

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 17-3388

Caption [use short title]

Motion for: leave to file a petition for rehearing en banc

Set forth below precise, complete statement of relief sought: Court-appointed amicus curiae Public Citizen Litigation Group (PCLG) seeks leave to file a petition for rehearing en banc. PCLG's proposed petition is attached to the motion.

Mei Xing Yu v. Hasaki Resturant, Inc.

MOVING PARTY: Public Citizen Litigation Group

OPPOSING PARTY: Defendants-Appellants

- Plaintiff Defendant Appellant/Petitioner Appellee/Respondent

MOVING ATTORNEY: Adina H. Rosenbaum

OPPOSING ATTORNEY: Louis Pechman

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Pechman Law Group, PLLC 488 Madison Ave., 17th Floor, New York, NY 10022 (212) 583-9500, pechman@pechmanlaw.com

Court- Judge/ Agency appealed from: Southern District of New York- Hon. Jesse M. Furman

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1): Yes No (explain):

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:

Has this request for relief been made below? Has this relief been previously sought in this court? Requested return date and explanation of emergency:

Opposing counsel's position on motion: Unopposed Opposed Don't Know

Does opposing counsel intend to file a response: Yes No Don't Know

Is oral argument on motion requested? Yes No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? Yes No If yes, enter date: Argument took place on 10/10/18

Signature of Moving Attorney:

/s/ Adina H. Rosenbaum Date: 12/20/19 Service by: CM/ECF Other [Attach proof of service]

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MEI XING YU, INDIVIDUAL,)
ON BEHALF OF ALL OTHER)
EMPLOYEES SIMILARLY)
SITUATED,)

Plaintiff-Appellee,)

v.)

No. 17-3388

HASAKI RESTAURANT, INC.,)
SHUJI YAGI, KUNITSUGU)
NAKATA, HASIMOTO GEN,)

Defendants-Appellants,)

JOHN DOE AND JANE DOE #1-10,)

Defendants.)

**MOTION OF COURT-APPOINTED AMICUS CURIAE
PUBLIC CITIZEN LITIGATION GROUP FOR LEAVE TO FILE A
PETITION FOR REHEARING EN BANC**

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December 20, 2019

Attorneys for Court-Appointed Amicus
Curiae Public Citizen Litigation Group

Court-appointed amicus curiae Public Citizen Litigation Group (PCLG) respectfully moves for leave to file a petition for rehearing en banc. PCLG was appointed to defend the district court's decision because both the plaintiff and defendant were in agreement on the issue before the panel; indeed, the plaintiff-appellee neither filed a brief in this Court nor participated in oral argument. The panel decision drew a strong dissent, and, if the panel's decision is allowed to stand, the issue presented by the case will not reach this Court again. In this unique situation, the Court should allow court-appointed amicus to file a petition for rehearing en banc.

PCLG's proposed petition for rehearing en banc is attached. The petition explains that the panel's opinion conflicts with decisions of this Court and the Supreme Court and presents an issue of exceptional importance. PCLG has contacted counsel for the parties to obtain their position on the motion: Counsel for defendants-appellants informed counsel for PCLG that they will oppose the motion and intend on filing a response. Counsel for plaintiff-appellee informed counsel for PCLG that he will not oppose the motion.

BACKGROUND

On August 1, 2016, plaintiff Mei Xing Yu, individually and on behalf of all other employees similarly situated, filed a complaint and putative collective action against defendants Hasaki Restaurant, et al., alleging violations of the overtime

provisions of the Fair Labor Standards Act (FLSA) and various New York laws. *See* Complaint, JA 9–26. After plaintiff purported to accept an offer of judgment pursuant to Federal Rule of Civil Procedure 68 “to settle the matter,” JA 33, the district court ordered the parties either to file their settlement agreement and explain “the basis for the proposed settlement and why it should be approved as fair and reasonable,” or to explain why judicial approval was not required, *see* JA 34. In response, the parties jointly filed a letter arguing that judicial approval was not required. JA 36–41.

After supplemental briefing, JA 66–68, the district court disagreed with the parties and held that judicial approval was required of FLSA settlements reached through Rule 68, JA 72. In a later opinion, the court explained its reasoning, but, recognizing that the district courts in this Circuit were divided on the question, certified its order for interlocutory appeal under 28 U.S.C. § 1292(b). JA 79–92.

Defendants filed a notice of appeal and a petition for permission to appeal under 28 U.S.C. § 1292(b). *See Mei Xing Yu v. Hasaki Rest., Inc.*, 874 F.3d 94, 96 (2d Cir. 2017). This Court granted permission to appeal on October 23, 2017. *Id.* at 98.

Because the parties’ positions before the district court were fully aligned with one another and against the district court’s decision, PCLG moved this Court for an order appointing it amicus curiae to defend the decision below. The Court granted

the motion and appointed PCLG amicus curiae to defend the district court's decision. *See Order, Mei Xing Yu v. Hasaki Rest., Inc.*, No. 17-3388 (2d Cir. Nov. 28, 2017). The Court permitted PCLG to file a party-length brief of up to 13,000 words and to participate in oral argument. *See Order, Mei Xing Yu v. Hasaki Rest., Inc.*, No. 17-3388 (2d Cir. Feb. 6, 2018). PCLG filed its brief on April 30, 2018, and participated in oral argument on October 10, 2018. Appellee neither filed a brief in this Court nor participated in oral argument.

On December 6, 2019, the panel issued its decision in the case. The panel majority held that “judicial approval is not required of Rule 68(a) offers of judgment settling FLSA claims.” Slip Op. 3. It reversed and vacated the district court's order and remanded “with instructions to direct the Clerk of the Court to enter the judgment as stipulated in the accepted Rule 68(a) offer.” *Id.*

Judge Calabresi “respectfully, but emphatically, dissent[ed].” Dissent Slip Op. 28. Judge Calabresi's dissent explained that the majority “misread[] the language, the history, and the design” of the FLSA and “ignore[d] the longstanding position of the Supreme Court of the United States, the Department of Labor, and seven Courts of Appeals,” including this Court. *Id.* at 1.

DISCUSSION

PCLG respectfully requests that it be permitted to file the attached petition for rehearing en banc. PCLG, the litigating arm of the nonprofit organization Public

Citizen Foundation, often represents consumer and worker interests in litigation, and it has represented parties and amici in many United States Supreme Court and federal court of appeals cases raising issues involving the FLSA and/or Federal Rule of Civil Procedure 68.

PCLG served the role traditionally filled by an appellee in this Court, filing a brief and participating in oral argument in defense of the decision below. Because the appellant and appellee agree with the panel's decision, which reversed and vacated the district court's order, neither will seek rehearing en banc.

As Judge Calabresi's emphatic dissent demonstrates, however, the issue presented in this case is one on which judges on this Court can disagree, and about which they can have strong opinions. Particularly given the disagreement among the judges on the panel, the full Court should have the opportunity to consider whether to rehear this case en banc. If PCLG is not granted leave to file the attached petition, the Court will not have a petition before it to help it determine whether such review is appropriate.

Importantly, because of the nature of the issue presented by this case, the issue will not reach this Court again. This case reached the Court only because the district court judge disagreed with both the plaintiff and the defendant, who agreed with one another that court approval of their settlement was not required, and therefore declined to enter judgment. Now that the panel majority has held that judicial

approval is not required of Rule 68 offers of judgment settling FLSA cases, district court judges will not require parties who have used Rule 68 to settle FLSA cases to submit those settlements for judicial approval. Instead, when presented with an accepted Rule 68 offer in a FLSA case, the Clerk of the Court will simply enter judgment. Accordingly, this Court will not be presented in the future with appeals of the issue.

As this Court explained in *Cheeks v. Freeport Pancake House, Inc.*, 796 F.3d 199, 207 (2d. Cir. 2015), employees need protections “to prevent abuses by unscrupulous employers, and remedy the disparate bargaining power between employers and employees.” The panel’s opinion provides a mechanism by which employers with unduly large bargaining power will be able to coerce employees into waiving their FLSA rights. Particularly given the importance of the issue and the demonstrated disagreement among judges on this Court, PCLG should be granted leave to file the attached petition to explain why en banc review is warranted.

Courts of appeals may order rehearing en banc regardless of whether such rehearing has been requested by a party, and “each Court of Appeals is vested with a wide latitude of discretion to decide for itself just how th[e] power [to order rehearing en banc] shall be exercised.” *W. Pac. R. Corp. v. W. Pac. R. Co.*, 345 U.S. 247, 259 (1953). Accordingly, this Court has authority to grant PCLG leave to file the attached petition to aid the court in its determination of whether to grant en banc

rehearing. Although the appellate rules contemplate that a rehearing petition will be filed by a party, *see* Fed. R. App. P. 35(b), this Court has authority to suspend any provision of the rules for good cause, *see* Fed. R. App. P. 2. In the alternative, PCLG asks this Court to consider the attached petition to be an amicus brief in support of the Court granting en banc rehearing without a petition.

CONCLUSION

For the foregoing reasons, the Court should grant PCLG leave to file the attached petition for rehearing en banc.

Respectfully submitted,

/s/ Adina H. Rosenbaum

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December 20, 2019

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 32(g) and 27(d)(2), I certify that the foregoing motion is proportionately-spaced, has a type-face of 14 points, and, as calculated by my word processing software (Microsoft Word), contains 1,311 words.

/s/ Adina H. Rosenbaum
Adina H. Rosenbaum