherent in Mr. Gammella's case and those like it

virtually guarantee, as in *Wilson,* that questions of this sort are likely to arise again and evade review.

a. This case and others like it are of public importance because they implicate the rights of employees across the Commonwealth under the Wage Act and the rights of individuals and absent class members seeking relief through class actions.

Mr. Gamella's claim is well within the category of cases in which this Court has found the public importance exception to apply. Such cases arise in circumstances where the rights of large numbers of people are affected, as in disputes surrounding the transparency of government, *see Boelter v. Bd. of Selectmen of Wayland*, 479 Mass. 233, 237-38 (2018), or substantial changes to the use of a public hospital ward, *see Bd. of Selectmen of Braintree v. Cty. Comm'rs of Norfolk*, 399 Mass. 507, 508 (1987).[4]

The particular circumstances of Mr. Gammella's case rise to a similar level of public importance. Wage theft is a widespread problem with serious

---

[4] Another category of civil cases that have met the public importance threshold are cases that implicate core rights, like medical care without consent, *see Norwood Hosp. v. Munoz*, 409 Mass. 116, 121 (1991), or guardianship, *see L.B. v. Chief Justice of Prob. & Family Court Dep't*, 474 Mass. 231, 235 n.10 (2016). Such cases also fall within the shadow of the risk created by sanctioning the defendant's manufacture of mootness in this case.

consequences. A survey by the Economic Policy Institute estimates the total of wages stolen from workers nationally due to minimum wage violations exceeds $15 billion each year, with workers losing close to a quarter of their wages due to wage theft. David Cooper and Teresa Kroger, *Employers Steal Billions from Workers' Paychecks Each Year*, Economic Policy Institute (May 10, 2017).[5]

Estimates in Massachusetts tell a similar story. Data on enforcement actions by the Attorney General's office show the size and scope of violations pursued by the Attorney General in the last fiscal year. These data demonstrate that as a result of over 15,000 calls to the Fair Labor Hotline and over 5,700 filed complaints, the Attorney General assessed over $6.8 million in restitution and over $2.7 million in penalties against employers in a broad swath of industries. Office of Attorney General Maura Healey, *The AG's Labor Day Report 2018: Protecting Massachusetts Workers*, (Aug. 31, 2018), available at:

---

[5] Available at: https://www.epi.org/publication/employers-steal-billions-from-workers-paychecks-each-year-survey-data-show-millions-of-workers-are-paid-less-than-the-minimum-wage-at-significant-cost-to-taxpayers-and-state-economies/.

https://www.mass.gov/doc/ags-labor-day-report-2018 (last accessed Nov. 28, 2018).

These numbers alone confirm the public importance of actions brought under the Wage Act, yet they still likely represent only a fraction of the underlying scope of violations. Time, money, and fear of retaliation weigh heavily against an employee filing a complaint or bringing an action. *See Machado*, 465 Mass. at 515 n.12 (describing one of the policy rationales behind the Wage Act as "the desire to allow one or more courageous employees the ability to bring claims on behalf of other employees who are too intimidated by the threat of retaliation and termination to exercise their rights under the Wage Act"). *See also Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (quoting Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 Harv. L. Rev. 356, 497 Prefatory Note (1967)) (describing class actions as protecting "the rights of groups of people who individually would be without effective strength to bring their opponents into court at all").

The public importance of this matter is further

underscored by the implications of this Court's decision for class cases across a range of legal fields. Class actions serve a critical compensatory and deterrence function by holding defendants liable when they otherwise might avoid liability given the small size of harms and the fact that they are often widely dispersed. *See* Rubenstein, *supra* § 1.8; *Eisen v. Carlisle and Jacquelin*, 417 U.S. 156, 161 ("Economic reality dictates that petitioner's suit proceed as a class action or not at all."). If defendants are allowed to avoid liability, they would instead shift the social costs of their actions onto others. *See* Rubenstein, *supra* § 1.8. This, in turn, would only increase the scope of the harms and the number of people affected.

At the core of the class action vehicle's public importance are the due process rights of absent class members. *See* Section I, *supra*. Recognizing this, courts and the Legislature have provided safeguards to ensure that the rights of absent class members are protected, including preventing defendants from "picking off" a named plaintiff by mooting her individual claim. *See Wolf*, 367 Mass. at 297-298 (adopting the rule "that a class action is not mooted

by the settlement or termination of the named plaintiff's individual claim"). Our class action infrastructure is infused with various procedural protections for absent class members. *See* Mass. R. Civ. P. 23(c) (requiring a court to approve a class action settlement); Mass. R. Civ. P 23(d) (requiring the court to ensure that the rights of absent members receive adequate protection and authorizing the court to order notice); *Spence v. Reeder*, 382 Mass. 398, 408 (1981) (highlighting that the principal concern in assessing whether due process requirements were met in class actions "is the fairness and adequacy of the representation"). *See also Wolf*, 367 Mass. at 297-298 (1975) (applying the public importance doctrine to a class action seeking public assistance benefits).

Because Mr. Gammella brought this suit as a class action and under the Wage Act, it is of sufficient public importance such that this Court should reach the merits of the appeal.

b. This case is likely to arise again because defendants will use it as a blueprint to avoid collective actions under the Wage Act and class actions more broadly.

The second element of consideration this Court uses in determining whether or not to decide an

otherwise moot case is also present here, where it is virtually guaranteed that this question will arise again in similar circumstances. Employers facing litigation under the wage laws will rationally seek to limit their liability. In doing so, sophisticated defendants confronting expensive collective action claims – compounded by attorney's fees, treble damages, and other sources of liability under the Wage Act – will leverage openings in the doctrine to shield themselves. *See* Section 1, *supra*. This conclusion is perhaps best demonstrated by Appellee's brief, which digested, cited, and acted in exact accordance with the explicit reference to a hypothetical future defendant in the Supreme Court case, *Campbell-Ewald*. 136 S. Ct. at 672 (holding that an unaccepted settlement offer does not moot a plaintiff's case and declining to decide a hypothetical scenario in which a defendant deposits the amount in an account payable to the plaintiff). *See* Resp. Br. 45-46 (acting in exact accordance with the hypothetical in *Campbell-Ewald* and stating that *Campbell-Ewald* is limited because it explicitly does not decide the hypothetical).

Further support for this conclusion is found in the widespread resources publicly available to

defendants identifying and analyzing the loophole left open by *Campbell-Ewald* and employed by the Appellee here. *See, e.g.*, Katherine S. Kattaya, *Class Actions 101: Mooting a Putative Class Action after* Campbell-Ewald Co. v. Gomez, Am. Bar Assoc. (Oct. 24, 2016),[6] Stephen E. Fox, Gabrielle Levin & Abigail Pessen, *Offers of Judgment in Employment Litigation After* Campbell-Ewald *and* Fulton Dental, Strafford (Sep. 28, 2017);[7] Richard P. Eckman, Douglas D. Hermann, Jan. P. Levine, Robin P. Summer, Lindsay D. Breedlove & Janine P. Yaniak, *It is Not All Bad News from the Supreme Court in* Campbell-Ewald v. Gomez, Pepper Hamilton, LLP (Jan. 25, 2016).[8]

The likelihood that this practice will proliferate is only made more likely by the asymmetry of the parties engaged in Wage Act litigation and class action litigation more broadly. Low-wage workers

---

[6] Available at: https://www.pierceatwood.com/sites/default/files/webfiles/Kayatta%20article%20-%20ABA%20CADS%20Article%2010-2016.pdf;

[7] Available at: http://media.straffordpub.com/products/offers-of-judgment-in-employment-litigation-after-campbell-ewald-and-fulton-dental-2017-09-28/presentation.pdf

[8] Available at: https://www.pepperlaw.com/publications/it-is-not-all-bad-news-from-the-supreme-court-in-campbell-ewald-v-gomez-2016-01-25/.

are often up against more sophisticated defendants. *See* John C. Jr. Coffee, *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. Chi. L. Rev. 877, 889-90 (1987) (describing the expectations that "class action defendants . . . [will be] willing to litigate more vigorously, to expend more resources, to pursue more collateral matters, and to raise the 'ante' at each stage of the litigation in order to exploit this differential"); *Risk-Preference Asymmetries in Class Action Litigation*, 119 Harv. L. Rev. 587, 591 (2005) (describing defendants as "risk-seeking" when the merits of the case produce a high likelihood that the defendant will lose). Putative class representatives and the class members they seek to represent usually do not have the same resources, and are often pursuing these claims at great personal risk, with small awards on the line. This dynamic virtually guarantees that the "check tender" strategy employed by the Appellee here will become a standard practice in the future, absent a ruling from this Court undermining it. In any event, it is a virtual certainty that the case will arise again.

c. Mr. Gammella's claims and others like it are unlikely to obtain appellate review.

Even putting aside the reality that appellate review of claims like Mr. Gammella's will become extinct absent affirmative guidance from this Court, there are more general barriers that limit the availability of appeal. Such litigation is typically resource- and time-intensive, a deterrent when the damages are the small dollar amounts at stake in low-wage litigation. Additionally, the short-term expenses of pursuing the appeal, time spent in litigation, and a continuous fear of retaliation would weigh heavily against an employee appealing even a clearly erroneous ruling. This is in stark contrast to the sophisticated employers with time and resources to expend in litigation to avoid liability. *See* John C. Jr. Coffee, *supra* at 889-90 (describing class action defendants as "willing to litigate more vigorously, to expend more resources, to pursue more collateral matters, and to raise the 'ante' at each stage of the litigation in order to exploit this differential"). The Legislature recognized as much in constructing the Wage Act.

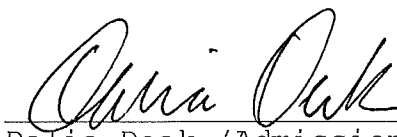
The voluntary cessation exception to mootness provides a useful set of principles for this Court to

use as a comparison. Courts "should take particular care that judicial review not be foreclosed on the basis of technical 'mootness,'" because courts do not want to reward "a defendant's voluntary cessation of allegedly wrongful conduct" by allowing it "to moot the case for the entire plaintiff class." *Wolf*, 367 Mass. at 299. At the heart of this exception is the condemnation of defendants seeking to control the fate of meritorious class claims by manipulating their behavior to create temporary mootness. This Court now is faced with the risk that sophisticated defendants will simply tender unaccepted checks for the relatively paltry sums at stake in the individual litigation as a means of foreclosing further judicial review following denial of class certification. On the basis of similar principles as those that animate the voluntary cessation doctrine, this Court should take steps to preserve the open access to appellate review that is the current default preference in the courts of the Commonwealth.

CONCLUSION

For the foregoing reasons, the Supreme Judicial Court should address the second Question Presented, regardless of its ruling on the merits of Mr. Gammella's class certification argument. In addressing the second Question Presented, the Court should take affirmative steps in its opinion to disincentivize future defendants from following the Appellee's blueprint here as a means to manufacture mootness and prevent appellate review of class certification denials. Should this Court conclude that Mr. Gammella's claims are technically moot, it should apply well established exceptions to the mootness doctrine as a means of preserving the appellate interests of absent class members.

Center for Health Law & Policy
Innovation of Harvard Law School,



Dalia Deak (Admission to Practice via SJC Rule 3:03 pending)
Kevin Costello BBO# 669100
Center for Health Law & Policy
Innovation of Harvard Law School
1585 Massachusetts Avenue
Cambridge, MA 02138
Boston, MA 02111
Tel: (617) 496-0901

Dated: DECEMBER 5, 2018

CERTIFICATE OF SERVICE

I, Kevin Costello, hereby certify that on December 5, 2018, I served the foregoing Brief of Amicus Curiae Center for Health Law & Policy Innovation of Harvard Law School by causing two copies to be sent by First Class Mail and an electronic version to be sent by email to Counsel for the Plaintiff-Appellee, Stephen S. Churchill, Fair Work, PC, 192 South Street, Suite 450, Boston, MA 02111, email to: steve@fairworklaw.com; and to counsel for the Defendant, Lisa Burton, Ogletree, Deakins, Nash, Smoak & Stewart, P.C., One Boston Place, Suite 3500, Boston, MA 02108, email to: lisa.burton@ogletreedeakins.com.

Kevin Costello
(BBO #669100)