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| JUAN MARTINEZ,<br><br>*Plaintiff/Respondent,*<br><br>v.<br><br>T. SLACK ENVIRONMENTAL SERVICES, INC., THEODORE SLACK, AND "UNKNOWN SUPERVISORS 1-5" (NAMES BEING FICTITIOUS),<br><br>*Defendants/Appellants* | SUPERIOR COURT OF NEW JERSEY<br>APPELLATE DIVISION<br>DOCKET NO. A-001008-24<br><br>Civil Action<br><br>On Appeal from:<br><br>LAW DIVISION: MIDDLESEX COUNTY<br>Docket No. MID-L-001335-20<br><br>Sat Below:<br>Hon. Ana C. Viscomi, J.S.C. |

# DEFENDANTS/APPELLANTS' MEMORANDUM OF LAW

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Dated: April 10, 2025

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Defendants/Appellants T. Slack Environmental Services, and Theodore Slack ("collectively "Defendants") submits this brief in support of their appeal.

## PRELIMINARY STATEMENT

Defendants appeal the trial court's Order granting Plaintiff's motion for class certification and to designate Plaintiff as class representative in this matter.

In New Jersey, there is only one mechanism by which a plaintiff can certify a class – Rule 4:32-1. As this Court is aware, the burden on the plaintiff to certify a class under that rule is not an onerous one, but each requirement set forth in that rule must nevertheless be met. A plaintiff seeking to certify a class must show numerosity, that questions of law or fact predominate over individual ones, that the plaintiff claims are typical of the class, and that the representative parties will fairly and adequately represent the class.

As Defendants pointed out in their brief and at oral argument, Plaintiff's Motion for Class Certification was deficient in several respects, namely that Plaintiff had failed to show that the class was sufficiently numerous, that Plaintiff is not an adequate class representative, and that individual questions would inevitably predominate over common ones. And rather than seek to counter that argument, Plaintiff instead has created a novel argument.

Plaintiff submits that Rule 4:32-1 does not apply because the New Jersey Wage and Hour Law allows Plaintiff to bring an action on behalf of himself and

others "similarly situated." Yet, that law contains no procedural mechanism for doing so, nor does there appear to have been any prior instance of any court in New Jersey certifying a class without using Rule 4:32-1 as the mechanism by which to do so. In other words, Plaintiff's argument in favor of class certification appears to be one made entirely from whole cloth and the trial court erred by failing to conduct a rigorous analysis to determine whether the New Jersey Legislature intended to provide some alternative mechanism for class certification for New Jersey Wage and Hour claims without providing any sort of procedural framework in which to do so.

Furthermore, even assuming that a New Jersey Wage and Hour plaintiff can somehow circumvent the strictures of Rule 4:32-1, the trial court erred in certifying the class because Plaintiff here failed to provide even a scintilla of evidence that there were others "similarly situated" to him. Using the Federal Fair Labor Standards Act and the Age Discrimination in Employment Act (both of which utilize the "similarly situated" standard albeit with opt-out procedures in place) as analogs, a modest factual showing must made to certify such a class. No such showing has been made here. In fact, Plaintiff did not submit any evidence whatsoever in his Motion. The trial court erred in certifying a class without any evidentiary basis to do so.

Finally, the trial court erred in holding that a six-year lookback applied rather than a two-year lookback. A recent New Jersey Supreme Court decision has made clear that the recent amendment to the New Jersey Wage and Hour law is prospective rather than retrospective. In other words, this look-back provision applies to conduct occurring on or after the effective date of the amendment but not to conduct occurring before then. The trial court should have instead used a two-year lookback.

For the foregoing reasons and as discussed in detail in this brief, Defendants respectfully request that this Court reverse the trial court's ruling and remand this matter so that Plaintiff can proceed in his individual capacity only.

## STATEMENT OF FACTS

The record does not contain a significant amount of facts because Plaintiff did not submit any record evidence in support of his motion for class certification. The facts present in the record are almost entirely from Defendants' opposition to that motion.[1]

[1] The sum total of "evidentiary" submissions by Plaintiff are the text of the Fair Labor Standards Act, the New Jersey prevailing wage rates for various occupations, and an unpublished United States District Court for the District of New Jersey decision.

Plaintiff was an employee of Defendant T. Slack Environmental Services for approximately 13 years. Da200; Da201. He was employed as a laborer, but he testified that he performed various other tasks as needed. Id. Plaintiff was issued a company credit card as part of his job, which he was supposed to use to purchase supplies as needed, as well as fuel for company vehicles. Da202; Da205.

However, in early 2019, Defendants discovered that Plaintiff was using the company credit card to make fraudulent purchases for his personal benefit in excess of $50,000. Da233-241. In order to resolve the matter without going to court, Defendants presented Plaintiff with a settlement agreement wherein he would repay a certain amount of that sum up front by withdrawing money from his retirement account, and then repay the balance in installments. Da241. Plaintiff signed this agreement on or about March 26, 2019. Id. However, approximately one month later, Plaintiff, through his counsel, repudiated that agreement. Da243-244.

On January 14, 2020, Defendants filed suit against Plaintiff asserting claims for conversion, fraud, unjust enrichment, and civil conspiracy. Da233. Six weeks after that, Plaintiff commenced the present suit. Da023. Plaintiff has asserted a single claim solely on his own behalf. Da031. He has also asserted claims on behalf of himself and "all other hourly employees employed by

Defendants" pursuant to the New Jersey Wage and Hour Law and the Earned Sick Leave Act. Da028. In his deposition, Plaintiff testified that Defendants employed six or seven hourly workers other than himself. Da214. From 2014 to the present, T. Slack Environmental Services has employed between six and ten hourly workers. Da296. From 2018 to the present, T. Slack Environmental Services has employed six hourly workers. Id.

In his class claims, Plaintiff alleges that he was not properly paid overtime rates because Plaintiff worked both public works jobs (which required prevailing wage under New Jersey law) and private jobs (which did not require prevailing wage). Da026-027. Plaintiff specifically alleges that Defendants should have paid Plaintiff a "blended rate, depending on the number of hours worked at each rate" but did not do so and also failed to do so for its other employees. Da027. Plaintiff makes similar allegations with regard to paid sick leave. Id.

During Plaintiff's employment with Defendants, he would work on both public works projects and private projects. On public works projects, he was paid at the prevailing wage rate. Da248-293. On private projects, he was paid at a lower rate. Id. To the extent Plaintiff worked overtime on a public works project, he was paid overtime rates for those hours worked. Id. Conversely, if he worked overtime hours on a private project, he was paid overtime rates based on those lower wage rates. Id.

## PROCEDURAL HISTORY

On January 14, 2020, Defendants filed suit against Plaintiff asserting claims for conversion, fraud, unjust enrichment, and civil conspiracy. Da0233. On February 28, 2020, Plaintiff commenced the present suit. Da023. The two suits were consolidated and after an extended discovery period, Plaintiff filed his motion for class certification on September 30, 2024. Da034. Defendants opposed the motion and on December 6, 2024, the trial court by way of oral opinion and written order granted Plaintiff's motion holding:

> The Court has considered the pleadings in support of and in opposition to this motion, and while it is true it has not been brought pursuant to rule -- the class action rule at 4:32-1, et. seq., that this is a representative action that is permitted pursuant to the statute.

T at 14:9-14[2]; see also Da18.

## LEGAL ARGUMENT

### I. Standard of Review

One of the challenges before this Court is that there is not a single New Jersey court decision regarding a "representative action" that has not been brought under Rule 4:32-1. See, e.g. Iliadis v. Wal-Mart Stores, Inc., 191 N.J. 88, 922 A.2d 710 (2007) (granting class certification of wage and hour action pursuant to Rule 4:32-1); Lopez v. 5 De Mayo Bakery, Inc., No. A-2520-08T3,

[2] The transcript of oral argument for the December 6, 2024 argument on the motion for class certification is referred to as "T."

2010 WL 2869484 (N.J. Super. Ct. App. Div. July 20, 2010) (affirming denial of motion for class certification of claim brought under Wage and Hour Law pursuant to Rule 4:32-1); Perez v. Access Bio, Inc., No. A-3071-16T4, 2019 WL 3297297, at *2 (N.J. Super. Ct. App. Div. July 23, 2019) (noting trial court denied class certification because administrative efforts to make potential class members whole negated "the numerosity requirement of Rule 4:32-1"); see also Novak v. Home Depot U.S.A., Inc., 259 F.R.D. 106 (D.N.J. 2009) (denying class certification under New Jersey Wage and Hour Law pursuant to Federal Rule of Civil Procedure 23).

It appears that Plaintiff's theory in this matter is novel, untested, and based solely on the New Jersey Wage and Hour Law, which states that "[a]n employee shall be entitled to maintain the action for and on behalf of himself or other employees similarly situated, and the employee and employees may designate an agent or representative to maintain the action for and on behalf of all employees similarly situated." N.J. Stat. Ann. § 34:11-56a25. Because Plaintiff seeks to make an end-run around the strictures of Rule 4:32-1, there appears to be no applicable standard by which this Court should review the trial court's decision.

With that said, as a general rule "[c]lass certification decisions rest in the sound discretion of the trial court." Muise v. GPU, Inc., 371 N.J. Super. 13, 31,

851 A.2d 799, 810 (App. Div. 2004). "In determining a motion for class certification, a court "must 'accept as true all of the allegations in the complaint,' and consider the remaining pleadings, discovery (including interrogatory answers, relevant documents, and depositions), and any other pertinent evidence in a light favorable to plaintiff." Dugan v. TGI Fridays, Inc., 231 N.J. 24, 49, 171 A.3d 620, 634 (2017). However, "[t]he deferential standard by which the court views the facts alleged, however, does not apply to a plaintiff's assertion that a given case is appropriate for class certification." Id. In determining whether a claim is appropriate for class treatment the "certifying court must undertake a "rigorous analysis" to determine if the *Rule's* requirements have been satisfied. Iliadis, 191 N.J. at 106–07 (italics in original). "That scrutiny requires courts to look 'beyond the pleadings [to] ... understand the claims, defenses, relevant facts, and applicable substantive law.'" Id. at 107 (quoting Carroll v. Cellco P'ship, 313 N.J. Super. 488, 495, 713 A.2d 509, 512 (App. Div. 1998)). "Although class certification does not occasion an examination of the dispute's merits … a cursory review of the pleadings is nonetheless insufficient." Iliadis, 191 N.J. at 107.

## II. The Trial Court Erred in Holding That the New Jersey Wage and Hour Law, N.J.S.A. 34:11-56a1, Et Seq., Created a Form of Representative Action Separate and Apart From a Class Action Under Rule 4:32-1 (Da018; T at 14:9-14)

This Court should note that there are no major disputes regarding the facts (mostly since Plaintiff did not submit any evidence in his motion to certify the class, nor do the parties disagree as to the applicability of the New Jersey Wage and Hour Law. The question before this Court is whether the words "similarly situated" as contained in that statute create a vehicle for class certification separate and apart from Rule 4:32-1. Defendants respectfully submit that it does not.

As an initial matter, if Plaintiff's argument were credible, then why file a motion for class certification in the first place? If he truly believed that class certification was not necessary, he should have submitted a brief saying as much. And this Court should have denied Plaintiff's motion as moot because under Plaintiff's theory, a representative action requires no class certification whatsoever. Rather, the class comes into being solely by the institution of the action. Furthermore, there is not a shred of legislative history to suggest that the New Jersey Wage and Hour Law was intended to provide a separate vehicle for class treatment of claims. Simply put, the only mechanism by which a Plaintiff can certify a class is through Rule 4:32-1. By failing even to consider the requirements of that rule, the trial court committed a reversible error.

### A. Representative Actions are a Separate Issue

In his submission to the Court, Plaintiff styles the proceeding as a "representative action" rather than a class action. That distinction is a red herring. A representative action concerns matters of standing – whether a singular individual or group can bring claims on behalf of all persons adversely affected by a policy. In asserting that a "representative action" was appropriate here, Plaintiff relied on Crescent Park Tenants Ass'n v. Realty Equities Corp. of New York, 58 N.J. 98, 275 A.2d 433 (1971) for the proposition that Plaintiff can serve as a representative on behalf of all of Defendants' employees in this matter. However, that case, which involved a tenants association bringing suit on behalf of individual tenants regarding the poor condition of the building in question and seeking equitable relief in the form remediation efforts, concerned the question of standing, i.e., whether that association was able to bring suit on behalf of individual tenants in the first place. Crescent Park, 58 N.J. at 111 ("We are satisfied that the plaintiff Crescent Park Tenants Association had sufficient standing to maintain its complaint below").

Defendants do not contest Plaintiff's standing in this matter. Plaintiff clearly has standing pursuant to the NJWHL to bring claims on behalf of himself and others similarly situated. The question is not whether he can do so generally, however, but rather when he should be permitted to do so in this

particular instance. Crescent Park, as well as any decisions concerning representative actions, are therefore of little assistance to either Plaintiff or this Court.

### B. "Similarly Situated" Does not Create a Class Action Mechanism

As set forth above, Plaintiff and the trial court relied extensively on the language in the NJWHL that permits a plaintiff to bring an action on behalf of himself and others "similarly situated." While federal law is not controlling over this Court, looking to interpretations of federal caselaw in connection with statutes from which New Jersey laws are essentially structured for the purpose of guidance is common. See, e.g., State v. Ball, 268 N.J. Super. 72, 98, 632 A.2d 1222, 1235 (App. Div. 1993), aff'd, 141 N.J. 142, 661 A.2d 251 (1995) ("is appropriate to seek guidance from" federal decisions interpreting the Federal RICO statute in a New Jersey RICO case); Borngesser ex rel. Est. of Borngesser v. Jersey Shore Med. Ctr., 340 N.J. Super. 369, 380, 774 A.2d 615, 621 (App. Div. 2001) ("in interpreting [the New Jersey Law Against Discrimination] in the context of claims of discrimination by the handicapped, the federal law has consistently been considered for guidance"); Fed. Ins. Co. v. Campbell Soup Co., 381 N.J. Super. 190, 196, 885 A.2d 465, 469 (App. Div. 2005) ("when construing [the New Jersey Uniform Securities Law], we look for guidance to federal decisions interpreting federal securities law"). Defendants respectfully

submit that it is appropriate to do so in this instance because the language upon which Plaintiff relies is identical to that found in the Federal Fair Labor Standards Act.

The Fair Labor Standards Act states:

> An action to recover the liability prescribed in the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated.

29 U.S.C.A. § 216.

While the "similarly situated" language is present in both statutes, the similarities do not extend to the procedural framework by which an employee may bring an action on behalf of similarly situated employees. The federal statute continues: "[n]o employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought." Id. In other words, class members may "opt in" to this particular form of collective action. Lusardi v. Xerox Corp., 99 F.R.D. 89, 92 (D.N.J. 1983) ("in contrast to the 'opt out' class action provided by Rule 23, the FLSA describes an 'opt in' class action—no one is a member of the class until written consent is given to the court."). There is no equivalent procedural mechanism found within the NJWHL. N.J. Stat. Ann. § 34:11-56a25. Thus, the question that this Court must answer is if Rule 4:32-

1 does not apply as Plaintiff hopes it would not, and there is no "opt-in" provision found within the statute, how exactly does a plaintiff go about certifying a class and proceeding on a representative basis? As set forth above, there is no common law concept of a representative action for money damages. The cases that Plaintiff relied upon in his submissions to the trial court concerned issues of standing in matters of equity.

For example, in its briefing before the trial court, Plaintiff relied upon on Newark Laborers' Pension-Welfare Funds v. Com. Union Ins. Co. of New York, 126 N.J. Super. 1, 312 A.2d 649 (App. Div. 1973) for the proposition that he can bring a representative action in a case involving the Prevailing Wage Act. However, that case concerned monies to be paid to a union pension fund, meaning that the plaintiff had standing under any standard to bring suit and was not acting in a representative capacity in any sense. Id. at 3 ("The issue in this appeal is whether, in an action to collect an employer's delinquent contributions to the welfare and pension fund of a laborers' union, costs and reasonable attorney's fees are recoverable from a surety company on payment bonds furnished in connection with the construction of two housing projects for which financing was provided by the New Jersey Housing Agency").

Plaintiff also relied upon Cipparulo v. David Friedland Painting Co., 139 N.J. Super. 142, 353 A.2d 105 (App. Div. 1976) for the same proposition.

However, that case did not contain any analysis as to the propriety of a representative action or the question of standing and the facts suggest that it is not analogous to the case at bar. The case was brought by the plaintiff "as business representative of Painters Local 480 and on behalf of Local 480 members who worked for defendant" indicating a collectively bargained agreement that is not present here. Id. at 105-106. Additionally, that case concerned a single issue – the determination of the correct prevailing wage to be paid. Id. at 107. Here, there is no dispute regarding the correct wage, only whether it was correctly applied in each instance where Plaintiff worked for Defendants, which is a significantly different issue. Thus, this decision is of no help to Plaintiff.

When confronted with Plaintiff's novel theory of a "representative action" that exists outside of the class or collective action context, the only real analog that Defendants could find was the California Private Attorneys General Act. Under that statute, the plaintiff acts as a private agent of the state. Cal. Lab. Code § 2699; see also Arias v. Superior Ct., 46 Cal. 4th 969, 980, 209 P.3d 923, 929–30 (2009) (the California legislature determined it is "in the public interest to allow aggrieved employees, acting as private attorneys general, to recover civil penalties for Labor Code violations"). New Jersey has no such analog statute. Additionally, the California Private Attorneys General Act contains

extensive procedures that a plaintiff seeking to bring suit under that statute must follow. Cal. Lab. Code § 2699. As set forth above, the NJWHL contains no procedures whatsoever, only language that a plaintiff may bring suit on behalf of others "similarly situated." It does not even contain the opt-in provision present in the FLSA that permits collective actions.

The Lopez decision cited above is instructive and offers insight into Plaintiff's strategic motivations. In that matter, the plaintiffs sought to assert a class action under both the NJWHL and FLSA on behalf of a class of hourly workers, including waiters and waitresses, busboys, cooks, bakers, kitchen workers, cleaning staff, and delivery persons. Lopez, 2010 WL 2869484, at *1. The trial court denied the plaintiffs' motion as to the NJWHL claims but granted it as to the FLSA claims on an "opt-in" basis. Id. This Court held that the trial court erred by refusing to certify the NJWHL class on the grounds that it was incompatible with a FLSA collective action but held that this refusal constituted harmless error. Id. at *4. This Court noted the significant differences between an "opt-in" action under the FLSA and a class action under the NJWHL. Id. ("The 'similarly situated' requirement for a FLSA collective action is broader than the requirements of a state class action."). This Court also found that the denial of class certification of the NJWHL claim was proper because the plaintiffs failed, *inter alia*, to show numerosity or that common questions of law

or fact predominated over individual ones. Id. at * 5- 6. The trial court in that matter held that there were variations between the classes of employees (particularly between tipped and non-tipped employees) that defeated commonality and led to the predominance of individual issues over common ones. Id. at *2. The Appellate Division affirmed that ruling. Id. at *7.

When one considers the ruling in Lopez, it is unsurprising that Plaintiff here has attempted this end-run. After all, Plaintiff's counsel was the counsel for the plaintiffs in the Lopez matter. Faced with the prospect of a denial of class certification under Rule 4:32-1 and not wanting to file a FLSA claim for some reason, Plaintiff, through his counsel, has come up with this novel approach that falls outside of both frameworks. Yet, Lopez's decision is clear: Plaintiff should have sought class certification under Rule 4:32-1, and his failure to do so should have precluded certification of his proposed class.

Simply put, there is no precedent in this state or anywhere else for what Plaintiff has sought or what the trial court has granted. The trial court has erroneously created a new form of representative action based upon two lines of the NJWHL, and there is no evidence to demonstrate that this was intended by the New Jersey legislature when it passed that statute. Indeed, the Lopez decision suggests that the trial court had no basis to grant Plaintiff's motion. Furthermore, what Plaintiff is effectively proposing and what the trial court has

effectively granted is particularly troubling because this certified class falls outside of Rule 4:32-1. Under Rule 4:32-1, a class member can opt out of the class. Under the FLSA collective action framework, a class member must opt-in. Here, Plaintiff is attempting to borrow from Rule 4:32-1 by creating an opt-out framework (see T at 12:24-13:2), but without any authority to do so in either the NJWHL or the Rules of Court. "It is, of course, not for the courts to write or rewrite legislation." Matter of Liquidation of Sussex Mut. Ins. Co., 301 N.J. Super. 595, 604, 694 A.2d 312, 316 (App. Div. 1997). Yet that is exactly what Plaintiff has asked the trial court to do, and the trial court erroneously indulged this request.

Without rewriting the NJWHL to accommodate his interests, Plaintiff is left with a statute that, according to him, allows for a representative action that is not a class action but without any method by which a class member may opt in or out. By Plaintiff's logic, the class would automatically come into being by instituting the action, and the class members would instead be tied to this litigation regardless of their wishes. This absurd result calls into question the class members' substantive and procedural due process rights, and this Court should not entertain such an outcome. Plaintiff can indeed bring suit on behalf of himself and others similarly situated. But he must do so through the

procedures outlined in Rule 4:32-1, and the trial court erred in holding otherwise.

### C. Plaintiff Cannot Satisfy Rule 4:32-1

Although Plaintiff did not attempt to indicate that he could satisfy Rule 4:32-1 and candidly admitted that he sought certification of a class outside of that framework, this Court should note that class certification under that Rule is unattainable in this matter. Plaintiff's proposed class lacks numerosity and individual questions predominate over common ones. Both of these issues preclude class certification under Rule 4:32-1.

#### i. The Proposed Class Is Not Sufficiently Numerous

In order to satisfy the numerosity requirement, the plaintiff must show that the class is "so numerous that joinder of all members is impracticable." R. 4:32-1(a). Although Rule 4:32-1 does not specify a minimum number of class members necessary to satisfy the numerosity requirement, that rule is based on its federal analog, Federal Rule of Civil Procedure 23 and New Jersey courts, "bound by the interpretations given the federal rule … have consistently looked to the interpretations given the federal counterpart for guidance." Delgozzo v. Kenny, 266 N.J. Super. 169, 188, 628 A.2d 1080, 1090 (App. Div. 1993). And under federal precedent, while there is no set numerical cutoff, "[a]s a general rule ... classes of 20 are too small, classes of 20-40 may or may not be big enough

depending on the circumstances of each case, and classes of 40 or more are numerous enough." Baskin v. P.C. Richard & Son, LLC, 246 N.J. 157, 174, 249 A.3d 461, 471 (2021) (quoting In re Toys R Us-Delaware, Inc.--Fair & Accurate Credit Transactions Act (FACTA) Litig., 300 F.R.D. 347, 367–68 (C.D. Cal. 2013)).

Here, Plaintiff testified that he believes that there are six other class members besides himself. Plaintiff appears to have underestimated the class size, but not by much. Defendants assert that there are a total of 15 putative class members representing all employees between 2018 and 2020. Regardless of which number is more accurate, neither comes close to satisfying any standard of numerosity necessary for class treatment.

Furthermore, this is not merely academic. Instead, an equal part of the numerosity inquiry "centers around whether 'the difficulty and or inconvenience of joining all members of the class calls for class certification.'" W. Morris Pediatrics, P.A. v. Henry Schein, Inc., 385 N.J. Super. 581, 596, 897 A.2d 1140, 1148 (Law. Div. 2004), aff'd, No. A-3595-04T1, 2006 WL 798952 (N.J. Super. Ct. App. Div. Mar. 30, 2006) (quoting Lerch v. Citizens First Bancorp, Inc., 144 F.R.D. 247, 250 (D.N.J. 1992)). Here, all putative class members' identities and contact information have been made available to Plaintiff through discovery, and they all reside in or near New Jersey. Da296. There would be little

difficulty in joining each and every one of Defendants' employees. See Liberty Lincoln Mercury, Inc. v. Ford Mktg. Corp., 149 F.R.D. 65, 74 (D.N.J. 1993) (numerosity requirement not met for proposed class of 38 or 123 members where those members were "(1) known and readily identifiable by name and address, (2) easily subject to service of process and notice, and (3) confined to the limited geographical area of the State of New Jersey"). Plaintiff has made no effort to show that joinder of Defendants' additional employees would be inconvenient or difficult. Instead, as discussed *supra*, he has advanced the flawed argument that he need not show numerosity for proposed classes where claims are made under the WHL because Rule 4:32-1 does not apply. The lack of numerosity is fatal under Rule 4:32-1 and the trial court erred by failing to consider this issue.

**ii. Individual Questions Predominate Over Common Ones**

Even assuming that the class is sufficiently numerous (which it is not), his proposed class under Rule 4:32-1 should not have been certified because individual questions of fact will inevitably predominate over common ones. "When considering the issue of predominance, it is necessary to analyze the movant's underlying theories of liability, the proofs necessary to establish them, and the predictable defenses to the legal claims." Varacallo v. Massachusetts Mut. Life Ins. Co., 332 N.J. Super. 31, 42, 752 A.2d 807, 813 (App. Div. 2000). "While individual issues of causation, reliance and damages do not preclude

class certification, ..., common questions of law or fact must outweigh individual questions in order to satisfy the predominance requirement." Gross v. Johnson & Johnson-Merck Consumer Pharms. Co., 303 N.J. Super. 336, 343, 696 A.2d 793, 796 (Law. Div. 1997) (internal citations omitted).

Here, Plaintiff alleges that he was not paid the proper rate for overtime and that he was also not paid the proper rate for earned sick leave. Da022. This claim is based upon the theory that Plaintiff should be paid a blended rate accounting for the hours worked on public works projects vis a vis the hours worked on private projects. Da026-027. This theory is, of course, based on the assumption that Plaintiff routinely worked on both private and public works projects in a given week. However, his payroll records show that this split was sporadic at best. Da245. Most of the time, Plaintiff was paid a singular rate for both his regular time and his overtime. Furthermore, there are several weeks where Plaintiff was paid both overtime at the prevailing wage and overtime based on his pay for private projects. Id.

Under Plaintiff's theory, if he worked an entire week on a private project, he'd have no right to relief under his theory of liability as a blended rate for that week would be unnecessary. Similarly, to the extent that Plaintiff or any other of Defendant's employees worked an entire week on a public works project, he would again have no right to relief as no blended rate would be necessary,

assuming that that employee was paid prevailing wage for the entire time worked. Therefore, the trial court must first determine for Plaintiff as well as each and every class member if that individual worked an entire week on either a private or public project from 2018 to the present. That is a massive undertaking that requires a review of each and every payroll record of each and every employee.

Once the Court makes the determination as to which weeks were "blended", this Court must then determine for each and every employee if the amounts paid to that employee accurate reflect the "blended" rate that each employee should have been paid under Plaintiff's theory. Again, this requires the Court to review each and every payroll record for each and every employee and make mathematical calculations as to whether the rates paid were proper.

Whether or not the proper rate was paid is only the intermediate step of this inquiry to determine if Defendants are liable in the first place. To the extent that the trial court determines that the proper rate was not paid and that Defendants are liable for the difference between the rate paid and the proper rate, the next step is to determine what the proper rate should have been and calculate the appropriate measure of damages. In other words, extensive individual inquiries are required to establish liability before the trier of fact can even move onto damages calculations. See Muise, 371 N.J. Super. at 46 ("Once

the court finds that common questions of liability, and the fact of damage, predominate, individual variations in the calculation of damages does not preclude class certification.").

While Plaintiff may present a common issue in this matter as to whether a blended rate is appropriate, that common issue is overwhelmed the individualized inquiries that inevitably flow from this theory. Extensive individual inquiries are required to determine if Defendants are liable to Plaintiff and the other class members in the first place. As such, class treatment is inappropriate as those individual issues predominate over common ones and the trial court erred by granting Plaintiff's motion for class certification.

## III. The Trial Court Erred in Holding that Plaintiff had Demonstrated That Class Treatment Was Warranted When He Provided No Proof That Any Employees of Defendants Were "Similarly Situated" Under the New Jersey Wage And Hour Law (Da018; T at 51:8-12)

Even assuming that a form of representative action exists in New Jersey outside of Rule 4:32-1, the trial court nevertheless committed reversible error by failing to consider whether any of Defendants' other employees were "similarly situated" under the NJWHL.

Again, this Court should look to the FLSA for guidance regarding whether the proposed class is "similarly situated." In suits brought under that statute, there are two different standards for certification apply. Zavala v. Wal Mart Stores Inc., 691 F.3d 527, 535 (3d Cir. 2012). First, a "fairly lenient standard"

is applied for conditional certification (i.e. the opt-in process). Id. Second, the plaintiff must apply for final certification here they "bear the burden of demonstrating that they are similarly situated." Id. at 536. And they must satisfy that burden "by a preponderance of the evidence." Id. at 537. This "second step occurs after discovery and before trial." Lopez, 2010 WL 2869484, at *4.

Again, this standard is found in a framework set forth by the FLSA that does not have an analog in the NJWHL. As a result, this Court is confronting a final, rather than conditional, certification that has been granted by the trial court. Yet, the record definitively demonstrates that Plaintiff made no effort whatsoever to meet the burden of showing that Defendants' other employees are similarly situated to Plaintiff. Instead, Plaintiff relies solely on the allegations made in his complaint to support his motion and the trial court accepted those allegations as sufficient in granting Plaintiff's motion.

If the NJWHL contained the two-step framework found in the NLSA along with the two-tiered approach adopted by the Third Circuit along with several other courts, that might have been acceptable for conditional certification. However, that framework does not exist in New Jersey, meaning that this certification is final, and that class members must affirmatively opt out. As a result, "[t]he "similarly situated" requirement for a FLSA collective action is broader than the requirements of a state class action." Lopez, 2010 WL

2869484, at *4. In other words, the trial court granted class certification on nothing more than the bald allegations found in Plaintiff's complaint. See T at 15:8-12 ("And so the Court finds that that is satisfied here based upon the pleadings as submitted in consideration of the statute, and will order the relief that is granted"). Even by New Jersey's lenient standard, in which the class action rule should be "liberally construed," the New Jersey Supreme Court has made clear that "a cursory review of the pleadings is nonetheless insufficient" to grant class certification. Iliadis, 191 N.J. at 107. A class is not "maintainable merely because the complaint parrots the legal requirements" of the class-action rule." Id. Yet, that is exactly what Plaintiff did here. He asked the trial court to find a class of similarly situated individuals based on nothing more than his own pleading, and the trial court committed reversible error by accepting this as sufficient for class certification.

At a minimum, this Court should reverse and remand this matter to the trial court with instructions for the court to conduct further inquiry into whether Plaintiff can meet the burden of showing that Defendants' hourly employees are similarly situated under the NJWHL. However, given the dearth of evidence submitted by Plaintiff, Defendants respectfully submit that Plaintiff waived his opportunity to present such evidence and respectfully request that this Court

reverse the trial court's decision and remand with instructions to proceed as an individual action.

## IV. The Trial Court Erred in Holding That the Six-Year Look-Back Applied When the New Jersey Supreme Court Has Ruled That the Six Month Look-Back is Prospective Rather Than Retrospective (Da018; T at 15:12-16)

Even assuming that it was correct in certifying a class outside of the requirements of Rule 4:32-1, the trial court committed reversible error by applying a six-year look-back in this matter rather than a two-year look-back. See T 15:12-16 ("So this will go from any time from February 28th, 2014 to February 28th, 2020, it's a six-year look back period, with regard to overtime claims when two different wage rates were paid in the same week by the defendants."). While the New Jersey legislature recently amended the NJWHL to add a six-year look-back provision, the New Jersey Supreme Court has held that this provision is prospective, not retroactive. Maia v. IEW Constr. Grp., 257 N.J. 330, 313 A.3d 887 (2024). The Court held that the six-year look-back only applied to "conduct occurring on or after its effective date of August 6, 2019, but not to conduct occurring before then." 257 N.J. at 337. The entirety of the conduct in question took place before August 6, 2019, meaning that the two-year look-back must apply. Plaintiff's Complaint was filed on February 28, 2020, meaning that the class period for his WHL claims would be from February 28, 2018 to the filing date. Accordingly, at a minimum, this Court should

reverse the trial court's decision to apply the six-year look-back and remand with instructions to apply the two-year look-back.

## CONCLUSION

This Court should reverse the lower court's decision certifying the proposed class and appointing Plaintiff as class representative and remand this matter for further proceedings.

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Dated: April 10, 2025

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| JUAN MARTINEZ<br><br>Plaintiff/Respondent,<br><br>vs.<br><br>T. SLACK ENVIRONMENTAL SERVICES, INC., THEODORE SLACK, AND "UNKNOWN SUPERVISORS 1-5" (NAMES BEING FICTITIOUS),<br><br>Defendants/Appellants | SUPERIOR COURT OF NEW JERSEY<br>APPELLATE DIVISION<br><br>DOCKET NO.: A-001008-24<br><br>Civil Action<br><br>On Appeal from:<br><br>Docket No. MID-L-001335-20<br><br>Sat Below:<br>Hon. Ana C. Viscomi, J.S.C. |

# AMENDED
# PLAINTIFF/RESPONDENT'S BRIEF

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93 Cong. Rec. 538, 2182 (1947) . . . . . 36

Portal-to-Portal Act of 1947, ch. 52, §§ 5(a), 6, 7, 61 Stat. 87-88 . . . . . 36

Pressler & Verneiro, Comment R.2:4-4 . . . . . 5

Pressler & Verneiro, Current N.J. Court Rules,
Comment1 R. 4:32-1 (2025 ed. P.1431 . . . . . 33

Pressler &Verneiro, Note R. 4:32-2, (2025 ed., p. 1430) . . . . . 19

Norman J. Singer & Shambie Singer, 2A Sutherland Statutory Construction
§ 46:6 at 238 (7th ed. 2024) . . . . . 12

## PROCEDURAL HISTORY

On February 28, 2020, Plaintiff filed his Complaint, alleging that Defendants had violated the Prevailing Wage Act. N.J.S.A. §§ 34:11-56.25 - 56.46 ("PWA"), the Wage and Hour Law, N.J.S.A. §§ 34:11-56a - 34:11-56a38 ("WHL") as well as other statutes and the common law. The Complaint pled a representative action. Defendant duly answered and denied the pertinent allegations. Extensive discovery followed under the guidance of Special Master Agatha Dzikiewicz.

Pursuant to the direction of Special Master Dziekiewicz, on September 30, 2024, Plaintiff filed his representative action motion pursuant to "N.J.S.A. 34:11-56.40 [PWA] and 34: 11-56a25 [WHL]", designating Plaintiff as a representative of the current and former employees of Defendants with regard to certain overtime claims," Pa0001-Pa0002, in particular with regard to "with regard to overtime claims when two different wage rates were paid in the same week by Defendants."Pa0003. Plaintiff's motion was unambiguously made pursuant to the cited statutory provisions allowing for a representative action, and not according to R. 4:32-1, on which Rule Plaintiff explicitly disclaimed reliance. Pa0017, 0339-0350. Defendants filed opposition to the Motion to which Plaintiff replied, and oral argument was held on December 6, 2024, following which the Court entered the Order from which Defendants appealed Da7-9 ("the December 6 Order") . Under that order Plaintiff

" is designated the representative of the employees of Defendants who worked at any time from February 28, 2014 to February 28, 2020, with regard to overtime claims when two different wage rates were paid in the same week by Defendants ("the Represented Employees") Da 7-8.

## STATEMENT OF FACTS AND RELEVANT LAW

The PWA provides that "**Any workman shall be entitled to maintain such action for and on behalf of himself or other workmen similarly situated**, and such workman and workmen may designate an agent or representative to maintain such action for and on behalf of all workmen similarly situated." N.J.S.A. § 34:11-56.40 (emphasis added). Similarly, the WHL explicitly states " **An employee shall be entitled to maintain the action for and on behalf of himself or other employees similarly situated**, and the employee and employees may designate an agent or representative to maintain the action for and on behalf of all employees similarly situated." N.J.S.A.§ 34:11-56a25 (emphasis added).

Defendants are a small non-union company and its eponymous principal performing sewer clean-outs and the like for various, principally public, entities. As stated in his motion papers, brought under the above-quoted statutes:

> Plaintiff has alleged that Defendants violated the applicable [statutes] in paying premium pay for overtime, as required by the WHL and PWA in two separate circumstances: first, where some of the workweek involved both public and private rates, Defendants paid overtime at the lower, private rate. Second, where some of the workweek was paid for under one title e.g. Laborer and some of the [public] workweek was paid under a different title e.g. Ironworker, the premium pay was calculated at the lower rate (in the example, using the Laborer rate), rather than at a rate that weights the time and half between the two titles. Plaintiff is similarly situated to Defendant's other hourly employees who were paid two distinct wage rates in a single week and were paid premium pay based on the lower rate.

Pa0010-0011.

## THE STANDARD OF REVIEW

The issues here are principally legal, and hence review is *de novo*. *Motorworld, Inc. v. Benkendorf,* 228 N.J. 311, 329, 156 A.3d 1061 (2017)("To the extent that the trial court interprets the law and the legal consequences that flow from established facts, we review its conclusions de novo.")(citations omitted). A "trial court's determinations with respect to the applicability of [a statute] are legal conclusions subject to de novo review." *Gannett Satellite Info. Network, LLC v. Tp. of Neptune*, 467 N.J. Super. 385, 398-99, 253 A.3d 1173, 1181 (App. Div. 2021),

quoting *O'Shea v. Twp. of W. Milford*, 410 N.J. Super. 371, 379, 982 A.2d 459 (App. Div. 2009).

## ARGUMENT

### POINT I

### ALTHOUGH DEFENDANTS TO HAVE NO RIGHT TO APPEAL, THE COURT SHOULD GRANT DEFENDANTS' LEAVE TO APPEAL *NUNC PRO TUNC,* GIVEN THE IMPORTANT LEGAL QUESTION BEFORE THE COURT REGARDING THE RELATIONSHIP OF R. 4:32-1 TO REPRESENTATIVE ACTIONS TO COLLECT UNPAID WAGES

Because subject matter jurisdiction is a threshold matter that must be addressed before a court can reach the merits, see *N.J. Citizen Action v. Riviera Motel Corp.*, 296 N.J. Super. 402, 410-11, 686 A.2d 1265 (App. Div. 1997), Plaintiff is compelled to begin by noting that Defendants have no appeal as of right from Judge Viscomi's grant of a representative action in the December 6 Order. There is no question that the December 6 Order is not final, as it clearly does not resolve all issues as to all parties, see *e.g. Silvera-Francisco v. Bd. of Ed.*, 224 N.J. 126,136 (2016), and thus Defendants have no appeal as of right under R.2:2-3(a)(1). Noting that "New Jersey appellate practice generally draw[s] a sharp distinction between final judgments appealable as of right to the Appellate Division and interlocutory orders that may be

challenged by motion for leave to appeal governed by the 'interest of justice' standard." the Supreme Court has emphasized "our general policy in favor of 'restrained appellate review of issues relating to matters still before the trial court' to avoid piecemeal litigation." *Harris v. City of Newark*, 250 N.J. 294, 308, 312, 271 A.3d 1250, 1261 (2022), quoting *Moon v. Warren Haven Nursing Home*, 182 N.J. 507, 510, 516-18, 867 A.2d 1174 (2005).

Defendants are plainly relying on R. 2:2-3(b)(9) which grants an appeal of right concerning orders entered pursuant to R. 4:32-1. However, the December 6 Order does not purport to invoke R. 4:32-1, and the Rule is nowhere mentioned in that Order. Da 7-9. Further, while Defendant urged that Plaintiff's motion be denied for failing to meet the requirements of R. 4:32-1, T1 at 11, Plaintiff vigorously opposed that proposition. Pa0339-Pa364; see also Pa0017. By entering the proposed form of Order, Judge Viscomi unambiguously rejected Defendant's argument that R. 4:32-1 was necessarily incorporated into the representative action. Defendants can point to no precedent which holds statutory representative actions to the standards of R. 4:32-1. As the Order appealed from does not invoke R. 4:32-1, and indeed rejects that Rule as the governing standard for a statutory representative action to recover unpaid wages, therefore R. 2:2-3(b)(9), which specifically requires an order under that Rule to vest the appellant with an appeal as of right, cannot be invoked to provide the

basis for the appeal here as of right. Indeed, the standard of "restrained appellate review" of interlocutory orders, *Harris*, supra, strongly urges that R. 2:2-3(b)(9) be strictly limited to class actions motions brought under R. 4:32-1, and not broadened to cover the distinctly different class of representative action motions, such as the Order appealed from. There is thus no basis for Defendants claim to be able to appeal the December 6 Order as of right.

Notwithstanding the interlocutory nature of this appeal, and cognizant that this Court's "stated preference is to dismiss the appeal of an interlocutory order that has been filed without our leave." *Grow Co., Inc. v. Chokshi*, 403 N.J. Super. 443, 463, 959 A.2d 252 (App. Div. 2008). Plaintiff would urge the Court grant leave to appeal *nunc pro tunc*, which the Court has the power to do.[1] See *Caggiano v. Fontoura*, 354 N.J. Super. 111, 124, 804 A.2d 1193 (App. Div. 2002); see also Pressler & Verneiro, Comment R.2:4-4 (recognizing power of court to grant leave *nunc pro tunc* in appropriate circumstances and in the public interest when, as here, counsel mistakenly files a notice of appeal rather than a petition for leave to appeal.). The principal issue on this appeal, the relationship of R. 4:32-1 to the statutorily

[1] Plaintiff acknowledges that precedent would, in these circumstances, have him file a motion to dismiss. See *Caggiano*, 354 N.J. Super. at 123. However, given that his position is that there is a significant legal issue that this Court should address, Plaintiff must respectfully decline to make a motion that would contradict his position that this appeal should be heard.

authorized representative actions in the PWA and WHL, has not been the subject of any previous appellate decision. It has been fully briefed by the parties. The issue is of growing importance in light of the Legislature's passage in recent years of at least five separate statutes authorizing temporary, longshore, building service, certain railroad and airport workers and all workers not timely paid per the Wage Payment Law, ("WPL") N.J.S.A. §§ 4:11-2 *et seq.* to bring representative actions to redress underpayment of wages. See Pb19-20, *infra*. Thus, this "appeal raises an important question in the [employment] field that has not specifically been dealt with in New Jersey by an appellate court. On our own motion we will, therefore, grant leave to appeal now as of the date the notice of appeal was filed." *Eisen v. Kostakos,* 116 N.J. Super. 358, 366, 282 A.2d 421, 424-25 (App. Div. 1971), citing *Butler v. Bonner & Barnewall, Inc*., 56 N.J. 567, 573 (1970).

In *Harris,* the Supreme Court considered whether a trial court order denying a peace officer qualified immunity was appealable as of right. In reaching its negative conclusion, the Court synthesized a non-exclusive list of factors to be considered as to whether a particular order is appealable as of right: "the impact of an immediate right to appeal on the litigation between the parties, the burdens imposed on the parties, the language and legislative purpose of the governing statute, the prospect of substantial prejudice to parties absent an appeal as of right, and uniformity in

appellate procedure as applied to similar categories of trial court orders" 250 N.J. at 310-311. The balance of these factors support a right to immediate appeal of orders granting or denying a representative action to recover unpaid wages.

- the impact of an immediate right to appeal on the litigation between the parties - an immediate right to appeal will make earlier settlement more likely, as the issue of whether a representative action can be maintained may be seen as outcome-determinative for the parties. An immediate right of appeal will lead to a more accurate appraisal by the parties of the potential damages to be recovered, and hence is likely to lead to an earlier settlement.
- the burdens imposed on the parties - an immediate appeal of a representative action will lead to efficiency in the discovery process, as the parties will know sooner rather than later as to the scope of what information need be provided, and who would need to be deposed.
- the language and legislative purpose of the governing statute - the Legislative purpose in the PWA and similar wage statutes is to assure that the covered employees are paid at the proper wage rate. See Pa0016-18, *infra*. An immediate appeal of the representative action decision will clarify who is covered by the suit, and will advance the Legislative policy to cover "all workmen".

- the prospect of substantial prejudice to parties absent an appeal as of right - the decision to certify a representative action has the potential to transform a case worth three or four figures into a case worth six or seven figures or more, although that would not occur in this case, as best Plaintiff can determine. Plaintiff would thus not urge that there is a prospect of substantial prejudice to the parties if an immediate appeal is not granted.
- uniformity in appellate procedure as applied to similar categories of trial court orders - as Defendants' error in filing a notice of appeal makes clear, a representative action is similar in many ways to a class action per R. 4:32-1, and hence an immediate appeal of a decision on a claimed PWA or other statutory representative action would foster uniformity with R. uniformity with R. 2:2-3(b)(9)

For all of these reasons, Plaintiff would respectfully request that the Court grant Defendants leave to appeal *nunc pro tunc*.

## POINT II

### THE EXPLICIT AUTHORIZATION OF A REPRESENTATIVE ACTION IN THE PREVAILING WAGE ACT IS NEITHER TRUMPED BY NOR DOES IT INCORPORATE THE JUDICIAL CLASS ACTION RULE R. 4:32-1

Defendants' principal argument is that the trial court did not subject Plaintiff's representative action motion to the requirements of R. 4:32-1. Plaintiff did not move under R. 4:32-1, and this Court should reject Defendant's tying Plaintiff to a legal theory which he did not assert. Rather, Plaintiff has moved under the plain language of PWA to redress a violation of that statute with regard to the payment of overtime when he and employees are paid at two rates in the same week as a "workman [who] shall be entitled to maintain such action for and on behalf of himself or other workmen similarly situated . . ." Neither the plain language of the statute, nor the well-settled policy and purpose of the PWA, nor well-recognized canons of statutory interpretation, nor precedent accord with Defendants' engrafting of the requirements of R. 4:32-1 onto the PWA's creation of a representative action.[2]

Here, the relevant question is whether the representative action provisions of the PWA and the WHL must meet the requirements of R. 4:32-1. It is of course

[2] Similar language exists in the WHL, see N.J.S.A.§ 34:11-56a25, under which Plaintiff also moved.

hornbook law that when a court is interpreting a statute, "our overriding goal must be to determine the Legislature's intent." *Johnson v. Roselle EZ Quick LLC*, 226 N.J. 370, 386, 143 A.3d 254, 263 (2016)(citations and quotation marks omitted). "In most instances, the best indicator of that intent is the plain language chosen by the Legislature." Ibid., quoting *Cashin v. Bello*, 223 N.J. 328, 335, 123 A.3d 1042 (2015) and *State v. Gandhi*, 201 N.J. 161, 176, 989 A.2d 256 (2010)). "If the plain language leads to a clear and unambiguous result, then our interpretive process is over." Ibid., quoting *Richardson v. Bd. of Trs., Police & Firemen's Ret. Sys.,* 192 N.J. 189, 195, 927 A.2d 543 (2007) (citing *DiProspero v. Penn*, 183 N.J. 477, 492, 874 A.2d 1039 (2005)). To repeat the language of the relevant statutes: "**Any workman shall be entitled to maintain such action for and on behalf of himself or other workmen similarly situated**, and such workman and workmen may designate an agent or representative to maintain such action for and on behalf of all workmen similarly situated." N.J.S.A. § 34:11-56.40 (emphasis added). " **An employee shall be entitled to maintain the action for and on behalf of himself or other employees similarly situated**, and the employee and employees may designate an agent or representative to maintain the action for and on behalf of all employees similarly situated." N.J.S.A.§ 34:11-56a25 (emphasis added). There is simply nothing in the plain language of either of these statutes that suggests that R. 4:32-1 either supersedes or

is necessarily incorporated. Nor is there any ambiguity in the statutory language under either the PWA or the WHL as to whether the representative action therein authorized must follow the strictures of a class action under R. 4:32-1.

Precedent argues against the reading in of additional language to N.J.S.A. § 34:11-56.40. In *Quayle v. TriCon Construction*, 295 N.J.Super. 640 (App.Div. 1996), the plaintiff workers sued for violations of the PWA, and subsequently moved to join the defendant-employer's surety, which the trial court deemed untimely under the Public Bond Act, N.J.S.A. §§ 2A:44-143 to 147. This Court framed the issue on appeal as the "determination of the date from which a project is to be deemed accepted when a Prevailing Wage Act claim is made against the surety bond . . ." 295 N.J.Super. at 642. The surety argued that the project had been "substantially" accepted by the municipal owner when it executed a Certificate of Substantial Completion, and that industry practice was that this meant the project had been completed. This Court rejected the attempt to read in "substantially" and industry practice to the PWA, holding that doing so would be contrary to the worker protective "public policy of each of the relevant statutes[;] a judicial construction of the words 'acceptance' and 'completion' used in the limitation statute and surety bond respectively, should not be quick to diminish their scope by adopting a supposed industry practice, whether accurately stated or not, of implying that the word

'substantial' must be read into the meaning of the word 'completion'". Id., at 644.. Similarly, this Court should not be quick to "diminish the scope" of the Legislature's authorization of representative actions by reading in the requirements of R. 4:32-1, as this would undermine the worker-protection purpose of the PWA. See also, *Department of Labor & Indus. v. Union Paving & Constr. Co.*, 168 N.J. Super. 19, 26 (App.Div.1979)(refusisng to read in a *mens rea* requirement to the civil remedy portion of the PWA).

Defendant's fundamental argument that R. 4:32-1 overrides the representative actions specifically allowed by the PWA and WHL is at root deeply flawed and misconceives the roles of the Legislature and the Courts. In *Best v. C&M Door Controls, Inc.,* 200 N.J. 348, 981 A.2d 1267 (2009), our Supreme Court considered the interplay between a Rule of Court, namely the Offer of Judgment ("OOJ") rule of R. 4:58-3(c) and the PWA as well as the Conscientious Employees Protection Act ("CEPA"), N.J.S.A. §§ 34:19-1 to -14. In *Best*, the jury had awarded substantially less than the Defendant's OOJ, and thus under the terms of R.4:58-3(c), the Defendant employer was entitled to attorney's fees. *Best* reviewed the fee-shifting provisions of both the PWA and the CEPA, finding that neither statute permitted the award of attorneys to a non-prevailing employer when the employee's action was not frivolous. Thus, similar to Defendants' here, *Best* confronted a situation in which the statues and

the Rule were at direct odds over an issue — in that case over whether a prevailing employer could receive attorney's fees under the OOJ when neither the the PWA nor CEPA allowed attorney's fees to prevailing employers; in our case, whether a representative action authorized by the statute must meet the requirements of the class action R. 4:32-1, when the Legislature imposed no such requirement in either statute. In other words, Defendants ask this Court to have R 4:32-1's requirement supersede the Legislature's considered determination not to add such requirements to the statute. *Best* makes clear that "**(b)ecause a rule can never trump a statute**," 200 N.J. at 357 (emphasis added), Defendant's argument that R. 4:32-1 trumps the representative action provisions of the PWA and WHL is without any real legal foundation, and is contrary to settled law.

Defendants do not offer a reasoned basis for why and how R. 4:32-1 overrides the Legislature's authorization of representative actions. But even assuming there is a conflict between the PWA's and the WHL's statutory authorizations of representative action and R 4:32-1, Defendants' urging that the Rule nullifies the statutory authorization is contrary to settled precedent which holds Court should accept the Legislative authorization of representative actions. Courts have consistently deferred to Legislative choices concerning actions to be brought in court:

> The Court in *Passaic County* [*Probation Officers' Ass'n v. County of Passaic*, 73 N.J. 247, 374 A.2d 449 (1977)], stated that "since 1948, [it has] been the practice of this Court, with only occasional deviation, to accept and adopt legislative arrangements *that have not in any way interfered with this Court's constitutional obligation*" and that the Court had "every intention of continuing this practice." 73 N.J. at 255, 374 A.2d 449 (emphasis added). The Court added that:
>
> *Only where we are satisfied that the proper exercise of our constitutional responsibility to superintend the administration of the judicial system requires such action* would we feel compelled to exert this power in the adoption of a rule at odds with a legislative enactment. We repeat that in the absence of any action by this Court--felt to be constitutionally compelled--and as a matter of comity and respect for other branches of government, we accept and adopt all statutory arrangements touching or concerning the administration of any courts in the State . . .

*Williams v. State*, 375 N.J. Super. 485, 514, 868 A.2d 1034, 1053-54 (App. Div. 2005) (emphasis added by Appellate Division), aff'd sub.nom. *In re P.L. 2001, Chapter 362.*, 186 N.J. 368 (2006). As the Supreme Court stated in its affirmance of *Williams*, as "principles of comity always animate this Court's review of legislation that affects judicial administration," and "(b)ecause every possible presumption favors the validity of an act of the Legislature," a court "will not declare void legislation unless its repugnancy to the Constitution is clear beyond a reasonable doubt." 186 N.J. at 392 (quotation marks and citations omitted). Given that

Defendants have not argued that the Constitution and the separation of powers requires setting aside the PWA's and WHL's authorization of representative actions, let alone demonstrated same beyond a reasonable doubt, "principles of comity" and "every possible presumption favor[ing] the validity of an act of the Legislature," ibid., require that this Court hold that the Legislature's authorization of PWA and WHL representative actions is valid and should be followed. The trial court's holding to this effect should be affirmed on this ground alone.

The logic of the Supreme Court's recent opinion concerning the WPL may fairly be applied to the PWA - the statute

> is unambiguous. Even if it was not, applying well-known canons of statutory construction also demonstrates that [R. 4:32-1 does not supersede the PWA's authorization of representative actions.]. For example, "[i]t is an elementary rule of construction that effect must be given, if possible, to every word, clause and sentence of a statute." Norman J. Singer & Shambie Singer, 2A Sutherland Statutory Construction § 46:6 at 238 (7th ed. 2024) (citing *United States v. Menasche*, 348 U.S. 528, 75 S. Ct. 513, 99 L. Ed. 615 (1955)).

*Musker v. Suuchi, Inc.*, 260 N.J. 178, 189, 331 A.3d 900, 907 (2025) A worker claiming underpayment under the PWA has, as with any other action, the option of seeking class certification pursuant to R. 4:32-1. But Defendants' position that a representative action authorized under the PWA must meet the strictures of R. 4:32-1

renders as surplus the language in N.J.S.A. § 34:11-56.40 that "Any workman shall be entitled to maintain such action for and on behalf of himself or other workmen similarly situated, and such workman and workmen may designate an agent or representative to maintain such action for and on behalf of all workmen similarly situated." Neither Plaintiff nor any other "workman" bringing a PWA action need cite this language to move for a class action authorized by R 4:32-1. Thus, Defendants' interpretation of N.J.S.A. § 34:11-56.40 gives no effect to the quoted language of the PWA authorizing representative actions, and renders that language mere surplusage.. "Such an interpretation would contravene the canon of statutory construction that directs courts to interpret laws so as to give meaning to all of the Legislature's statutory text. *In re Civil Commitment of J.M.B.*, 197 N.J. 563, 573, 964 A.2d 752 (2009) ("Interpretations that render the Legislature's words mere surplusage are disfavored.")." *In re N.B.*, 222 N.J. 87, 101, 117 A.3d 1196, 1204 (2015). There is simply no reason Defendants offer to adopt such a "disfavored" view of N.J.S.A. § 34:11-56.40. Id.[3]

Defendants seem to be suggesting that R. 4:32-1 impliedly repeals N.J.S.A. § 34:11-56.40's authorization of representative actions. As set forth above,

[3] The same reasoning may be applied *mutatis mutandis* to N.J.S.A.§ 34:11-56a25, the authorization of representative actions under the WHL.

fundamental principles of separation of powers and democratic governance do not allow a Rule like 4:32-1, whether by supersession or implied repeal, to trump a Legislative enactment. "There is a strong presumption in the law against implied repealers." *Mahwah v. Bergen Cty. Bd. of Taxation*, 98 N.J. 268, 281, 486 A.2d 818, 825, cert. denied, 471 U.S. 1136, 105 S. Ct. 2677, 86 L. Ed. 2d 696 (1985), citing *Brewer v. Porch*, 53 N.J. 167, 173 (1969). Here, Defendants have offered no substantial reasoning to overcome this "strong presumption." *Mahwah* held, "(e)very reasonable construction should be applied to avoid a finding of implied repealer." 98 N.J. at 281 (citation omitted). The Supreme Court had earlier explained the logic behind requiring the adoption of any "reasonable construction" to avoid an implied repealer:

> The question of repeal is essentially one of legislative intention; and there is a presumption as a matter of interpretive principle and policy against an intent to effect a repeal of legislation by mere implication. The purpose so to do must be free from all reasonable doubt. Repeals by implication are not favored in the law; and where the statutory provisions may reasonably stand together, each in its own particular sphere of action, there is not the repugnancy importing the design to repeal the earlier provision.

*Swede v. Clifton*, 22 N.J. 303, 317, 125 A.2d 865, 872 (1956)(citations omitted.)

Here it is not repugnant to the Legislative purpose to allow for both a representative

action per N.J.S.A. § 34:11-56.40, particularly given the significant number of instances where, as here, a small employer is involved, as set forth Pa0018-19, *infra*. Indeed, it is entirely consonant with the Legislative purpose to cover "all workmen" victimized by underpayment of wages when performing public work, as discussed at Pa0017-19 *infra*, to allow for representative actions where one or more of the R. 4:32-1 requirements cannot be met.

If R. 4:32-1 impliedly repealed N.J.S.A. § 34:11-56.40 such that the Rule was meant to be the exclusive means by which workers could redress the failure to pay proper wages, the Legislature has simply not gotten the message. It has passed at least five separate statutes in recent years allowing various categories of workers who have not been paid the requisite wages to bring a representative action:

- N.J.S.A. § 34:8D-11 ("An action may be brought by one or more temporary laborers employed by the temporary help service firm for and on behalf of themselves and other temporary laborers similarly situated against the temporary help service firm or a third party client.") L. 2023, c. 10, § 11
- N.J.S.A. § 34:11-56.88 ("Any longshoreman shall be entitled to maintain such action for and on behalf of himself or other longshoremen similarly situated, and the longshoreman or longshoremen may designate an agent or

representative to maintain such action for and on behalf of all longshoremen similarly situated..") L. 2021, c. 336, § 12

- N.J.S.A. § 34:11-56.62 ("The worker shall be entitled to maintain an action for and on behalf of the worker or other workers similarly situated and the worker or workers may designate an agent or representative to maintain such actions for and on behalf of all workers similarly situated.)" L. 2005, c. 379, § 5 covering certain building service workers and then amended by L. 2021, c. 68, § 4 expanding the coverage to certain railroad and airport workers
- N.J.S.A. § 34:11-4.10 amending the Wage Payment Law, N.J.S.A. §§ 4:11-2 *et seq*. to specifically authorize an employee to bring a civil action to redress a violation, and stating "The employee shall be entitled to maintain the action for and on behalf of other similarly situated employees, or designate an agent or representative to maintain the action for and on behalf of all similarly situated employees." L. 2019, c. 212, § 2.

All of the foregoing statutes were enacted after R.4:32-1's effective enactment. As with N.J.S.A. § 34:11-56.40, none make reference to R. 4:32-1 and each authorizes a separate, non-class action avenue for workers claiming unpaid wages under these statutes to have unnamed fellow employees become part of the lawsuit. Defendants are effectively arguing that these repeated enactments by the Legislature are "mere

surplusage" in that the only avenue for unnamed employees to collect unpaid wages is via R. 4:32-1. Defendants would have this Court believe the Legislature to have lost its collective mind by these repeated, supposedly impliedly repealed, authorizations of representative actions. Cf. *Leavitt v. Arave*, 646 F.3d 605, 616 (9th Cir. 2011)("One definition of insanity is repeating the same course of action twice and expecting a different result.") These repeated Legislative enactments make clear that the Legislature does not view R. 4:32-1 as impliedly repealing the authorization of representative actions, but rather sees representative actions to recover unpaid wages as a separate, appropriate means of effectuating the public policy embodied in these statutory minimum wage mandates, and is evidence of the Legislative intent in the PWA. See *Quaremba v. Allan*, 67 N.J. 1, 14 (1975).

A representative action to enforce the PWA's wage mandates advances the purpose of the statute. The PWA "was passed to protect the compensation rates paid to laborers under a public work contract." *Horn v. Serritella Bros., Inc.*, 190 N.J.Super. 280, 283, 463 A.2d 366 (App.Div.1983); accord *Bankston v. Hous. Auth. of City of Newark*, 342 N.J. Super. 465, 469, 777 A.2d 74, 76 (App. Div. 2001) The statute contains the following language as to the legislative purpose: "to establish a prevailing wage level for workmen engaged in public works in order to safeguard their efficiency and general well being and to protect them as well as their employers

from the effects of serious and unfair competition resulting from wage levels detrimental to efficiency and well being." N.J.S.A. § 34:11-56.25. See *Serritella Bros.*, 190 N.J.Super. at 283. This Court in *Bankston,* quoting *Cipparulo v. Friedland*, 139 N.J.Super. 142, 148, 353 A.2d 105 (App.Div.1976), explained the reasoning behind establishment of specific wage rates in the PWA:

> The prevailing wage rate is a minimum wage rate and is unquestionably designed to protect union contractors from under bidding on public work by their non-union competitors who conceivably would have the advantage of paying their labor nonunion wages . . . . Its purpose is to insure that the prevailing wage rate existing at the time of the signing of a public contract constitutes the minimum wage paid to workers under that contract.
>
> Because the Act "is remedial in nature," *Horn v. Serritella Bros., Inc*., supra, 190 N.J.Super. at 283, 463 A.2d 366, it 'is entitled to a liberal construction and application in order to effectuate the strong public policy of protecting those whose labor goes into public projects.' " Ibid., (quoting *Newark Laborers' Pension--Welfare Funds v. Comm. Union Ins. Co.,* 126 N.J.Super. 1, 8, 312 A.2d 649 (App.Div.1973)).

342 N.J.Super. at 469. Precisely, this scenario is at play on this motion. This small, non-union contractor is undercutting the rules established in union contracts, and embodied in the Commissioner's rulings on the prevailing wage, when it comes to overtime where two different wage rates are paid to the worker in the same week. Unlike their union counterparts, the workers covered by this representative action do

not have the readily available alternative of a grievance-arbitration procedure to correct this underpayment. Nor do they have the alternative of a R. 4:32-1 class, given that the numerosity requirement of that Rule cannot be met. Thus, the PWA's purpose to create a floor for wages of workers on public works projects, "the strong public policy of protecting those whose labor goes into public projects," can only be met if a representative action is allowed.

Allowance of representative actions also advances the PWA"s intent to cover "all workmen" engaged in public work. See N.J.S.A. § 34:11-56.28 and § 34:11-56.33(a). "The Prevailing Wage Act imposes liability for all workmen. . . . This provision ensures that all workers are paid the prevailing wage." *Serraino v. Mar-D, Inc.*, 228 N.J. Super. 482, 488, 550 A.2d 178, 181 (Law Div. 1988); accord *Bankston*, 342 N.J.Super. at 469-470; see also *Dep't of Labor v. Titan Constr. Co.*, 102 N.J. 1, 5, 9, 504 A.2d 7 (1985)(affirming DOL position " that the purpose of the Act is to ensure that all bidders on public contracts pay all their workmen the prevailing wage, and that small contractors whose principals perform manual labor should not be exempt from this requirement.") Without allowance of a representative action, "all workmen" engaged in public work by Defendants will not be paid the prevailing wage when they work more than forty (40) hours for Defendants and receive two different wage rates during that week.

As indicated above, Defendant T. Slack Environmental is a small employer, usually employing less than fifteen (15) workers on a public project in any given week. Of the 165,315 New Jersey employees in the construction sector, 24,191 worked for employers with less than five employees; 24,905 worked for employers with five to nine employees; and 28,801 worked for employers with ten to nineteen employees. NJ Department of Labor and Workforce Development, Quarterly Census of Employment and Wages, https://www.nj.gov/labor/labormarketinformation/employment-wages/quarterly-census/(visited July 3, 2025). In other words,77,897employees or 47.12% of our State's construction workforce are employed by employers with less than 20 employees. The unionization rate among construction workers is 21.01%. Van der Naald, Joseph & Vachon, Todd E., "The State of Labor in New Jersey 2021-2023" at p. 5, https://smlr.rutgers.edu/sites/default/files/Documents/LEARN/State_of_Labor_Report_August2024.pdf (visited July 3, 2025). Our Courts follow the Federal rule that a class of twenty employees is too small to satisfy the numerosity requirements of R. 4:32-1. See *Baskin v. P.C. Richard & Son, LLC*, 246 N.J. 157, 174 (2021). Thus, applying the 78.99% non-unionized rate to the 77,897 construction employees at employers with less than twenty employees means that 61,531 construction

employees or 37.22% of our State's construction employees lack the ability to have a grievance-arbitration procedure or a class action per R. 4:32-1 to remedy any underpayment of the prevailing wage. It is no wonder then that the Legislature saw fit to include a representative action procedure to facilitate its intent to cover underpayments to "all workmen" whose labor is used in public work.

Indeed, jurisprudential precedent draws the conclusions that PWA representative actions are entirely viable without meeting the requirements of R. 4:32-1. In *Cipparullo,* a PWA case involving unpaid wages following the initial adoption of class action rule on September 8, 1969, Pressler &Verneiro, Note R. 4:32-2, (2025 ed., p. 1430), the sole Plaintiff was the local union business representative. Plaintiffs challenged the failure of the defendant-employer-subcontractor to raise their wages from the initially contracted rate to the higher rate following renegotiation of the contract. Following testimony from a Department of Labor representative, the trial court held for the subcontractor per its reading of the PWA on the merits, and this Court affirmed. That both this Court and the trial court reached the merits means both courts found that the Union Business Representative had standing to bring the case, even if the case lacked merit. "As a threshold justiciability requirement, standing must be determined before a court may proceed to consider the substantive merits of the case." *Watkins v. Resorts Int'l Hotel & Casino*, 124 N.J. 398, 424, 591

A.2d 592, 605 (1991). As this Court has held, "Courts will not entertain matters in which plaintiffs do not have sufficient legal standing." *N.J. Citizen Action v. Riviera Motel Corp*., 296 N.J.Super. 402, 409, 686 A.2d 1265 (App. Div. 1997), appeal dismissed, 152 N.J. 361, 704 A.2d 1297 (1998). "Standing requires a sufficient stake in the outcome of the litigation, a real adverseness with respect to the subject matter, and a substantial likelihood that the party will suffer harm in the event of an unfavorable decision." *In re Camden County*, 170 N.J. 439, 449, 790 A.2d 158 (2002)(citation and quotation marks omitted). In *Cipparullo*, it is clear that the Union Business Manager did not suffer any harm in the form of lost wages, and hence would not have had standing but for the authorization of representative actions under N.J.S.A. § 34:11-56.40 of the PWA.

Notably, nowhere in *Cipparullo* is there any mention of R. 4:32-1. Indeed, it very much appears that like Defendants here, the subcontractor-employer in *Cipparullo* was a small employer, such that imposition of R. 4:32-1 requirements on this representative would have precluded it before reaching the merits. At issue in *Cipparullo* was the wage for the stipulated 4,703 hours worked by the employees occurred over a 34 week period from September 1, 1971 and May 1, 1972. 139 N.J.Super. At 143. Thus, a worker on a 40 hour week would have worked 1,390.4 hours during this period. In other words, less than four full-time workers would have

reached the total of 4,703 hours during this period, assuming the employee worked 40 hours each week.. Even if this number were tripled, to twelve (12) employees so as to account for time not worked, it is entirely clear that the number of employees in this representative action would never have satisfied the numerosity requirements of R. 4:32-1. That this Court considered the merits of the claims of this small group of employees without reference to the numerosity and other requirements of R. 4:32-1 is ample judicial precedent for rejecting Defendants' appeal.

At issue in *Newark Laborers*, a case decided before passage of the Employment Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001, *et seq*.. was whether the Trustees of the fringe benefit funds were entitled to attorney's fees from the surety where the employer did not pay and the plaintiffs needed to resort litigation to collect unpaid contributions. This Court answered the question in the affirmative explaining:

> Since the Prevailing Wage Act is remedial in nature, *Male v. Pompton Lakes Mun. Util. Auth.*, 105 N.J. Super. 348, 355 (Ch. Div. 1969), it is entitled to a liberal construction and application in order to effectuate the strong public policy of protecting those whose labor goes into public projects. [*United States v.* ] *Carter*, [353 U.S. 210], at 216, [77 S. Ct. 793, 1 L. Ed. 2d 776 (1957)].
>
> It is evident that the Legislature sought to prevent the frustration of its declared policy by providing for the

> additional recovery of costs and reasonable attorney's fees, thus assuring laborers full payment of the wages due them.

126 N.J. Super. at 8. Here, the Court reached the merits and ruled in the Trustees' favor, which can only mean that it found that the Trustees had standing. That standing came from the PWA's authorization of a representative action. Id., at 6. No mention of R. 4:32-1 was found necessary for the Trustees to prevail.

As stated in several of the cited decisions, the PWA is a remedial statute that should be given a liberal, worker-protective interpretation. *Newark Laborers*, 126 N.J. at 8; *Bankston*, 342 N.J.Super. at 469; *Serritella Bros., Inc*., supra, 190 N.J.Super. at 283. Even if there were any ambiguity as to the issue of whether a representative action must meet the requirements of R.4:32-1, this liberal, worker protective interpretation would favor a construction that would allow for representative actions to cover workers who were underpaid while performing public work.

Defendants' invocation of Federal precedent as justification for incorporating R. 4:32-1 into the PWA and WHL, Db at 12, is belied by the actual history and structure of the similar Federal statutes. Examination of the history and structure must begin with the Federal Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201 *et seq.,* passed in 1938, which contains language close to the "similarly situated"

employees/workmen provisions of the PWA and WHL - it is noteworthy that the Davis-Bacon Act, the Federal analogue to the PWA, contains no such language. . In particular, 29 U.S.C. § 216(b) states that "Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated." Given the wage regulating purposes of the WHL and PWA, and the impact of the FLSA as a major intervention in the field of employer/employee wages, it seems entirely probable that the FLSA was the source of the "similarly situated" language empowering employees to bring a representative private right of action under both State statutes.

However, in 1947 Congress passed the Portal-to-Portal Act, which substantially modified the FLSA.[4] Following *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S.680, 690-691, 66 S. Ct. 1187, 90 L. Ed. 1515 (1946), Congress perceived that there was a "flood of litigation" largely brought by unions, which prompted passage of the Portal-to-Portal Act in 1947. See *Integrity Staffing Sols., Inc. v. Busk*, 574 U.S. 27, 31, 135 S. Ct. 513, 516, 195 L.Ed.2d 410 (2014). Congress enacted the Portal-to-Portal Act to limit the number of FLSA lawsuits. See *De Asencio v. Tyson*

[4] A copy of the Portal-to-Portal Act, as adopted, is submitted for the convenience of the Court as Pa0022-0028.

*Foods, Inc.,* 342 F.3d 301, 306 (3rd Cir. 2003), overruled in part on other grounds, *Knepper v. Rite Aid Corp.*, 675 F.3d 249 (3d Cir. 2012). The 1947 amendments in Section 4 made travel to and from work and preliminary and postliminary activities not compensable. See 29 U.S.C. 254(a). In Section 5A, the Portal-to-Portal Act amended the FLSA to eliminate the possibility of representative actions; indeed that section of the statute is entitled "Representative Actions Banned." The 1947 Amendments added the following language to Section 16(b) of the FLSA: "No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought." This was the state of the FLSA when the New Jersey Legislature took up the issue of wage regulation in the 1960s. Neither the PWA nor the WHL incorporate anything like the above-quoted language that the Portal-to-Portal Act added to Section 16(b) of the FLSA, 29 U.S.C. § 216(b). When the Legislature adopted the WHL in 1966, it must be deemed to have been entirely aware of the original language of FLSA, which covers the same subject as the WHL, see *Hargrove v. Sleepy's, LLC,* 220 N.J. 289, 313 (2015), as well as its subsequent amendment by the Portal-to-Portal Act. Similarly, given that the FLSA as the likely source of the language authorizing representative actions in the PWA, the Legislature must be deemed aware of the original language of Section 16(b) of the FLSA and the major

changes to the representative action provisions in 29 U.S.C. § 216(b) made by the Portal-to-Portal Act, when it adopted the PWA in 1963. Indeed, this Court should " presume that the New Jersey Legislature was aware of the federal law," when it interprets a statute enacted by the Legislature. See *State ex rel. Health Choice Grp., LLC v. Bayer Corp.*, 478 N.J. Super. 184, 198 (App. Div. 2024); *Communications Workers of Am. v. McCormac*, 417 N.J. Super. 412, 428 (Law Div 2008)("the Legislature is presumed to be aware of the federal statute, and it chose not to adopt the federal statutory language.") This Court has stated that the WHL is "patterned on the federal Fair Labor Standards Act," *Marx v. Friendly Ice Cream Corp.,* 380 N.J. Super. 302, 309 (App. Div. 2005); see also *Hargrove ,* 220 N.J.at 313 (stating that the FLSA "influenced the adoption in 1966 of the WHL to protect workers not covered by FLSA").

As the Supreme Court has explained, the general rule is that when

> our Legislature has used a federal statute as a model for a counterpart provision and replicated its language but deleted a portion of the text, [that deletion] would evince legislative intent to diverge from the federal approach in that specific respect. See *Airwork Serv. Div. v. Dir., Div. of Taxation*, 97 N.J. 290, 294, 478 A.2d 729 (1984), cert. denied 471 U.S. 1127, 105 S. Ct. 2662, 86 L. Ed. 2d 278 (1985) "Where the Legislature adopts a new law, using as a source a statute (theretofore enacted in another jurisdiction, but omits a provision of the source statute, the

> omission is construed as being deliberate." (quotation omitted)).

*Matter of Enf't of N.J. False Claims Act Subpoenas*, 229 N.J. 285, 287-88, 162 A.3d 262, 263 (2017). Here, the Legislature used the FLSA as the model for enacting the WHL including its authorization of representative actions. See *Marx,* supra and *Hargrove,* supra. However it deleted the Portal-to-Portal Act's insertion of the clause "No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought," language that effectively banned representative actions under the FLSA. Hence, the principle of *False Claims* and *Airwork* mandate the conclusion that the Legislature in the WHL intentionally chose to keep the original authorization of representative actions intact.

As this Court has explained when specifically considering the WHL: "Presumably the Legislature was well aware of the distinct exclusions from the federal law for 'motor buses' and for 'taxicabs' and deliberately determined that the interests of the citizens of New Jersey were best served by not granting a similar exclusion to the taxicab industry from the provisions of the Wage and Hour Law." *Yellow Cab Co. v. State,* 126 N.J. Super. 81, 86 (App. Div. 1973). Similarly, the Legislature was well aware of the original FLSA language which authorized

representative actions, and the subsequent banning of such actions by the Portal-to Portal Act when it enacted the WHL, particularly in light of its refusal to include Portal-to-Portal Act language when it authorized representative actions three years earlier under the PWA. Thus, there is every reason to follow the presumption that the Legislature was aware of the Portal-to-Portal Act's banning of representative actions, and intentionally chose to omit the 1947 language from both the PWA and the WHL. A court "cannot presume the Legislature 'intended a result different from what is indicated by the plain language or add a qualification to a statute that the Legislature chose to omit.'" *Simadiris v. Paterson Pub. Sch. Dist.*, 466 N.J. Super. 40, 49 (App. Div. 2021) quoting, *Tumpson v. Farina*, 218 N.J. 450, 467-68 (2014). To interpose the Portal-to-Portal Act's ban on representative actions would be to add a qualification to the WHL that the Legislature chose to omit. Id.

The issue of whether the Portal-to-Portal Act has been incorporated into the WHL has been squarely litigated in the U.S. District Court for the District of New Jersey. *Farrell v. FedEx Ground Package Sys.*, 478 F. Supp. 3d 536, 543 (D.N.J. 2020), and *Vaccaro v. Amazon*, No. 18-11852, 2020 U.S. Dist. LEXIS 114526, 2020 WL 3496973 (D.N.J. June 29, 2020). In rejecting the employer-defendant's claims concerning the later passed State statute, *Vacarro* found that "the New Jersey legislature did not intend to incorporate the Portal-to-Portal Act . . ." It noted "the

NJWHL and its regulations expressly refer to specific provisions of the FLSA and its regulations, see, e.g., N.J.S.A. § 34:11-56a4 (citing to "Section 6 of the federal "Fair Labor Standards Act of 1938'"); N.J.A.C. 12:56-7.2(a) (citing to 29 C.F.R. Part 541), yet the NJWHL and its regulations do not cite to the section of the FLSA that was amended by the Portal-to-Portal Act." 2020 U.S. Dist. LEXIS 114526 at *17. It contrasted New Jersey's non- incorporation of the Portal-to-Portal Act with Ohio law which incorporated the Portal-to-Portal Act, where the Ohio statute "expressly incorporate[ed] all of Section 7 of the FLSA, as amended"). Ibid *Vacarro* thus concluded that the Legislature's omission of reference to the Portal–to-Portal Act was deliberate, and hence barred any incorporation claim, as Defendants are making here.

*Vaccaro* reinforced its conclusion by noting that several regulations issued by the NJ DOLWD were inconsistent with the Portal to Portal Act, specifically citing N.J.A.C 12:56-5.5 (reporting to work requires minimum of 1 hour's pay); N.J.A.C. 12:57-3.7 (requiring travel time in mercantile operations be paid); N.J.A.C. 12:57-5.7 (requiring travel time in laundry, cleaning and dyeing operations be paid). Id. at *18. Accord, *Stebbins v. Petro. Equip. Servs.*, No. 21-15117, 2022 U.S. Dist. LEXIS 42484, 2022 WL 717166, at *23-24 (D.N.J. Mar. 9, 2022)("the Court finds that the NJWHL also does not incorporate the original Portal-to-Portal Act amendments.") .

In *Farrell v. FedEx Ground Package Sys*., 478 F. Supp. 3d 536, 543 (D.N.J. 2020), Chief Judge Wolfson, the author of *Vacarro*, was confronted with a similar

argument that Portal-to-Portal Act had been incorporated into the WHL and thus required dismissal of the plaintiff's complaint on the pleadings. Relying on *Vacarro*, the Chief Judge reiterated that "the NJWHL did not incorporate the federal Portal-to-Portal Act. . ." and denied the Motion to Dismiss. Defendant has failed to cite, much less rebut *Vaccaro*, *Farrell* and *Stebbins,* which cases Plaintiff submits are persuasive on the point that the the Portal-to-Portal Act's banning of representative actions has not been incorporated into the WHL. See also, *Del Rio v. Amazon.com.dedc, LLC*, 132 F.4th 172, 2025 U.S. App. LEXIS 6166 (2d Cir. 2025)(noting that NJ's wage and hour statute does not incorporate the Portal-to-Portal Act and certifying to the Connecticut Supreme Court the question of whether that State's wage and hour legislation does so as well).

This Court's citation in *Newark Laborers* to *Carter*, brings up the federal Davis-Bacon Act, 40 U.S.C. §§ 3141-48, adopted in 1931, which regulates wage rates on Federally funded projects, just as the PWA regulates wages rates on State funded projects. Indeed, the PWA, adopted 32 years later, has been characterized as a little Davis-Bacon Act. See *George Harms Constr. Co. v. N.J. Tpk. Auth*., 137 N.J. 8, 22 (1994); cf. *Union Paving,* 168 N.J. Super. at 27 ("The Prevailing Wage Act is similar to, if not patterned after, the federal prevailing wage statute, the Davis-Bacon Act.").

Plaintiff would begin by noting the complete absence of any language in the PWA that could be read similarly to the Portal-to-Portal Act's elimination of representative actions under the FLSA. Any claim that the Portal-to-Portal Act is incorporated into the PWA via the Davis-Bacon Act is belied by the fact that the Portal-to-Portal Act does not purport to ban representative Davis-Bacon claims. While the Portal-to-Portal Act does amend the Davis-Bacon Act to exclude the same travel, preliminary and postliminary and activities, as it does under the FLSA, Pa0024-0025, no mention whatsoever is made of the Davis-Bacon Act in Section 5A, Pa0025, of the Portal-to-Portal Act, the provision banning representative actions. "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23, 104 S. Ct. 296, 78 L. Ed. 2d 17 (1983) (cleaned up); *General Motors Corp. v. United States*, 496 U.S. 530, 541, 110 L. Ed. 2d 480, 110 S. Ct. 2528 (1990); see also *T.H. v. Div. of Developmental Disabilities*, 189 N.J. 478, 492, 916 A.2d 1025, 1034 (2007) ("it is well settled that where the Legislature specifically includes a requirement in one subsection of a statute but not in another, the term should not be supplied where it has been omitted."), citing, *Higgins v. Pascack*, 158 N.J. 404, 419, 730 A.2d 327 (1998); and *Marshall v. Western Union,* 621 F.2d 1246, 1251 (3d Cir.1980) (stating that "[u]nder the usual canons of statutory

construction, where [the Legislature] has carefully employed a term in one place and excluded it in another, it should not be implied where excluded"). Thus, the intentional exclusion of any mention of the Davis-Bacon Act in Section 5A of the Portal-to-Portal Act, after its inclusion in the immediately preceding Section 4 compels the conclusion that Congress deliberately intended to exclude the banning of representative actions from prevailing wage claims.

Nor is there any indication of a "flood of litigation" in the wake of World War II such as gave rise to the Portal-to-Portal Act's ban of FLSA representative actions. While his Court need not decide why there was an absence of a similar "flood of litigation" under the Davis-Bacon Act in the immediate post World War II context, one good reason may be that it is doubtful that the Davis-Bacon Act permits private civil suits to redress underpayment, see *Weber v. Heat Control Co.*, 579 F. Supp. 346 (D.N.J. 1982), aff'd, 728 F.2d 599 (3d Cir. 1984); *Livingston v. Shore Slurry Seal, Inc.*, 98 F. Supp. 2d 594, 600-601 (D.N.J. 2000).[5] It is certainly clear that the Portal-to-Portal Act found no need to amend the Davis-Bacon Act to limit representative actions as it had done with the FLSA. Given this history and that the Davis-Bacon Act has no language whatsoever concerning representative actions, the authorization of representative actions in the PWA plainly had a source other than the Davis-Bacon

[5] For a discussion of the reasons why the Davis-Bacon Act is best read as not authorizing a private right of action, see *Bullock v. United States*, No. 88-1141, 1989 U.S. App. LEXIS 24002 (9th Cir. Aug. 17, 1989).

Act. The most likely source is the FLSA, given that both that Federal statute and the PWA concern the underpayment of wages. Hence, for the same reasons as necessitate the conclusion that the Legislature in enacting the WHL intentionally omitted the effective ban on representative actions in the then-current version of the FLSA, so too in enacting the PWA, the Legislature intentionally omitted the effective ban on representative actions in enacting the PWA. See *False Claims* and *Airwork*, supra.

As set forth above, the plain, articulated purpose of the Portal-to-Portal Act was to limit the number of FLSA lawsuits. See *De Ascensio*, 342 F.3d at 306. But the Legislature has never amended relevant language of PWA authorizing representative actions, N.J.S.A. § 34:11-56.40, so as to limit such actions, and the courts have approved of their use in *Cipparullo* and *Newark Laborers*. "[T]he construction of a statute by the courts, supported by long acquiescence on the part of the Legislature or by continued use of the same language or failure to amend the statute, is evidence that such construction is in accord with the legislative intent." *Macedo v. Dello Russo*, 178 N.J. 340, 346, 840 A.2d 238, 242 (2004). Here, the Legislature has known that the Courts have construed the PWA, specifically N.J.S.A. §34:11-56.28 and § 34:11-56.33(a), as having a policy of covering "all workmen" those perform hourly labor on public works. *Serraino* 228 N.J. Super. At 488, 550 A.2d 178, 181 (Law Div. 1988); *Bankston*, 342 N.J.Super. at 469-470; see *Titan Constr.*, 102 N.J. at 5 and 9.

While the Legislature has amended the language of those statutes to change "all workmen", to "all workers", that change simply emphasizes that the Legislature intended to cover all employees who contribute to public work. The amendments here consciously retain the language on which the Courts relied for their holding of the coverage of all workers, providing even stronger evidence of Legislative agreement with the Court's interpretation of the PWA. *Mass. Mut. Life Ins. Co. v. Manzo*, 122 N.J. 104, 116, 584 A.2d 190, 196 (1991)("The inference of legislative acquiescence is fortified if, as here, the Legislature has amended a statute several times without altering the judicial construction.")

In sum, the plain language of the relevant statutes, basic principles of comity between the judicial and legislative branches, furtherance of the statutory policies and purposes, existing jurisprudential precedent, longstanding canons of statutory interpretation, the numerous recent Legislative enactments authorizing representative actions to redress underpayment of wages, and the pertinent legislative history all reject Defendants' claim that the requirements of R. 4:32-1 must be met before a Court can allow a representative action under the PWA or WHL. The decision below rejecting Defendants' claims should be affirmed.

## POINT III

### AS DEFENDANTS FAILED TO ARGUE TO THE TRIAL COURT THEIR SECOND BRIEFED POINT CONCERNING THE EVIDENCE OF SIMILARLY SITUATED EMPLOYEES, THE COURT SHOULD NOT CONSIDER THIS POINT

The argument of Appellant's Point II is that the Court failed to consider the evidence that the Plaintiff and the other "workmen" were similarly situated. However, Defendants never raised that issue in their brief to the Court on the Motion. Indeed, in their brief to the trial court, see Pa0175-0338, the phrase "similarly situated" is nowhere to be found. Not only did Defendants fail to raise this issue properly before the trial court, that error has prejudiced Plaintiff and prevents a full presentation of this issue to this Court.

It is of course hornbook law that an issue not properly presented below will not be considered by this Court. Thus this Court will routinely "decline to consider questions or issues not properly presented to the trial court when an opportunity for such a presentation is available unless the questions so raised on appeal go to the jurisdiction of the trial court or concern matters of great public interest." *Selective Ins. Co. of Am. v. Rothman*, 208 N.J. 580, 586, 34 A.3d 769 (2012) (*quoting Nieder v. Royal Indem. Ins. Co.*, 62 N.J. 229, 234, 300 A.2d 142 (1973)). Thus, it is well established that "[A]n issue not briefed is deemed waived." *State v. Zingis*, 471 N.J. Super. 590, 599 n.4, 274 A.3d 677, 683 (App. Div. 2022) (citations omitted); accord

*W.H. Indus., Inc. v. Fundicao Balancins, Ltda*, 397 N.J. Super. 455, 459, 937 A.2d 1022, 1025 (App. Div. 2008). It is settled that an issue not argued in a brief below is deemed abandoned. *Noye v. Hoffmann-La Roche Inc*., 238 N.J. Super. 430, 432 n.2, 570 A.2d 12 (App. Div.), certif. denied, 122 N.J. 146, 584 A.2d 218 (1990), and certif. denied, 122 N.J. 147, 584 A.2d 218 (1990).

Here, Plaintiff's opening brief on the motion, Pa0010-0019, pointed to the statutory language in both the PWA and the WHL as to "similarly situated" employees and argued that there the statutory "similarly situated" language represented a legislative judgment as to what constituted the appropriate group to be represented, namely the hourly employees of the defendant-employer without consideration of many of the requisites for a R. 4: 32-1 class action. Cf. *Iglesias-Mendoza v. La Belle Farm, Inc.*, 239 F.R.D. 363, 368 (S.D.N.Y. 2007)(for an FLSA op-in collective action"'no showing of numerosity, typicality, commonality, or representativeness need be made.'"), quoting *Young v. Cooper Cameron Corp.*, 229 F.R.D. 50, 54 (S.D.N.Y. 2005)); *O'Brien v. Ed Donnelly Enters.*, 575 F.3d 567 (6th Cir. 2009)(explaining that Federal Rule 23 predominance analysis is inappropriate under FLSA collective action)(citations omitted); *Oztimurlenk v. United States*, 162 Fed. Cl. 658, 681 n.33 (Ct. Claims 2022)("( "[o]pt-in classes do not inherently support" the commonality, predominance, or typicality requirements")(citation omitted). Plaintiff argued to the trial court, as he has done

here, that the source of both statutes' "similarly situated" was the FLSA, prior to amendment by the Portal-to-Portal Act. Pa0012-0016. Thus, Defendants were clearly on notice of the importance of the "similarly situated" language of the statutes. In sum, there can be no question that Defendants had every opportunity to brief the evidentiary requirements to make out the "similarly situated" issue to the trial court, should it have wished to do so, and that it failed to brief this issue. Hence the question of the evidential quantum necessary to make out "similarly situated," was not "properly presented to the trial court when there was an opportunity for such presentation." *Selective Ins.*, supra 208 N.J. at 586, and this Court should not hear this issue on appeal.

"An appellate court will consider matters not properly raised below only if the issue is one of sufficient public concern."*Alan J. Cornblatt, P.A. v. Barow*, 153 N.J. 218, 230, 708 A.2d 401 (1998) (citations omitted). Defendants do not contend that the question of whether Defendants' few employees who have worked more than forty hours at two different wagesrates involves a major public question. Moreover, Defendants have been remiss in failing to label in their brief that their Point II was not briefed below. See R. 2:6-2(a)(6).

Defendants did raise defenses around the "similarly situated" language for the first time at oral argument on the motion, Pa0377, although the reason offered was the need to engage in potentially difficult individual damages calculations.

"[M]ention of an issue at oral argument before the trial court does not require an appellate court to address it." See *Selective Ins. Co. of Am. v. Rothman*, 208 N.J. 580, 586, 34 A.3d 769 (2012. Hence, the mere mention of this issue after briefing had been completed does not mandate this Court's consideration of the issue, should not lead to the Court to take up this unargued point.

Further, at oral argument, Defendants did not explain what the Federal standard is and why Plaintiff fails to be "similarly situated." This failure to specify the proposed standard or adduce any evidence as to why Plaintiff fails that standard is tantamount to a waiver of the point. Further, by failing to specify the standard or adduce evidence of how Plaintiff failed to meet the standard, Plaintiff has been precluded from presenting evidence to the trial court, and hence to this Court, pertaining to the "similarly situated" nature of the hourly employees of T. Slack Environmental to the trial court.

For all of these reasons, Plaintiff respectfully requests that the Court not consider Defendants' Point III.

## POINT IV

### SHOULD THE COURT WISH TO ADDRESS THE MERITS OF DEFENDANTS' CLAIM THAT PLAINTIFF FAILED TO MAKE THE NECESSARY SHOWING THAT THE THEIR EMPLOYEES WERE SIMILARLY SITUATED TO PLAINTIFF, IT SHOULD FIND THAT CLAIM TO BE MERITLESS

Should the Court wish to take up Defendants' claim that there was an insufficient showing that the employees to be represented were "similarly situated" to Plaintiff, it should find the claim to be meritless. As set forth previously, the PWA is to be liberally constructed so as to protect the wages of employees who labor on public works. *Bankston*, 342 N.J.Super. at 469 (and cases cited thereat). So too with the worker-protective WHL: "The remedial purpose of the [WHL] dictates that it should be given a liberal construction." *New Jersey Dep't of Labor v. Pepsi-Cola Co.*, 170 N.J. 59, 62, 784 A.2d 64 (2001); accord *Hargrove*, 220 N.J. at 304, 106 A.3d 449 ("The [WHL] should be construed liberally to effectuate its purpose."). That liberal construction mandate should be applied to the "similarly situated" language in both statutes.

Further, R. 4:32-1 casts upon the objecting defendant the necessity of making the requisite showing sufficient to deny class certification. As this Court explained in *Delgozzo, "*a class action 'should be permitted unless there is a clear showing that it is inappropriate or improper.'" 266 N.J.Super. at 180, quoting *Lusky v. Capasso*

*Bros*., 118 N.J.Super. 369, 373, 287 A.2d 736 (App.Div.), certif. denied, 60 N.J. 466, 291 A.2d 16 (1972); accord *Beegal v. Park W. Gallery,* 394 N.J. Super. 98, 110 925 A.2d 684 (App. Div. 2007); *Saldana v. City of Camden*, 252 N.J. Super. 188, 599 A.2d 582 (App. Div. 1991); Pressler & Verneiro, Current N.J. Court Rules, Comment1 R. 4:32-1 (2025 ed. P.1431). These decisions came to this determination based on New Jersey's liberal policy of interpreting the requirements of R, 4:32-1. Plaintiff would urge that once a plaintiff makes a *prima facie* showing that s/he is similarly situated to the other employees, the PWA and WHL requires the defending employer to make a "clear showing" that a representative action "is inappropriate or improper." *Lustky, 118* at 373.

As with R. 4:32-1, the *prima facie* case for a representative action can be made simply on the allegations of the Complaint. See *Int'l Union of Operating Eng'rs Local No. 68 Welfare Fund v. Merck & Co.,* 192 N.J. 372, 376, 929 A.2d 1076 (2007); see also *Delgozzo*, 266 N.J. Super. at 181 (accepting as true all substantive allegations of party seeking certification). On a certification motion, the court must "accord[] plaintiffs every favorable view" of the complaint and record." *Iliadis v. Wal-Mart Stores, Inc.*, 191 N.J. 88, 96, 922 A.2d 710, 714 (2007), citing *Riley v. New Rapids Carpet Ctr*., 61 N.J. 218, 223, 294 A.2d 7 (1972), and the mandated liberal construction argues in favor of applying the same standard to representative actions.. Contrary to Defendants' animadversions, Db at 25, Plaintiff did not simply parrot the

"similarly situated" language of the PWA and WHL. Rather, the Complaint specifically alleges that Plaintiff and Defendants' similarly situated employees were covered by the PWA and WHL during weeks in which they provided services at two different rates. The Complaint further alleges that Defendants violated the PWA and WHL for both Plaintiffs and Defendants' other hourly employees when they failed to pay premium pay at time-and-a half of the weighted average blended rate. Complaint ¶¶38-42, Da 26-27. Giving Plaintiff "every favorable view", ibid.. of these allegations in the Complaint, he has made out a *prima facie* case that he is similarly situated to Defendants' other employees with regard to these purported violations of the PWA and WHL. The burden to make a "clear showing" that the representative action was "inappropriate or improper," was thus cast on Defendants, a burden they have failed to meet.

As an initial matter, at the oral argument on Plaintiff's motion, Defendants argument about Plaintiff not being "similarly situated" to Defendants' other hourly employees, was because individualized inquiries that would need to be made concerning damages.[6] But this is simply to argue that there are individualized

[6] Defendants' argument that its employees were not similarly situated "is that you have a lot of individual inquiries that you're going to have to make if this class is certified. You're going to have to figure out if an employee for a full week in prevailing wage or non-prevailing wage. If they worked part of a week in prevailing wage, part of a week in nonprevailing wage. And you're going to have to figure that out for each and every week for the entire class period for each and every plaintiff." Pa0377.

damages, a point with which Plaintiff would agree. However, as this Court has explained in the context of a R.4:32-1 motion to certify a class, "the overwhelming weight of authority holds that the need for individual damages calculations does not diminish the appropriateness of class action certification where common questions as to liability predominate." *Delgozzo v. Kenny,* 266 N.J. Super. 169, 190, 628 A.2d 1080, 1091 (App. Div. 1993)(citation and quotation marks omitted); see also, *Baskin*, 246 N.J. at 175. Just as there is is no reason to conclude that the need for individualized damage determinations should preclude a class action, there is no reason to believe that individualized damages determinations should preclude a representative action, where as here there are common questions of liability. Liberal interpretation of the statutes' "similarly situated" language would strongly argue in favor of this view, and the actual argument Defendants made to the trial court should not be adopted.

Second, Defendants seek to have this Court adopt the two step procedure for post-Portal-to-Portal Act collective actions under the FLSA. See Db at 23-24. But that procedure was necessitated by the Portal-to-Portal Act's banning of representative actions by requiring employees to opt in to any litigation. .

> In 1938, Congress gave employees and their "representatives" the right to bring actions to recover amounts due under the FLSA. No written consent requirement of joinder was specified by the statute. In enacting the Portal-to-Portal Act of 1947, Congress made

> certain changes in these procedures. In part responding to excessive litigation spawned by plaintiffs lacking a personal interest in the outcome, the representative action by plaintiffs not themselves possessing claims was abolished, and the requirement that an employee file a written consent was added. See 93 Cong. Rec. 538, 2182 (1947) (remarks of Sen. Donnell). The relevant amendment was for the purpose of limiting private FLSA plaintiffs to employees who asserted claims in their own right and freeing employers of the burden of representative actions. Portal-to-Portal Act of 1947, ch. 52, §§ 5(a), 6, 7, 61 Stat. 87-88. Congress left intact the "similarly situated" language providing for collective actions, such as this one.

*Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, 173, 110 S. Ct. 482, 107 L. Ed. 2d 480 (1989). The Portal-to-Portal Act prompted the implementation of the two step procedure for a certification of collective actions. See *Symczyk v. Genesis HealthCare Corp.*, 656 F.3d 189, 192 (3d Cir. 2011), rev'd on other grounds, *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 133 S. Ct. 1523, 185 L. Ed. 2d 636 (2013); see also *Sperling*, 493 U.S. at 169 (noting that judicial intervention was proper if not necessary at the first step notice giving process). That two step procedure fulfills the Portal-to-Portal Act's mandate of assuring that every worker who claims underpayment joins herself as a party to the case by filing a consent form - first by having notice sent to the potentially affected employees and second by providing for a decertification procedure once discovery is complete.

As set forth previously, see Pa0021-0028, the NJ Legislature did not incorporate the Portal-to-Portal Act's banning of representative actions into the PWA

or the WHL Hence, while the two-step procedure may be appropriate under the Portal-to-Portal-Act-modified version of the FLSA requiring underpaid workers to opt in to a lawsuit, as Defendants note in their opening brief, Db at 23-24, that two-step procedure is on its face inappropriate for the non-Portal-to-Portal-Act-modified PWA or WHL, which do not require an affirmative opt-in to be included in a representative action. Defendants have failed to explain why the Court should adopt this incongruous, opt-in procedure for non-opt-in claims. Indeed, Defendants' principal argument that the R. 4:32-1 opt-out procedure be incorporated into the PWA and WHL representative actions are in stark contradiction to their claim that the Court should adopt the amended FLSA's opt-in procedure. Rather, as with Legislative enactments generally, the "similarly situated" language in the PWA and WHL's authorization of representative actions should be understood in its ordinary and plain meaning. "It is a fundamental canon of statutory construction that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *In re Alleged Failure of Altice USA, Inc.,* 253 N.J. 406, 419, 291 A.3d 790, 797 (2023)(citations and quotation marks omitted). Here, "similarly situated" is not defined in either the PWA or the WHL, and hence the "ordinary, contemporary, common meaning" of "similarly situated "should be applied. Judged by that standard, Plaintiff and Defendants' other hourly employees who were at two different wage rates during a week in which they worked more than forty hours were all paid

premium pay (time and a half) at the lower rate, and they plainly meet the ordinary, contemporary and common meaning of "similarly situated" in urging that they were all underpaid by Defendants.

## POINT V

### THE SIX YEAR LIMITATIONS PERIOD IS APPLICABLE IN THIS MATTER, AS THE TRIAL COURT PROPERLY HELD

Plaintiff's representative action is bottomed on both the PWA and the WHL which have nearly identical language pertaining to representative actions. Based on our Supreme Court's decision in *Maia v. IEW Constr. Grp.*, 257 N.J. 330, 313 A.3d 887 (2024), Defendant argues that the Court below erred in holding a six year limitations period was appropriate on this motion. Whatever may be the appropriate limitations period under the WHL, there is no question that the limitations period under the PWA is six years. See *Troise v. Extel Communications*, 345 N.J.Super. 231 (App. Div.2001), aff'd o.b., 174 N.J. 35 (2002)(holding that PWA has a six year limitations period).

Moreover, it will not do for Defendant to now belatedly argue that only the WHL and not the PWA deals with the issue of premium pay for hours in excess of 40 per week, or what is more commonly referred to as overtime, an argument that they did not make to the Court below. As Judge Skillman's Appellate Division opinion in *Troise* made clear, the PWA in "authorizing private causes of action by employees

to recover **the full amount of wages required under the law**," the WHL's provisions under N.J.S.A. § 34:11-56a25 "is substantially similar to N.J.S.A. § 34:11-56.40" (emphasis added). 345 N.J.Super. at 240. The "full amount of wages required under the law" clearly includes premium pay for hours in excess of 40 per week.

Rather, overtime pay is a proper subject for relief under the PWA. Under the statute ""Prevailing wage' means the wage rate paid by virtue of collective bargaining agreements by employers employing a majority of workers of that craft or trade subject to said collective bargaining agreements, in the locality in which the public work is done." N.J.S.A. § 34:11-56.26(9). For hours in excess of 40 during a workweek, and in discrete situations set forth by the Commissioner, the PWA requires that the premium rate be paid. As set forth in the Order of the Commissioner of Labor and Workforce Development setting the prevailing wages for Essex County submitted to the trial court Pa0030-0155, "For each craft listed there will be comments/notes that cover the definition of the regular workday, shift differentials, **overtime**, recognized holidays, and any other relevant information." Pa0031 (Emphasis added). Indeed, "overtime" is mentioned more than eighty times in the Commissioner's Order. Thus, it is entirely proper that Plaintiff herein be entitled to assert the right of "similarly situated" employees of Defendants to proper overtime pay under the PWA.

## CONCLUSION

While Plaintiff does not believe that this matter is properly before this Court as of right, he would respectfully request that the Court gant Defendants leave to appeal *nunc pro tunc* so that there may be an appellate ruling that R. 4:32-1 neither supersedes nor is incorporated into the PWA and the WHL's authorization of representative actions. When considering the merits, Judge Viscomi correctly concluded that Plaintiff had made out his case such that he should be authorized to give notice to the similarly situated employees who may have claims as to whether they received the proper premium pay during weeks in which they worked at two different wage rates. R. 4:32-1 is not to the contrary. Defendants did not rebut Plaintiff's *prima facie* showing that he was similarly situated to Defendants other employees who received premium pay when for weeks when they worked at two different wage rates. The Court below properly held that the six year limitations period of the PWA was applicable. For all of the reasons set forth herein, the Order of the Court below granting a representative action should be affirmed.

Respectfully Submitted,

*/s/David Tykulsker*

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Dated: July 16, 2025

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|---|---|
| JUAN MARTINEZ,<br><br>*Plaintiff/Respondent,*<br><br>v.<br><br>T. SLACK ENVIRONMENTAL SERVICES, INC., THEODORE SLACK, AND "UNKNOWN SUPERVISORS 1-5" (NAMES BEING FICTITIOUS),<br><br>*Defendants/Appellants* | SUPERIOR COURT OF NEW JERSEY<br>APPELLATE DIVISION<br>DOCKET NO. A-001008-24<br><br>Civil Action<br><br>On Appeal from:<br><br>LAW DIVISION: MIDDLESEX COUNTY<br>Docket No. MID-L-001335-20<br><br>Sat Below:<br>Hon. Ana C. Viscomi, J.S.C. |

# DEFENDANT T. SLACK ENVIRONMENTAL SERVICES INC. AND THEODORE SLACK'S REPLY BRIEF IN SUPPORT OF THEIR APPEAL

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Dated: August 15, 2025

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Defendants/Appellants T. Slack Environmental Services and Theodore Slack (collectively "Defendants") submit this Reply Brief in further support of their appeal.

## PROCEDURAL HISTORY AND STATEMENT OF FACTS

Defendants rely on the procedural history and statement of facts set forth in their Appellants' Brief.

## LEGAL ARGUMENT

### I. Defendants' Appeal is Properly Before This Court

As an initial matter, Plaintiff argues that this Court is not required to entertain this appeal because it is not a proper interlocutory appeal, but that it should do so due to the importance of the issues presented. This fits squarely within Plaintiff's logic, which is that when it comes to an NJWHL matter, the question of class certification must fall outside of the strictures of Rule 4:32-1.

It should come as no surprise that Defendants agree that this Court should consider this issue, but as Plaintiff aptly points out, that agreement does not render this question moot. Rather, Defendants' position differs from Plaintiff's in that Defendants respectfully submit that this Court must consider this appeal pursuant to R. 2:2-3(b)(9).

As Defendants argued at length in their initial brief, Plaintiff's argument is essentially one large end-run around the New Jersey Rules of Court in an

effort to find some sort of procedural framework within the language of the NJWHL itself. It is clear that no such avenue exists, which is why the trial court's ruling was erroneous and must be reversed. But Plaintiff's argument on this point is particularly troubling because not only does he argue that he should not be subject to the strictures of R. 4:32-1, but once class certification is obtained, the defendant in such an action does not have the right to an immediate appeal because R. 2:2-3(b)(9) specifically references R. 4:32-1. In other words, not only does the Plaintiff in a NJWHL have a lower bar to class certification than any other putative class representative, but once class certification is granted, that order is interlocutory and cannot be appealed as of right. There is no basis for Plaintiff to urge for such a result, and this Court should reject Plaintiff's argument on this point.

## II. The NJWHL and PWA Do not Authorize Class Actions Outside of R. 4:32-1

Plaintiff posits that it is incumbent upon Defendants to show how R. 4:32-1 somehow overrides the express language of the NJWHL. That is not the correct question. Rather, the correct question before Court is exactly how does the NJWHL and PWSA indicate that a lawsuit brought by an aggrieved individual and others "similarly situated" falls outside of the strictures of R. 4:32-1? The simple answer is that it does not.

As this Court is undoubtedly aware, Rule 4:32-1 was promulgated by the New Jersey Supreme Court in 1969, effective September 8 of that year, and was largely based on Federal Rule of Civil Procedure 23 as amended in 1966. Baskin v. P.C. Richard & Son, LLC, 246 N.J. 157, 174, 249 A.3d 461, 471 (2021) (noting that Rule 23 served as model for Rule 4:32-1). While the NJWHL did exist at that time and did include the "similarly situated" language for violations of minimum wage (N.J. Stat. Ann. § 34:11-56a25), which is what Plaintiff relies upon here, it was amended in 2019 to encompass any situation in which an "employer fails to pay the full amount of wages to an employee agreed to or required by, or in the manner required by, the provisions of" the NJWHL. N.J. Stat. Ann. § 34:11-4.10; CRIMES AND OFFENSES—COMPENSATION AND SALARIES, 2019 NJ Sess. Law Serv. Ch. 212 (SENATE 1790). As Plaintiff notes in his brief, the statute has also been amended at least three times since the 2019 amendment to encompass claims for payment of less than prevailing wage (N.J. Stat. Ann. § 34:11-56.62 (2021) and for claims brought by longshoremen (N.J. Stat. Ann. § 34:11-56.88) (2022) and for temporary laborers (N.J. Stat. Ann. § 34:8D-11) (2023).

Meanwhile, the concept of an "opt-in" class action was recognized by Federal courts as early as 1975 and was borne out of the Portal to Portal Act of 1947. See LaChapelle v. Owens-Illinois, Inc., 513 F.2d 286, 289 n. 6 (5th Cir.

1975). That decision was based on the FLSA, which by that point included the language indicating that "[n]o employee shall be a party plaintiff to such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought" thus giving rise to the "opt-in" mechanism. Id. at 287.

This Court should note that Plaintiff relies upon the wrong statute in support of his claims. In his Complaint, Plaintiff alleges a violation of N.J. Stat. Ann. § 34:11-56a25, which, as set forth above, pertains solely to violations of the minimum wage law. Da23; Da28. Plaintiff's Complaint makes clear that his claims bear no relevance to this statute. He asserts that he was not paid the amounts to which he was entitled under the circumstances, but at no point does he allege that he was paid less than the New Jersey minimum wage. Da25-27. The proper statutory claim that should be before this Court (but is not) is one under the recently amended N.J. Stat. Ann. § 34:11-4.10.

Putting aside the procedural deficiencies contained within Plaintiff's complaint as written, the question before this Court given the fact that the New Jersey Legislature was aware or should have been aware by 2019 of the opt-in provisions of the Federal Fair Labor Standards Act yet despite amending the NJWHL multiple times since that first recognition in 1975, is why did it not include the "opt in" provisions present in the FLSA when it expanded the

applicability of "similarly situated" to different workers or amend the existing statutes to incorporate such a mechanism. This stands in stark contrast to the clearly expressed intent of Congress with regard to the FLSA.

In Lusardi v. Xerox Corp., 99 F.R.D. 89, 93 (D.N.J. 1983), the United States District Court for the District of New Jersey refused to apply Federal Rule 23 to an action brought under the Age Discrimination in Employment Act (which specifically incorporates the "opt-in" provision of the FLSA) holding that the opt-in provision was the sole mechanism by which a plaintiff under that statute could bring a class action. In so holding, the court noted that:

> Had Congress intended that Rule 23 class actions as well as § 16(b) class actions be available to ADEA grievants, there is not doubt that it would have so provided. In the absence of such a provision, however, and in light of Congress' clear expression of an alternative class action apparatus, we decline to certify this class under the terms other than set forth in the statute.

Lusardi v. Xerox Corp., 99 F.R.D. 89, 92–93 (D.N.J. 1983) (emphasis supplied). The major difference in this matter is that there are no terms set forth in the statute. In other words, there is no clear expression by the New Jersey Legislature of an alternative class action apparatus. Again, despite multiple amendments within the past five years (including the amendment applicable to Plaintiff's case), the NJWHL remains entirely silent about how exactly one brings an action on behalf of himself and others "similarly situated." The inverse logic of Lusardi applies here. If the New Jersey Legislature wished to

create a class action mechanism that falls outside of the ambit of Rule 4:32-1, it has had ample opportunity to do so. Furthermore, it cannot be said that the New Jersey Legislature has simply ignored the NJWHL since recognition of the opt-out procedure available in the FLSA. The lack of action by the legislature is telling and suggests that it never intended to create an alternative procedure.

Plaintiff argues that Defendants suggest that Rule 4:32-1 somehow impliedly repeals the "similarly situated" provision of the Prevailing Wage Act, which predates Rule 4:32-1. The fatal flaw of that logic is that it assumes that class actions did not exist in New Jersey before the enactment of that rule. They most certainly did, and the concept of a class action predates the enactment of the PWA in 1963. For example, in Terrell v. Humble Oil & Ref. Co., 80 N.J. Super. 51, 56, 192 A.2d 850, 854 (App. Div. 1963), the court held that the lawsuit was not a class action under old Rule 4:36-1. That rule was "taken verbatim from Federal Practice Rule 23 as promulgated in 1937 and as it stood without change until completely revised in 1966." Conover v. Packanack Lake Country Club & Cmty. Ass'n, 94 N.J. Super. 275, 279, 228 A.2d 78, 80 (App. Div. 1967). Indeed, Rule 23 predated the Portal to Portal Act that created opt-in class actions at the Federal Level, which is precisely why the Lusardi court noted the express intent of Congress to create an alternative mechanism. Again,

even though New Jersey courts have recognized class actions long before the enactment of the PWA, no such analog exists for that statute.

The question that this Court must ask is not whether Rule 4:32-1 impliedly overruled either the NJWHL or the PWA. Rather, the Court must ask if either of those statutes expresses a clear intent by the New Jersey Legislature to create a mechanism for class actions that falls outside of the ambit of the established procedure for such actions, whether that be Rule 4:32-1 or old Rule 4:36-1. History and common sense suggest that the answer is no. Although many of these statutes have been in effect for decades, no single decision by any court has been made before this matter, indicating that a class action may be maintained under these statutes without meeting the requirements of the applicable rule. On the other hand, in their initial brief, Defendant identified several decisions where courts applied Rule 4:32-1 to NJWHL claims.[1]

The decisions cited to by Plaintiff have no bearing upon this matter. Plaintiff's citation to Musker v. Suuchi, Inc., 260 N.J. 178, 189, 331 A.3d 900, 907 (2025) is grossly misleading. That case does not address representative actions in any sense. While the general concept is that courts must give effect to every word, clause, and sentence of a statute, that generally accepted and

[1] Defendants were unable to find any PWA decisions concerning the certification of class actions and the lack of such decisions cited by Plaintiff suggests that none exist.

uncontroversial tenet does not automatically lead to the conclusion in this matter that by using the term "similarly situated," an entirely separate class action mechanism must be created for NJWHL and PWA claims. "When the plain language of a statute is susceptible to multiple interpretations, however, then recognized principles of statutory construction allow resort to extrinsic tools to determine the Legislature's likely intent. D'Annunzio v. Prudential Ins. Co. of Am., 192 N.J. 110, 120, 927 A.2d 113, 119 (2007). This Court can interpret the "similarly situated" provision as expressly authorizing plaintiffs bringing claims under those statutes to seek class treatment under Rule 4:32-1 so that there is no doubt that class treatment of such claims is permitted. Despite Plaintiff spilling much ink to suggest that the legislature intended to create a class action mechanism outside of Rule 4:32-1 or its forebear, there is no evidence to support this. If the New Jersey Legislature wanted to create an alternative mechanism outside Rule 4:32-1 for bringing class actions under the NJWHL and the PWA, it would have surely done so by now. The passage of decades, coupled with multiple amendments to the relevant statutes without the inclusion of any procedure for Plaintiff's proposed alternative, suggests that no such alternative was intended.

Having failed to adduce any evidence to suggest that the New Jersey legislature intended to create an alternative class action apparatus for claims

brought under either the PWA or WHL, Plaintiff then argues that public policy favors such an interpretation of the statute suggesting that Plaintiff will be left without a remedy if he is unable to bring a class action. This argument is highly disingenuous for several reasons.

First, it is not this Court's place to rewrite legislation in a manner that Plaintiff believes will better support public policy. DiProspero v. Penn, 183 N.J. 477, 492, 874 A.2d 1039, 1048 (2005) ("It is not the function of this Court to 'rewrite a plainly-written enactment of the Legislature [ ]or presume that the Legislature intended something other than that expressed by way of the plain language.'") (quoting O'Connell v. State, 171 N.J. 484, 488, 795 A.2d 857 (2002)). Furthermore, "[t]his Court will not engage in conjecture or surmise which will circumvent the plain meaning of the act." Matter of Closing of Jamesburg High Sch., Sch. Dist. of Borough of Jamesburg, Middlesex Cnty., 83 N.J. 540, 548, 416 A.2d 896, 900 (1980). Nothing in the plain language of either act suggests that Plaintiff is entitled to bring some form of collective action that falls outside of the ambit of Rule 4:32-1. Yet that is exactly the conclusion that Plaintiff is asking this Court to reach.

Second, Plaintiff suggests that for companies like the corporate defendant in this matter, that a class action would be impossible because numerosity would never be met. That argument ignores the obvious reason as to why numerosity

is a factor in determining the appropriateness of class treatment, which is that a class must be "so numerous that joinder of all members is impracticable." Clearly joinder of all employees of T. Slack, of whom there are less than 10, is not impracticable here. As And again, if the New Jersey legislature wanted to create an alternative to Rule 4:32-1, it could have followed the lead of the United States Congress vis a vis the FLSA on several occasions, but has repeatedly failed to do so.

Third, Plaintiff's suggestion that he would be without a remedy if he cannot bring a class action is without merit. Both the WHL and the PWA permit the recovery of attorneys' fees and liquidated damages in the event that Plaintiff prevails at trial. There is ample incentive for Plaintiff to bring this case as an individual action. While class treatment may in certain instances be more efficient than several individual actions, it does not logically follow that in the absence of a class action, Plaintiff will have no avenue to relief.

Ultimately, Plaintiff spends a great deal of his brief suggesting that this Court must permit him to bring a class action outside of Rule 4:32-1, but cannot set forth any plausible basis why such treatment should be afforded. For the reasons set forth above, it should not and this Court should reverse the trial court's decision on this issue.

## III. Defendants Raised the Evidentiary Issue Below

While this Court denied Plaintiff's Motion to Strike without prejudice with regard to the issue of whether Defendants had raised the evidentiary issue below, Defendants respectfully submit that for the same reasons set forth in Defendants' Opposition to that Motion, that this Court should consider this issue at this time.

As an initial matter, there is no dispute that the question of whether Plaintiff presented evidence to support his claim that other employees of Defendants were "similarly situated" to Plaintiff was raised by Defendant at oral argument in this matter. Plaintiff candidly admits that this issue was in fact argued before the trial court. Yet, Plaintiff relies on Selective Ins. Co. of Am. v. Rothman, 208 N.J. 580, 34 A.3d 769 (2012), as corrected (Jan. 19, 2012) for the proposition that oral argument is essentially meaningless and that an argument must be briefed to be preserved for appeal. In doing so, Plaintiff mischaracterizes the holding in Selective.[2] In that matter, the Supreme Court said "[a]lthough we do not suggest that counsel's reference to the retroactivity question during oral argument was sufficient to require the Appellate Division

[2] Plaintiff's reliance on *Noye v. Hoffmann-La Roche Inc*., 238 N.J. Super. 430, 432 n.2, 570 A.2d 12 (App. Div.), certif. denied, 122 N.J. 146, 584 A.2d 218 (1990), and certif. denied, 122 N.J. 147, 584 A.2d 218 (1990) is entirely misplaced because that decision concerned the *appellate brief*, not the motion brief below.

to address it, in light of our grant of leave to supplement the record, we have elected to address the question in a summary manner." Selective, 208 N.J. at 586. In other words, the New Jersey Supreme Court did not reach a decision one way or another as to whether an issue is waived if only raised at oral argument. Furthermore, several other decisions by this Court raise the strong implication that raising an issue at oral argument would be sufficient. Kim v. 1655 Valley Rd. LLC, No. A-1752-22, 2024 WL 3039793, at *4 n. 2 (N.J. Super. Ct. App. Div. June 18, 2024) (declining to consider "negligent hiring claim that was not alleged in plaintiff's complaint, discussed at oral argument, or addressed in the court's January 6, 2023 oral decision"); Bartz v. Weyerhaeuser Co., No. A-5635-18T1, 2020 WL 5033356, at *3 (N.J. Super. Ct. App. Div. Aug. 26, 2020) (holding that defendants "arguably waived [] issue" that "was not raised in oral argument before the trial court"); J.N. v. W. Windsor Plainsboro Reg'l Sch. Dist., No. A-0109-19T1, 2020 WL 4382229, at *3 (N.J. Super. Ct. App. Div. July 31, 2020) (contention "not properly presented to this court" where it was "only fleetingly raised this argument during the oral argument before the trial court").

Plaintiff has cited to a single decision that suggests that raising an issue at oral argument does not constitute "proper presentation" to the trial court. And the record shows quite plainly that this issue was discussed extensively. At best,

Plaintiff can point to dicta from the New Jersey Supreme Court that suggests that this Court may, but is not required, to consider this issue. That hardly constitutes an absolute bar to this Court considering the questions before it.

Additionally, Plaintiff's focus on this argument is overly myopic and fails to consider the broader argument which was in fact briefed extensively. In its opposition to Plaintiff's Motion for Class Certification, Defendants specifically noted that Plaintiff had offered any proof whatsoever that this matter is appropriate for class treatment. Da312-314. Defendants also noted that in order to obtain class certification, Plaintiff must meet the burden of proof for doing so, and the court must look 'beyond the pleadings [to] ... understand the claims, defenses, relevant facts, and applicable substantive law.'" Iliadis v. Wal-Mart Stores, Inc., 191 N.J. 88, 106, 922 A.2d 710, 720 (2007). Yet, the trial court in this matter decided Plaintiff's Motion on little more than the pleadings.

Ultimately, the standard to be used, whether it be "similarly situated" or the requirements of Rule 4:32-1(b), is largely beside the point. Regardless of the standard, the outcome was the same - Plaintiff did not submit a single piece of factual evidence in support of his motion and asked the trial court to rule solely on the pleadings. Defendants argued this point both in their brief and during oral argument. Just because the issue is raised differently at the appellate level does not preclude its consideration. See Universal Title Ins. Co. v. United

States, 942 F.2d 1311, 1314 (8th Cir. 1991) ("[W]e think it would be in disharmony with one of the primary purposes of appellate review were we to refuse to consider each nuance or shift in approach urged by a party simply because it was not similarly urged below") (internal quotations omitted). The ultimate question before this Court is whether class certification can be granted on pleadings alone. This is an issue that was argued below and is appropriate for review here.

Finally, Plaintiff glosses over the notion that even if an issue is not raised below, this Court may nevertheless consider it if it "concern[s] matters of great public interest." Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234, 300 A.2d 142, 145 (1973). Plaintiff previously argued that while this appeal was interlocutory, the issues discussed were of such importance that this Court should permit the appeal to move forward. Now Plaintiff makes an about-face and impliedly argues that this issue is not so important that it cannot be considered by this Court unless it was properly raised below. Plaintiff cannot have it both ways.[3] Plaintiff impliedly admits that the question of whether

[3] This is not the first instance where Plaintiff argued both sides of an issue where it suited his position. In his brief, Plaintiff suggests that by using the "similarly situated" he put Defendants on notice that because FLSA collective actions did not require numerosity, it was not required here. See Plaintiff's brief at p. 41. Then, a few pages below, he argues that this Court should not adopt the FLSA's procedure for collective actions. Id. at p. 47. Putting aside the absurd suggestion that this is what Defendants have argued for (it is most certainly not), Plaintiff has completely

evidentiary proof is necessary to obtain class certification is a matter of great public interest and Defendants agree on this point. If this Court were to follow Plaintiff's logic, class certification would be an almost pro forma matter where all that would be required of a would-be class representative is a pleading sufficient to meet the applicable standard. Not only does such a standard fly in the fact of Iliadis and countless other decisions, it effectively renders the requirements of class certification meaningless. The standard of proof required to obtain class certification is one that has significant ramifications not only in this matter and any other wage and hour matter, but also in mass tort claims, claims under the New Jersey Consumer Fraud Act, New Jersey Civil RICO matters, and any other potential form of class action. Accordingly, this Court should consider this issue as it is a matter of great public importance. And for the reasons set forth in Defendants' initial brief, Plaintiff has failed to meet even the lowest of evidentiary bars necessary to obtain class certification. As a result, the trial court's decision should be reversed.

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and utterly failed to articulate exactly why this Court should find that on the one hand, that the PWA and WHL are based upon the FLSA and not require numerosity, or adherence to Rule 4:32-1 in any sense, and that on the other hand, the legislature clearly intended to create a class action mechanism that was entirely separate and distinct from the collective actions created by the FLSA.

## CONCLUSION

This Court should reverse the lower court's decision certifying the proposed class and appointing Plaintiff as class representative and remand this matter for further proceedings.

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| JUAN MARTINEZ,<br><br>Plaintiff/Respondent,<br><br>vs.<br><br>T. SLACK ENVIRONMENTAL SERVICES, INC., THEODORE SLACK, AND "UNKNOWN SUPERVISORS 1-5" (NAMES BEING FICTITIOUS)<br><br>Defendants/Appellants. | SUPERIOR COURT OF NEW JERSEY<br>APPELLATE DIVISION<br>Docket Number: A—001008-24<br><br>Civil Action<br><br>On Appeal From:<br><br>Law Division: Middlesex County<br>Docket No. MID-L-001335-20<br><br>Sat Below:<br>Hon. Ana C. Viscomi, J.S.C. |

# AMICUS CURIAE BRIEF

**GOODLEY McCARTHY LLC**
*Counsel for Amicus Curiae, National Employment Lawyers Association, New Jersey*

Dated: August 14, 2025

By: *Ryan P. McCarthy*
RYAN P. McCARTHY

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## PRELIMINARY STATEMENT

The plain text of both the New Jersey Wage and Hour Law ("WHL") and New Jersey Prevailing Wage Act ("PWA," and together with the WHL, the "Wage Laws") expressly provide for a type of group litigation mechanism, a representative action. The WHL states, "An employee shall be entitled to maintain the action for and on behalf of himself or other employees similarly situated, and the employee and employees may designate an agent or representative to maintain the action for and on behalf of all employees similarly situated." N.J.S.A. § 34:11-56a25. Similarly, the PWA states, "Any workman shall be entitled to maintain such action for and on behalf of himself or other workmen similarly situated, and such workman and workmen may designate an agent or representative to maintain such action for and on behalf of all workmen similarly situated." N.J.S.A. § 34:11-56.40.

These words the Legislature wrote in the statutes must have meaning, and the Law Division was correct to give those words meaning by holding that an employee may proceed with a representative action lawsuit pursuant to the plain text of the Wage Laws, so long as the employee is able to show to the satisfaction of the court that their wage claims are "similarly situated" to the claims of the group of employees they seek to represent. N.J.S.A. §§ 34:11-56a25, 34:11-56.40. NELA-NJ urges this Court to affirm the decision of the Law Division.

## PROCEDURAL HISTORY

Amicus relies on the Procedural History of Plaintiff-Respondent.

## STATEMENT OF FACTS

Amicus relies on the Plaintiff-Respondent's Statement of Facts.

## ***AMICUS'S*** **LEGAL ARGUMENT**

### I. THE LEGISLATURE INTENDED THE WAGE LAWS TO PROVIDE FOR A REPRESENTATIVE ACTION MECHANISM SEPARATE AND APART FROM RULE 4:32-1

#### a. The Wage Laws Are Remedial Statues Which are to be Liberally Construed to Effectuate Their Remedial Purpose

The WHL "declares that it is the public policy of this State to establish a minimum wage level for workers in order to safeguard their health, efficiency, and general well-being and to protect them as well as their employers from the effects of serious and unfair competition resulting from wage levels detrimental to their health, efficiency and well-being." *Hargrove v. Sleepy's, LLC*, 220 N.J. 289, 304 (2015) (citing N.J.S.A. § 34:11-56a). The statute is "designed to 'protect employees from unfair wages and excessive hours.'" *Id.* (quoting *In re Raymour & Flanigan Furniture*, 405 N.J. Super. 367, 376 (App. Div. 2009)).

Accordingly, both the New Jersey Supreme Court and the Appellate Division have consistently held that the WHL "should be construed liberally to effectuate its purpose." *Id.* (citing *N.J. Dep't of Labor v. Pepsi-Cola Co.*, 170 N.J. 59, 62 (2001)); *see also Branch v. Cream-O-Land Dairy*, 459 N.J. Super. 529, 543 (App. Div. 2019), *aff'd as modified*, 244 N.J. 567 (2021) ("'The remedial purpose of the [WHL] dictates that it should be given a liberal construction.'") (quoting *Pepsi-Cola Co.* 459 N.J. at 543).

The PWA declares that it is the public policy of the State "to establish a prevailing wage level for workmen engaged in public works in order to safeguard their efficiency and general well being and to protect them as well as their employers from the effects of serious and unfair competition resulting from wage levels detrimental to efficiency and well-being." N.J.S.A. § 34:11-56.25. This Court has also made clear that with respect to the PWA that "[t]he prevailing wage rate is a minimum wage rate and is unquestionably designed to protect union contractors

from under bidding on public work by their non-union competitors who conceivably would have the advantage of paying their labor nonunion wages." *Bankston v. Hous. Auth. of City of Newark*, 342 N.J. Super. 465, 469 (App. Div. 2001) (quoting *Cipparulo v. Friedland*, 139 N.J. Super. 142 (App. Div. 1976)).

Same as the WHL, this Court has for decades directed that the PWA "is remedial in nature and thus 'is entitled to a liberal construction and application in order to effectuate the strong public policy of protecting those whose labor goes into public projects.'" *Horn v. Serritella Bros., Inc.*, 190 N.J. Super. 280, 283 (App. Div. 1983) (quoting *Newark Laborers' v. Comm. Union Ins. Co.*, 126 N.J. Super. 1, 8 (App. Div. 1973)); *see also Bankston*, 342 N.J. Super. at 469.

**b. The Plain Language of the Wage Laws Expresses the Intent of the Legislature to Provide for a Representative Action Mechanism**

The New Jersey Supreme Court has emphasized that "in the interpretation of a statute our overriding goal has consistently been to determine the Legislature's intent." *Sanchez v. Fitness Factory Edgewater, LLC*, 242 N.J. 252, 260 (2020) (quoting *Young v. Schering Corp.*, 141 N.J. 16, 25 (1995)). In doing so, a court "'need delve no deeper than the act's literal terms.'" *Id.* (quoting *State v. Gandhi*, 201 N.J. 161, 180, 989 A.2d 256 (2010)). In other words, "'[w]here a statute is clear and unambiguous on its face and admits of only one interpretation, a court must infer the Legislature's intent from the statute's plain meaning.'" *Id.* at 260-61 (quoting *O'Connell v. State*, 171 N.J. 484, 488 (2002) (alteration in original). Accordingly, courts should "strive for an interpretation that gives effect to all of the statutory provisions and does not render any language inoperative, superfluous, void[,] or insignificant." *Id.* at 261 (quoting *G.S. v. Dep't of Human Servs.*, 157 N.J. 161, 172 (1999)). Furthermore, a court should "not presume that the Legislature intended a result different from what is indicated by the plain language or add a qualification to a

statute that the Legislature chose to omit." *Tumpson v. Farina*, 218 N.J. 450, 468 (2014) (citing *DiProspero v. Penn*, 183 N.J. 477, 493 (2005)).

The first step in interpreting the meaning of a statute is "to look to 'the actual words of the statute, giving them their ordinary and commonsense meaning.'" *Sanchez*, 242 N.J. at 261 (quoting *State v. Gelman*, 195 N.J. 475, 482 (2008)). "'If the plain language leads to a clear and unambiguous result, then the interpretive process should end, without resort to extrinsic sources.'" *Id.* (quoting *State v. D.A.*, 191 N.J. 158, 164, 923 A.2d 217 (2007)). "'Only when the meaning of a statute is not self-evident on its face -- when it is subject to varying plausible interpretations, or the strict application of the words will lead to an absurd result or one at odds with public policy or an overall statutory scheme –' is it appropriate for the Court to 'turn to extrinsic sources, such as legislative history.'" *Id.* (quoting *Farmers Mut. Fire Ins. Co. of Salem v. New Jersey Property-Liability Ins. Guar. Ass'n*, 215 N.J. 522, 536 (2013)).

There can be no question that the literal terms of the Wage Laws expressly and unambiguously provide for their own representative action mechanism, whereby the only requirement a New Jersey employee must satisfy for a wage action to move forward as a representative action is that the employees are "similarly situated." The Wage Laws specifically state that an employee or workman shall be entitled to maintain the action for and on behalf of himself "**or other employees [or workmen] similarly situated.**" N.J.S.A. §§ 34:11-56a25, 34:11-56.40 (emphasis added). There is only one possible common-sense interpretation of this unambiguous language – that an employee in a single legal action may seek a recovery for unpaid minimum, overtime, or prevailing wages in a single proceeding (i.e., a representative action proceeding) on behalf of all employees similarly situated.

NELA-NJ urges the Court, as it must, "to strive for an interpretation that gives effect to [these] statutory provisions." *Sanchez*, 242 N.J. at 261 (quoting *G.S. v. Dep't of Human Servs.*, 157 N.J. at 172) (alteration added). To hold otherwise—that the Wage Laws do not provide for a type of group litigation where an employee may represent and seek a recovery on behalf of others—would unquestionably render these statutory provisions "inoperative, superfluous, void[,] or insignificant." *Id.* These statutory terms must have meaning.

Had the Legislature intended that New Jersey employees' wage claims only proceed on an individual basis, or that such claims could only be subject to group litigation pursuant to New Jersey Court Rule 4:32-1, it could have (*and would have*) completely omitted the language providing that an employee may maintain the action on behalf of himself and others "similarly situated." Without such language, New Jersey employees' wage claims could always have proceeded as a class action pursuant to Rule 4:32-1. *See, e.g., Iliadis v. Wal-Mart Stores, Inc.*, 191 N.J. 88, 106 (2007) (granting class certification of WHL claims pursuant to Rule 4:32-1). The Legislature amended the civil action provisions of the WHL as recently as 2019 (*see Maia v. IEW Const. Grp.*, 257 N.J. 330, 346-47 (2024), explaining that the WHL's civil action provision, N.J.S.A. § 34:11-56a25, was amended to add a 6-year statute of limitations and liquidated damages award for prevailing employees) and made the decision to leave the representative action provisions in the statute, at a time when there was no mistake or misunderstanding that employees could also pursue WHL claims as a class action pursuant to Rule 4:32-1.[1]

[1] The Legislature was certainly aware of New Jersey Class Action Rule 4:32-1 in 2019 when it amended the WHL's civil action provisions, and there is nothing in conflict between the class action rules and a representative action under the Wage Laws. The Wage Laws' representative action provisions must be interpreted to exist alongside Rule 4:32-1. *Cf. Sanchez*, 242 N.J. at 269 (""It is a long-recognized principle of statutory interpretation that '[t]he Legislature is presumed to be familiar with its own enactments, with judicial declarations relating to them, and to have

Had the Legislature intended for employees to only be able to pursue wage claims on an individual basis, or class basis pursuant to Rule 4:32-1, the operative statutory language of the WHL would have only stated, "If any employee is paid by an employer less than the minimum fair wage to which the employee is entitled … the employee may recover in a civil action the full amount of that minimum wage less any amount actually paid to him or her by the employer, … and an additional amount equal to not more than 200 percent of the amount of the unpaid minimum wage…, plus costs and reasonable attorney's fees as determined by the court…." N.J.S.A. § 34:11-56a25 (alteration added). Similarly, the PWA would have only stated, "If any workman is paid by an employer less than the prevailing wage to which such workman is entitled under the provisions of this act such workman may recover in a civil action the full amount of such prevailing wage less any amount actually paid to him or her by the employer together with costs and such reasonable attorney's fees as may be allowed by the court…." N.J.S.A. § 34:11-56.40 (alteration added). This is all that is needed to provide a private right of action for employees to sue their employers in court for unpaid wages. If this were the only language in the Wage Laws with respect to how such actions may proceed, a New Jersey employee with such a claim would be permitted to pursue such claims on an individual basis, or class basis pursuant to Rule 4:32-1.

But that's not what the Legislature did with respect to the Wage Laws. Rather, the Legislature made the conscious decision to add provisions stating that an employee or workman is entitled to maintain the action on behalf of himself and "other employees [or workmen] similarly situated." N.J.S.A. §§ 34:11-56a25, 34:11-56.40.

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passed or preserved cognate laws with the intention that they be construed to serve a useful and consistent purpose.'") (quoting *State v. Federanko*, 26 N.J. 119, 129, 139 A.2d 30 (1958)).

Clearly, the Legislature determined that wage claims should be able to proceed via a different and additional representative means than just Rule 4:32-1. Per the literal terms of the Wage Laws, an employee may proceed on such a representative basis so long as he is able to show to satisfaction of the court that he and his wage claims are "similarly situated" to the claims of the employees he seeks to represent. The "similarly situated" language is the only qualification in the text of the Wage the Laws. In other words, there is no language in the text of the Wage Laws to suggest that in order to proceed as a representative action, an employee or workman must also prove and establish all of the requirements of Rule 4:32-1, i.e., numerosity, predominance, and superiority, which are sometimes roadblocks to employees being able to pursue their wage claims on a group basis. *See Baskin v. P.C. Richard & Son, LLC*, 246 N.J. 157, 174 (2021) (explaining the general rule for numerosity is that "classes of 20 are too small, classes of 20-40 may or may not be big enough depending on the circumstances of each case, and classes of 40 or more are numerous enough.") (quoting *In re Toys "R" Us*, 300 F.R.D. 347, 367-68 (C.D. Cal. 2013)). The Legislature could have very reasonably determined with respect to actions under the Wage Laws that groups of employees that number only 5 to 39 should always be able to proceed on a group or representative basis (so long as they show they are similarly situated), without regard to whether "the class is so numerous that joinder of all members is impracticable." R. 4:32-1(a)(1). To hold that an employee may only proceed with group litigation of claims under the Wage Laws pursuant to Rule 4:32-1, or that an employee must still otherwise satisfy the requirements of, e.g., numerosity and predominance, to move forward as a representative action, would "presume that the Legislature intended a result different from what is indicated by the plain language [and] add a qualification to a statute that the Legislature chose to omit." *Tumpson v. Farina*, 218 N.J. at 468 (alteration added).

Given the broad remedial purpose of the Wage Laws, the Legislature clearly and unambiguously intended for New Jersey employees to be able to pursue their wage claims on a group or representative basis, if they can establish they are "similarly situated." N.J.S.A. §§ 34:11-56a25, 34:11-56.40. This interpretation is demanded by the plain and common sense meaning of the Wage Laws' literal terms. This interpretation is not "absurd" or in any way at odds with public policy or the Wage Laws' statutory schemes. In fact, this interpretation supports the public policy embedded in the Wage Laws, in that permitting employees to pursue their claims on a representative basis will aid to "protect employees from unfair wages and excessive hours," *Hargrove v. Sleepy's, LLC*, 220 N.J. at 304, especially those who work for smaller employers that employ less than 40 employees. As such, the Court need not look past the statute's literal terms. *Sanchez*, 242 N.J. at 261.

**c. The History of the WHL and Federal Fair Labor Standards Act Supports this Reading of the Wage Laws**

It has long been held that the WHL, in many respects, was modeled after its federal counterpart, the federal Fair Labor Standards Act ("FLSA"). *Marx v. Friendly Ice Cream Corp.*, 380 N.J. Super. 302, 309 (App. Div. 2005) (The WHL "is patterned on the federal Fair Labor Standards Act (FLSA), 29 U.S.C.A. §§ 201-219. Both the FLSA and the MWL require an employer to pay an employee who works more than forty hours per week at a rate of one-and-one half times the employee's regular hourly rate for every hour after the fortieth, unless the employer establishes the right to an exemption from the 'overtime' obligation based upon the employee's salary, duties and work.").

The WHL's "similarly situated" language is substantially similar to the language of the FLSA, which has long been held to provide its own class-like procedure (often referred to as a "collective" action) for adjudicating minimum and overtime wage claims. *See* 29 U.S.C. § 216(b)

("An action to recover the liability prescribed in the preceding sentences may be maintained against any employer … by any one or more employees for and in behalf of himself or themselves **and other employees similarly situated**.") (emphasis added); *see also Halle v. W. Penn Allegheny Health Sys.*, 842 F.3d 215, 223 (3d Cir. 2016) ("To focus, then, on what a collective action is and is not, we first observe the unremarkable fact that an FLSA collective action is a form of group litigation in which a named employee plaintiff or plaintiffs file a complaint 'in behalf of' a group of other, initially unnamed employees who purport to be 'similarly situated' to the named plaintiff. Thus, via § 216(b), the FLSA provides a vehicle for managing claims of multiple employees against a single employer. By permitting employees to proceed collectively, the FLSA provides employees the advantages of pooling resources and lowering individual costs so that those with relatively small claims may pursue relief where individual litigation might otherwise be cost-prohibitive. It also yields efficiencies for the judicial system through resolution in one proceeding of common issues arising from the same allegedly wrongful activity affecting numerous individuals." (citing *Hoffmann-La Roche, Inc. v. Sperling*, 493 U.S. 165, 170 (1989)).

The New Jersey Legislature was undoubtedly aware that this substantially similar language in the FLSA was intended to, and was interpreted by courts to, provide for its own group litigation mechanism. Thus, there can be no question that the Legislature intended the "similarly situated" provisions in the Wage Laws to provide for their own representative action mechanisms. *See State v. Pinkston*, 233 N.J. 495, 505 (2018) ("When, as here, 'the Legislature adopts or copies a law from another jurisdiction, we presume that it was aware of the construction given to that law by the courts of the other jurisdiction.'") (quoting *Maeker v. Ross*, 219 N.J. 565, 575, 99 A.3d 795 (2014)); *see also State ex rel. Health Choice Grp., LLC v. Bayer Corp.*, 478 N.J. Super. 184, 198-99 (App. Div. 2024) ("Accordingly, we presume that the New Jersey Legislature was aware of the federal

law concerning the prospective application of the new definition of original source and meant to likewise apply the NJFC Act amendments prospectively.").

**i. The New Jersey Legislature's Decision Not to Adopt the FLSA's Portal-to-Portal Act Amendments Was Intentional – A New Jersey Employee Need Not Affirmatively "Opt In" to a Representative Action Under the Wage Laws**

There is one important distinction between the FLSA's collective action mechanism and the Wage Laws' representative action mechanism. Unlike the Wage Laws, the FLSA also provides, "No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought." 29 U.S.C. § 216(b). Thus, under the FLSA (unlike the New Jersey Wage Laws), an employee must affirmatively "opt in" to the case to become a class or "collective" member. *See Halle*, 842 F.3d at 225 ("This 'opt-in' requirement — mandating that each individual must file an affirmative consent to join the collective action — is the most conspicuous difference between the FLSA collective action device and a class action under Rule 23.").

The addition of the language, "No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court," was added to the FLSA via the Portal-to-Portal Act Amendments ("PTPA") to the FLSA in 1947, to ban representative actions. *See Hoffmann-La Roche v. Sperling*, 493 U.S. 165, 174 (1989) ("In 1938, Congress gave employees and their 'representatives' the right to bring actions to recover amounts due under the FLSA. **No written consent requirement of joinder was specified by the statute**. In enacting the Portal-to-Portal Act of 1947, Congress made certain changes in these procedures. In part responding to excessive litigation spawned by plaintiffs lacking a personal interest in the outcome, the representative action by plaintiffs not themselves possessing claims was abolished, **and the requirement that an employee file a written consent was added**. *See* 93

Cong. Rec. 538, 2182 (1947) (remarks of Sen. Donnell). The relevant amendment was for the purpose of limiting private FLSA plaintiffs to employees who asserted claims in their own right and freeing employers of the burden of representative actions. Portal-to-Portal Act of 1947, ch. 52, §§ 5(a), 6, 7, 61 Stat. 87-88. Congress left intact the 'similarly situated' language providing for collective actions, such as this one.") (emphasis added). Another purpose of the PTPA Amendments was to "bar[] unions from bringing representative actions under the FLSA." *Arrington v. Nat'l Broad. Co.*, 531 F. Supp. 498, 500 (D.D.C. 1982) (alteration added).[2] Thus, in addition to adding the written consent requirement, Congress also removed the language which

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[2] In *Arrington*, the Court quoted the Chairman of the Senate Judiciary Committee, Senator Donnell, regarding the intent of the section of the PTPA Amendments titled, "Representative Actions Banned," to specifically bar unions from bringing representative FLSA actions on behalf of their members:

> It will be observed, Mr. President, that two types of action are permitted under this sentence in section 16(b) of the Fair Labor Standards Act of 1938: First, a suit by one or more employees, for himself and all other employees similarly situated. That I shall call for the purpose of identification a collective action, a suit brought by one collectively for himself and others. The second class of actions authorized by that sentence embrace those in which an agent or a representative who may not be an employee of the company at all can be designated by the employee or employees to maintain an action on behalf of all employees similarly situated.
>
> In illustration of this latter category-which category for purposes of identification I call a representative action, as distinguished from a collective action-suppose that every one here present this afternoon were employed by the X steel company, and we all belonged to a labor union, and gave a power of attorney to the district director of the labor union who might live 500 miles away and not be employed at all in the plant in which we were employed. He could file a suit there as a representative of all of us. We would not be in that case at all except as he is our representative. It will be noted, therefore, Mr. President, that in those two classes of cases there is this difference: In the first case, an employee, a man who is working for the X steel company can sue for himself and other employees. We see no objection to that. But the second class of cases, namely, cases in which an outsider, perhaps someone who is desirous of stirring up litigation without being an employee at all, is permitted to be the plaintiff in the case, may result in very decidedly unwholesome champertous situations which we think should not be permitted under the law."

stated, "or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated." *See Martino v. Mich. Window Cleaning Co.*, 327 U.S. 173, 175 n.1 (1946) (quoting pre-1947 version of FLSA § 16(b)).

The WHL was enacted in 1966 and has been amended since then. *See Maia v. IEW Const. Grp.*, 257 N.J. 330, 345-47 (2024) (discussing original purpose of the WHL and its 2019 amendments). The PWA was enacted in 1963 and has been amended since. *See Cent. Constr. Co. v. Horn*, 179 N.J. Super. 95, 101-02 (App. Div. 1981). Despite being enacted *after* the PTPA and being amended since, the New Jersey legislature never adopted the PTPA language in the FLSA which requires each individual employee's consent in writing filed with the court to join the representative litigation.[3]

In interpreting the WHL, it therefore must be presumed that the New Jersey legislature's conscious decision to not adopt the FLSA' "written consent" provision was intentional. *See Bayer Corp.*, 478 N.J. Super. at 198-99 (App. Div. 2024) ("Accordingly, we presume that the New Jersey Legislature was aware of the federal law concerning the prospective application of the new definition of original source and meant to likewise apply the NJFC Act amendments prospectively."); *Commc'ns Workers of Am. v. McCormac*, 417 N.J. Super. 412, 428 (Law Div.

[3] Furthermore, it is worth noting that the Legislature made the decision to include in the Wage Laws the provision which permits employees to designate a representative, such as a labor union, to bring an action on behalf of the employees, which provision was specifically removed from the FLSA via the PTPA in 1947. *See* N.J.S.A. § 34:11-56.40 ("… and such workman and workmen may designate an agent or representative to maintain such action for and on behalf of all workmen similarly situated"); *see also, e.g.*, *Cipparulo v. David Friedland Painting Co.,* 139 N.J. Super. 142, 353 A.2d 105 (App. Div. 1976) (PWA action brought by business representative of Painters Local 480 and on behalf of Local 480 members who worked for defendant). This lends further support for the conclusion that the New Jersey Legislature never intended for the Wage Laws' representative action provisions to incorporate or be influenced by the PTPA Amendments to the FLSA. Thus, the Wage Laws never imported the requirement that in order for each employee to receive a recovery in a representative action, each employee must file a written consent with the court.

2008) ("As noted heretofore, the Legislature is presumed to be aware of the federal statute, and it chose not to adopt the federal statutory language."); *Hargrove v. Sleepy's*, LLC, 220 N.J. 289, 313 (2015) ("We assume that the FLSA mandate for a federal minimum wage influenced the adoption in 1966 of the WHL to protect workers not covered by FLSA.").

Clearly, then, the New Jersey legislature determined that New Jersey employees need not affirmatively opt in to representative actions under the Wage Laws by filing written consents with the court. There is no requirement in the text of the WHL that each employee separately file their own consent form to join the representative litigation. *Tumpson*, 218 N.J. at 468 (a court should "not presume that the Legislature intended a result different from what is indicated by the plain language or add a qualification to a statute that the Legislature chose to omit").

In other words, by adopting the "similarly situated" provision from the FLSA, which created that law's representative action mechanism, but rejecting the FLSA's 1947 amendment that then "banned" such representative actions (by requiring written consent of each potential class member and barring unions and union leaders from bringing claims on behalf of members), the plain language of the Wage Laws indicates the New Jersey Legislature intended employees to be able to bring WHL representative actions if they could establish that they were "similarly situated" to other employees, without the need to file each employee's written consent on the docket. *Cf. N.J. Dep't of Labor v. Pepsi-Cola Co.*, No. A-918-00T5, 2002 N.J. Super. Unpub. LEXIS 2, at *188-89 (App. Div. Jan. 31, 2002) ("Pepsi urges that New Jersey follow the definition and interpretations established pursuant to the [FLSA] and its regulations. 'When a statute is drafted on the pattern of another jurisdiction, it is appropriate to consider interpretations in that jurisdiction.' *Chew v. New Jersey*, 150 N.J. 30, 55, 695 A.2d 1301 (1997), *cert. denied*, 528 U.S. 1052, 120 S. Ct. 593, 145 L. Ed. 2d 493 (1999). **On the other hand, 'where the legislature adopts**

**a new law, using as a source a statute theretofore enacted in another jurisdiction, but omits a provision of the source statute, the omission is construed as being deliberate.**'") (citing *Airwork Serv. Div. v. Dir., Div. of Taxation*, 2 N.J. Tax 329, 346 (Tax. 1981), *aff'd*, 4 N.J. Tax 532 (App. Div. 1982), *aff'd*, 97 N.J. 290, 294, 478 A.2d 729 (1984), *cert. denied*, 471 U.S. 1127 (1985)) (alterations added).

Courts have not hesitated to differentiate between the WHL and FLSA where the language of the statutes or their regulations depart. *See, e.g., id.* (regarding difference between the FLSA and WHL's outside sales employee exemptions from overtime); *Hargrove v. Sleepy's, LLC*, 220 N.J. 289 (2015) (holding the legal question of whether an individual is an employee covered by the WHL is subject to a different and more liberal test than under the FLSA); *Vaccaro v. Amazon*, No. 18-11852 (FLW), 2020 U.S. Dist. LEXIS 114526, at *17 (D.N.J. June 29, 2020) ("Turning to the language and structure of the statute at issue in this case, I find that the New Jersey legislature did not intend to incorporate the Portal-to-Portal Act's exclusions for 'preliminary' and 'postliminary' activities into the NJWHL. As with the Nevada wage and hour statute at issue in *[Integrity Staffing Sols., Inc. v. Busk (Busk II*), 905 F.3d 387, 402 (6th Cir. 2018)], the NJWHL and its regulations expressly refer to specific provisions of the FLSA and its regulations, *see, e.g.*, N.J.S.A. § 34:11-56a4 (citing to "Section 6 of the federal "Fair Labor Standards Act of 1938"'); N.J.A.C. 12:56-7.2(a) (citing to 29 C.F.R. Part 541), yet the NJWHL and its regulations do not cite to the section of the FLSA that was amended by the Portal-to-Portal Act, *i.e.*, Section 7…. Accordingly, I find that the NJWHL does not incorporate the federal Portal-to-Portal Act and, as such, time spent in mandatory security screenings at the end of the workday is compensable under the NJWHL.") (alteration added); *In re Raymour & Flanigan Furniture*, 405 N.J. Super. 367, 964 A.2d 830 (App. Div. 2009) (discussing that employees otherwise exempt from overtime

under the FLSA's motor carrier exemption may still be entitled to overtime under the WHL); *Branch v. Cream-O-Land Dairy*, 244 N.J. 567, 583 (2021) (explaining that "[t]he state and federal statutes, however, are not identical, and New Jersey's wage-and-hour law has occasionally diverged from the federal wage-and-hour law in specific respects."); *cf. Heimbach v. Amazon.com, Inc.*, 667 Pa. 16, 33 (Pa. 2021) (explaining that "in both *Chevalier* [*v. Gen. Nutrition Ctrs., Inc.*, 656 Pa. 296, 220 A.3d 1038 (2019)] and *Bayada* [*v. Dep't of Labor & Indus.*, 607 Pa. 527, 8 A.3d 866 (2010)], when considering the question of whether an employee was entitled to compensation by an employer under the [Pennsylvania Minimum wage Act], or the manner in which an employee's compensation was to be determined thereunder, we did not follow the interpretation of similarly applicable provisions of the federal FLSA," as the FLSA "establishes only a national floor under which wage protections cannot drop, but more generous protections provided by a state are not precluded") (internal quotations omitted).

Thus, New Jersey employees need not affirmatively opt in to a representative action under the Wage Laws in order to receive a recovery. Such an interpretation would improperly graft onto the Wage Laws a requirement that is not present in the text of the statutes. An employee may bring a wage action on behalf of himself and other employees similarly situated.

**d. The Court Should Look to the FLSA for Interpretation of the Wage Laws' "Similarly Situated" Standard**

"Similarly situated" is not defined in the Wage Laws or the FLSA. Under the FLSA, federal courts have determined that "similarly situated" "'means that one is subjected to some common employer practice that, if proved, would help demonstrate a violation of the FLSA'" *Halle*, 842 F.3d at 226 (quoting *Zavala v. Wal-Mart Stores Inc.*, 691 F.3d 527, 538 (3d Cir. 2012); *see also Scott v. Chipotle Mexican Grill, Inc.*, 954 F.3d 502, 516 (2d Cir. 2020) ("Thus, to be 'similarly situated' means that named plaintiffs and opt-in plaintiffs are alike with regard to some material

aspect of their litigation. That is, party plaintiffs are similarly situated, and may proceed in a collective, to the extent they share **a similar issue of law or fact** material to the disposition of their FLSA claims.") (citing *Campbell v. City of Los Angeles*, 903 F.3d 1090, 1114 (9th Cir. 2018) (emphasis added)).

"Similarly situated" is therefore somewhat akin to commonality from Federal Rule of Civil Procedure 23 and New Jersey Court Rule 4:32-1(a)(2). *Cf. Rivet v. Office Depot, Inc.*, 207 F. Supp. 3d 417, 429 (D.N.J. 2016) ("The commonality requirement will be satisfied if the named plaintiffs share at least one question of fact or law with the grievances of the prospective class.'") (quoting *In re Prudential Ins. Co. America Sales Practice Litig. Agent Actions*, 148 F.3d 283, 311 (3d Cir. 1998)). "It follows that if named plaintiffs and party plaintiffs share legal or factual similarities material to the disposition of their claims, 'dissimilarities in other respects should not defeat collective treatment [under the FLSA's similarly situated standard.]'" *Scott*, 954 F.3d at 516 (quoting *City of Los Angeles*, 903 F.3d at 1114 (alteration added); *cf. Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 597 (3d Cir. 2012) (""commonality requirement 'does not require identical claims or facts among class member[s].'") (quoting *Chiang v. Veneman*, 385 F.3d 256, 265, 46 V.I. 679 (3d Cir. 2004), *abrog. on other grounds by Hydrogen Peroxide*, 552 F.3d at 318 n.18.)); *Morgan v. Family Dollar Stores*, 551 F.3d 1233 (11th Cir. 2008) ("we instructed that under § 216(b), courts determine whether employees are similarly situated--not whether their positions are identical.") (citing *Grayson v. K Mart Corp.*, 79 F.3d 1086, 1096 (11th Cir. 1996)).

Though "similarly situated" may be similar to "commonality, it is "well established that the FLSA's 'similarly situated' requirement is 'independent of, and unrelated to' Rule 23's [other class action] requirements, *Kern v. Siemens Corp.*, 393 F.3d 120, 128 (2d Cir. 2004), and that it is 'quite distinct' from 'the much higher threshold of demonstrating that common questions of law

and fact will 'predominate' for Rule 23 purposes.'" *Scott*, 954 F.3d at 518 (quoting *Myers v. Hertz Corp.*, 624 F.3d 537, 555-56 (2d Cir. 2010) (alteration added). "Nearly every circuit to consider the relationship between the modern Rule 23 and § 216(b) has reached the same conclusion." *Scott*, 954 F.3d at 518 (collecting cases); *see also id.* at 521 ("This was error. In effect, the district court held that collective plaintiffs could not be similarly situated *because* class plaintiffs' common issues did not predominate over individualized ones. It is simply not the case that the more opt-ins there are in the class, the more the analysis under § 216(b) will mirror the analysis under Rule 23.") (emphasis in original).

As to the Wage Laws, there is no reason to suggest that the Legislature intended "similarly situated" in the WHL and PWA to have a different meaning than in the FLSA. NJ NELA therefore respectfully submits that "similarly situated" in the Wage Laws has the same meaning as in the FLSA, as the WHL was modeled after the FLSA, and in this instance, has substantially the same language. *See Marx*, 380 N.J. Super. at 309 (The WHL "is patterned on the federal Fair Labor Standards Act"); *Hall v. Adelphia Three Corp.*, No. 21-01106, 2023 U.S. Dist. LEXIS 18529, at *18-19 (D.N.J. Jan. 31, 2023) ("As a general matter … the FLSA and the NJWHL are interpreted in parallel because the NJWHL is patterned on the FLSA.") (quoting *Casco v. Ponzios RD, Inc.*, No. 16-2084, 2019 U.S. Dist. LEXIS 65320 (D.N.J. Apr. 17, 2019) (collecting cases).

## CONCLUSION

This Court should affirm the decision of the Law Division.

Dated: August 14, 2025

Respectfully Submitted,

by: /s/ Ryan P. McCarthy

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| JUAN MARTINEZ,<br><br>*Plaintiff/Respondent,*<br><br>v.<br><br>T. SLACK ENVIRONMENTAL SERVICES, INC., THEODORE SLACK, AND "UNKNOWN SUPERVISORS 1-5" (NAMES BEING FICTITIOUS),<br><br>*Defendants/Appellants.* | SUPERIOR COURT OF NEW JERSEY<br>APPELLATE DIVISION<br>DOCKET NO. A-001008-24<br>MOTION NO. M-007060-24<br><br>CIVIL ACTION<br><br>On Appeal from:<br><br>SUPERIOR COURT OF NEW JERSEY<br>LAW DIVISION<br>MIDDLESEX COUNTY<br><br>Sat Below:<br>Hon. Ana C. Viscomi, J.S.C.<br><br>DOCKET NO.: MID-L-001335-20 |

# DEFENDANTS-APPELLANTS T. SLACK ENVIRONMENTAL SERVICES, INC., AND THEODORE SLACK'S BRIEF IN RESPONSE TO AMICUS CURIAE BRIEF SUBMITTED BY NATIONAL EMPLOYMENT LAWYERS ASSOCIATION

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Defendants/Appellants T. Slack Environmental Services, and Theodore Slack ("collectively "Defendants") submits this Brief in response to Amicus Curiae Brief submitted by the National Employment Lawyers Association.

## PROCEDURAL HISTORY AND STATEMENT OF FACTS

Defendants rely on the procedural history and statement of facts set forth in their Appellants' Brief.

## LEGAL ARGUMENT

### I. Amicus Curiae Advances No Novel Arguments

Given the extent to which this appeal has been briefed, Defendants do not wish to belabor any of the issues raised by Amicus Curiae for one simple reason – they do not advance any novel arguments beyond those that have been Plaintiff himself. Simply put, the National Employment Lawyers Association stands behind Plaintiff and urges this Court to find in his favor for the simple reason that it will benefit their clients in future actions. Defendants certainly do not dispute that this outcome will benefit plaintiff's employment bar, but that fact alone does not even come close to justifying affirming the trial court's decision.

Just as Plaintiff has done, Amicus Curiae seeks to conjure legislative intent entirely out of whole cloth and based on little more than two words in the relevant statute. The relevant facts are as follows:

- 1947 – Congress passes the Portal to Portal Act creating the "opt-in" class action using the term "similarly situated."

- 1963 – the New Jersey legislature passes the Prevailing Wage Act, including the same term ("similarly situated") as the Portal to Portal Act. However, there is no opt-in mechanism created nor is there any evidence of intent by the legislature to create an alternative collective action procedure outside of Rule 4:36-1, which governed class actions at the time.
- 1969- Rule 4:32-1 is promulgated.
- 2019-2022 - The New Jersey Wage and Hour Law is amended at least three times, using the term "similarly situated" but without creating an alternative collective action mechanism.

The question that this Court should ask is if the New Jersey Legislature intended to create an alternative collection action mechanism outside of the strictures of Rule 4:32-1 and its predecessor, why has it not done so by now? After all, the NJWHL and the PWA have both been in existence for well over 50 years, yet outside of the use of the term "similarly situated," there is no indication that these statutes were meant to parrot their federal counterparts. Indeed, the existence of the alternative mechanism in the Fair Labor Standards Act, which was clearly known to the New Jersey Legislature at the time that it was promulgating its own state wage laws, suggests that there no such intent. Plaintiff and Amicus Curiae are essentially asking this Court to divine from two words an intent to circumvent the requirements of Rule 4:32-1. This Court should decline to do so.

## II. Amicus Curiae Pushes for an Absurd and Chaotic Result

Beyond the fact that Amicus Curiae advances no novel arguments beyond those advocated by Plaintiff himself, this Court should take note of the fact that both Plaintiff and Amicus Curiae advocate for an absurd result in this matter. If this Court affirms the trial court's holding, the path to class certification in NJWHL and PWA matters will be exceedingly simple, even more so than the requirements of an FLSA collective action. First, the plaintiff must file a complaint, sufficient to overcome a motion to dismiss and pleading the elements necessary to show that class treatment is appropriate. Second, without the need for any discovery, the plaintiff must file a motion to certify the class. There is no statutory framework to guide the court in determining whether such a motion should be granted, but based upon the trial court's logic, again only the bare pleadings are necessary to certify a class. That is the sum total of what must be done in order to certify a class using the logic of Plaintiff and Amicus Curiae. Under such circumstances, class actions would be the norm rather than the exception. Additionally, putting aside the fact that there is no indication that the New Jersey Legislature ever intended such an absurd result, such a framework would also cause significant logistical problems as the subsequent discovery (since no discovery is needed in the first instance prior to class certification) would inevitably lead to motions to decertify the class or a portion

thereof. Put simply, procedural chaos would ensue if this Court were to affirm the trial court.

Regardless of whether a claim is brought under Rule 23, the FLSA or ADEA, Rule 4:32-1 or another state law equivalent, the central tenet of every putative class action framework is that the plaintiff bears the burden of showing through a modicum of evidence that his or her claims (or some portion thereof) are appropriate for class treatment. The result that Plaintiff and Amicus Curiae push for turns that proposition on its head. It is black letter law that "legislation should not be construed to create an absurd result." Matter of K.M.G., 477 N.J. Super. 167, 174, 304 A.3d 1016, 1020 (App. Div. 2023). Yet that is exactly what is being advocated for here. This Court should reject such a result and hold that Plaintiff is bound to the same requirements set forth in Rule 4:32-1 as any other putative class action representative. And of course, should the New Jersey Legislature wish to create an alternative to Rule 4:32-1 for NJWHL and PWA claims, it is free to do so. But in the meantime, this Court should reverse the trial court's decision and remand for further proceedings on an individual basis.

## CONCLUSION

This Court should reverse the lower court's decision certifying the proposed class and appointing Plaintiff as class representative and remand this matter for further proceedings.

**KANG HAGGERTY LLC**
Attorneys for Appellants T. Slack Environmental Services, Inc. and Theodore Slack

By: ___*/s/ Aaron L. Peskin*_____
Aaron L. Peskin, Esquire

Dated: September 12, 2025