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| CHRISTOPHER MAIA and SEAN HOWARTH, on behalf of themselves and all those similarly situated,<br><br>Plaintiffs-Respondents,<br><br>v.<br><br>IEW CONSTRUCTION GROUP,<br><br>Defendant-Appellant. | SUPREME COURT OF NEW JERSEY<br>DOCKET NO. 088010 (A-3-23)<br><br>CIVIL ACTION<br><br>ON MOTION FOR LEAVE TO APPEAL FROM AN INTERLOCUTORY ORDER OF THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION DOCKET NO. A-4012-21<br><br>SAT BELOW:<br>HON. CARMEN MESSANO, P.J.A.D.<br>HON. LISA ROSE, J.A.D.<br>HON. KATIE A. GUMMER, J.A.D. |

# BRIEF OF NEW JERSEY BUSINESS & INDUSTRY ASSOCIATION IN SUPPORT OF MOTION FOR LEAVE TO APPEAR AS AMICUS CURIAE IN SUPPORT OF DEFENDANT-APPELLANT

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## PRELIMINARY STATEMENT

The New Jersey Business & Industry Association ("NJBIA") submits this Brief in support of its Motion for Leave to Appear as Amicus Curiae in this matter. NJBIA also requests to participate in the oral argument.

NJBIA – whose members represent a wide cross-section of New Jersey's business community – respectfully submits that the Appellate Division's interpretation of the Wage Theft Act ("WTA") effectively applied the WTA retroactively, thereby (1) improperly creating new claims against employers under the Wage and Hour Law ("WHL") after prior stale claims were declared legally invalid under the previous two-year statute of repose governing WHL claims; and (2) unconstitutionally punishing employers with new exposure to treble damages under the WHL and Wage Payment Law ("WPL") for already-completed conduct stretching back six years prior to the WTA's effective date of August 6, 2019.

## IDENTITY OF AMICUS CURIAE AND INTEREST IN CASE

NJBIA is New Jersey's largest statewide business association, representing member companies in all industries and regions of our State. Its mission is to provide information, services, and advocacy for its member companies and build a more prosperous New Jersey. NJBIA's members include most of the top 100 employers in the State, as well as thousands of small to medium-sized employers, from every sector of New Jersey's economy. One of NJBIA's goals is to reduce the

costs of doing business in New Jersey, including unwarranted litigation burdens, in an effort to promote economic growth and benefit all of New Jersey. *See* https://njbia.org/about. NJBIA has been granted leave to appear as amicus curiae in numerous cases before this Court.

NJBIA has a special interest and expertise regarding issues that concern the business community and can speak to many of the Legislature's policy considerations when it drafts legislation affecting New Jersey businesses, such as the Wage Theft Act. NJBIA respectfully submits that the issue raised in this case is of significant interest to the New Jersey business community, and that NJBIA can provide a broader perspective on the issue in this appeal than the parties can offer.

## PROCEDURAL HISTORY

NJBIA adopts and incorporates by reference the Procedural History and Statement of Facts set forth in Defendant-Appellant IEW Construction Group's briefing before this Court. *See* Defendant's Supreme Court Brief ("Def. S. Ct. Br.") at 3-6.

## ARGUMENT

### I. CHAPTER 212 SHOULD NOT BE APPLIED RETROACTIVELY BECAUSE IT CONTAINS A STATUTE OF REPOSE

NJBIA incorporates by reference the arguments presented by IEW, namely, (1) that the Appellate Division erred in applying the Wage Theft Act, *L.* 2019, *ch.* 212 (the "WTA" or "Chapter 212") retroactively, (2) that the Appellate Division

erred in failing to consider this Court's well-established principles about when to apply a law retroactively, and (3) that those principles as applied to Chapter 212 should have led to the conclusion that this law should not be given retroactive effect. NJBIA seeks to reinforce IEW's arguments by emphasizing that these problems are compounded by the fact that the central statutory provision at issue in this appeal, the amendment of the WHL's two-year "look-back period" to become a six-year "look-back period," is a statute of repose, as the Appellate Division recognized but failed to apply properly in adopting a retroactive application.

### A. The WHL's "Look-Back Period" Is a Statute of Repose

Prior to its amendment by the WTA, the WHL provided in pertinent part that "*[n]o claim* for unpaid wages, unpaid compensation, or other damages under this act *shall be valid* with respect to any such claim which has arisen *more than 2 years* prior to the commencement of an action for the recovery thereof. …" *N.J.S.A.* 34:11-56a25.1, *L.* 1967, *c.* 216, § 1 (emphasis added). By virtue of its amendment by Chapter 212 effective as of August 6, 2019, the WHL now provides, in relevant part: "*No claim* for unpaid minimum wages, unpaid overtime compensation, … or other damages under this act *shall be valid* with respect to any such claim which has arisen *more than six years* prior to the commencement of an action for the recovery thereof. …" *N.J.S.A.* 34:11-56a25.1, as amended by *L.* 2019, *c.* 212, § 5 (emphasis added).

The Appellate Division called this provision a "look-back period that effectively functioned as a statute of repose." (Da9.) The court's matter-of-fact characterization was proper and consistent with prior jurisprudence of this Court applying similar legislative phraseology because the wording of the WHL corresponds to language used in recognized statutes of repose rather than statutes of limitations.

The Court has previously explained the central difference between a statute of limitations and a statute of repose. While a statute of limitations bars an injured party from pursuing a remedy when a designated amount of time has passed following the accrual of a cause of action, a statute of repose dictates that, after passage of time from a given event, no cause of action can arise at all. *Daidone v. Buterick Bulkheading*, 191 N.J. 557, 564-65 (2007). Thus, for example, *N.J.S.A.* 2A:14-1.1, the law protecting architects, builders, and others from lawsuits seeking damages for design or construction or related deficiencies, is an acknowledged statute of repose because it states that "[n]o action … shall be brought … more than 10 years after … construction." *See Greczyn v. Colgate-Palmolive*, 183 N.J. 5, 14 (2005) ("The statute of repose [in *N.J.S.A.* 2A:14-1.1], by its very terms—'no action ... shall be *brought* ... more than ten years after ... construction'—bars those claims." (emphasis in original)). In *Wingate v. Estate of Ryan*, this Court recognized *N.J.S.A.* 9:17-45(b) to be a statute of repose for actions under the Parentage Act,

because it states that "[n]o action shall be brought under this act more than 5 years after the child attains the age of majority." 149 N.J. 227, 233 (1997). The Court reaffirmed that characterization of *N.J.S.A.* 9:17-45(b) by comparing its wording – that "No action shall be brought" – with that of *N.J.S.A.* 2A:14-1.1. *See R.A.C. v. P.J.S., Jr.*, 192 N.J. 81, 96 n.8 (2007).

The Appellate Division's description of the WHL as a statute of repose is consistent with this Court's previous recognition of both *N.J.S.A.* 2A:14-1.1 and *N.J.S.A.* 9:17-45(b) as statutes of repose based on the legislative choice of wording: All three statutes, by their terms, bar the right to bring an action at all after a designated period of time – in other words, repose from any such claim sets in. Indeed, that a WHL claim is termed not "valid" after a specified period of time connotes, even more strongly than language that claims shall not "be brought," that the claim does not exist in the eyes of the law. This is consistent with the character of a repose statute. *Daidone*, 191 N.J. at 564-65; *see also R.A.C.*, 192 N.J. at 96 ("After the expiration of the statutory period, a cause of action literally ceases to exist …." (quotation omitted)).

The phrasing in these three statutes is markedly different from language that is typical of a statute of limitations, across a variety of contexts, which requires that "every action … shall be commenced" within a certain amount of time. *See, e.g.*, *N.J.S.A.* 2A:14-3 (action for libel or slander); *N.J.S.A.* 2A:14-7 (action for real

estate); *N.J.S.A.* 14A:6-12(5) (action for director liability); *N.J.S.A.* 39:6A-13.1 (action for car insurance policy benefits).

In addition, this Court has noted that statutes of repose are "self-executing," while statutes of limitations are not; thus, a statute of limitations defense must be affirmatively raised or else it is waived. *Notte v. Merchants Mut. Ins. Co.*, 185 N.J. 490, 500 (2006). Therefore, the Court explained, "until adjudicated time-barred, a stale claim filed after the expiration of the applicable statute of limitations is nonetheless *valid*." *Id.* (emphasis added). The language of the WHL stands in sharp contrast: "No claim" under the act "shall be *valid*" if it is brought after the designated time period. *N.J.S.A.* 34:11-56a25.1 (emphasis added). A claim brought under the WHL after the repose period is a legal nullity from the outset, without a defendant needing to assert untimeliness as a defense. This is exactly how the Court has described a statute of repose.

### B. Applying a Statute of Repose Retroactively to Expired/Invalid Claims Creates New Causes of Action

This Court has not yet addressed whether or under what conditions a change to a statute of repose may be applied retroactively, and the Appellate Division in this case gave Chapter 212 retroactive effect without pausing to consider the implications of doing so for a statute of repose. The consequences, however, are far-reaching, inconsistent with the legislative intent to create a statute of repose, and potentially unconstitutional.

The general concern with giving any statute retroactive effect is clear: The "preference [for prospective application of statutes] is based on our long-held notions of fairness and due process." *Cruz v. Central Jersey Landscaping, Inc.*, 195 N.J. 33, 45 (2008) (citations omitted); *see also Hughes Aircraft Co. v. U.S. ex rel. Schumer*, 520 U.S. 939, 946 (1997) ("The principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal." (quotation omitted)). But it is heightened in the context of repose statutes, given their purpose and the nature of their operation.

The "chief consideration underlying" a statute of repose is "fairness to a defendant," because at a certain point in time the defendant "ought to be secure in his reasonable expectation that the slate has been wiped clean of ancient obligations…." *Rosenberg v. Town of N. Bergen*, 61 N.J. 190, 201 (1972) (quoting *Developments in the Law: Statutes of Limitations*, 63 Harv. L. Rev. 1177, 1185 (1950)); *see also* 51 Am. Jur. 2d Limitation of Actions § 4 (2023) ("Statutes of repose reflect the legislative conclusion that a point in time arrives beyond which a potential defendant should be immune from liability for past conduct." (citation omitted)). To that end, the "basic feature of a statute of repose is the fixed beginning and end to the time period a party has to file a complaint." *R.A.C.*, 192 N.J. at 96 (citation omitted).

But a statute of repose does not simply place a procedural bar on a lawsuit. Rather, it "prevent[s] what might otherwise be a cause of action from ever arising." *Daidone*, 191 N.J. at 564-65 (quotation omitted). Stated differently, when the period set by a statute of repose expires, "a cause of action literally ceases to exist no matter when the harm arose" and "confers immunity on a defendant." *R.A.C.*, 192 N.J. at 96 (quotations omitted); *see also* 51 Am. Jur. 2d Limitation of Actions § 4 (2023) ("With the expiration of the period of repose, the putative cause of action evanesces; life cannot thereafter be breathed back into it." (citation omitted)). Thus, when a statute of repose has run, thereby eliminating the possibility of a cause of action, and then if an amendment to the repose statute's time period is given retroactive effect, a cause of action that did not exist is created retroactively and the defendant's previously secured immunity is retroactively abrogated.[1]

**1. The Legislature Did Not Intend to Create New Causes of Action**

If the Legislature wanted the WTA to have such an extensive impact on claims that had already disappeared, *i.e.*, to revoke the statute of repose and the protection it already gave to employers from claims that were no longer valid, it surely would

[1] Although the claims of the named Plaintiffs in this case had not expired under the pre-existing two-year repose period as of August 6, 2019, those Plaintiffs seek to represent a class of employees who were employed by IEW "at any point in the six (6) years preceding the filing date of this Complaint." (Da20 [Class Action Complaint, ¶ 6].) This would include employees whose claims had expired and were no longer valid before August 6, 2019 under the prior two-year period of repose.

have used language that is clearer than the phrase "This act shall take effect immediately."

There are two possible interpretations of "This act shall take effect immediately" in the context of amending the WHL's two-year statute of repose to six years as of August 6, 2019. One is that *conduct* that occurs on or after August 6, 2019 is now subject to a six-year repose period. The other is that *lawsuits* that are filed on or after August 6, 2019 and complain of earlier conduct are now subject to a six-year period of repose. Only the second reading leads to the problem of creating new claims against employers that had already become immune to such invalid claims. The former presents no such difficulty.

Indeed, other legislatures have used much more specific language to show they intended for an extension to a repose statute to apply retroactively, and in particular to revive extinguished claims. For example, an amendment to a Georgia statute of repose that became effective July 1, 2020 specifically "appl[ied] to causes of action which have accrued on or after January 1, 1968." *S. States Chem., Inc. v. Tampa Tank & Welding, Inc.*, 316 Ga. 701, 705, 708 (2023). Similarly, an amendment to a Nevada statute of repose that became effective October 1, 2019 explicitly "'appl[ied] retroactively to actions in which the substantial completion of the improvement to the real property occurred before October 1, 2019." *Dekker/Perich/Sabatini Ltd. v. Eighth Jud. Dist. Ct. in & for Cnty. of Clark*, 137 Nev.

525, 528-29 (2021). And when Congress passed Sarbanes-Oxley, which included an extension to the repose period for securities fraud actions from three to five years, it stated that the extension "shall apply to all proceedings … that are commenced on or after the date of enactment of this Act." *In re Exxon Mobil Corp. Sec. Litig.*, 500 F.3d 189, 196 (3d Cir. 2007). The Third Circuit held that this language evinced an intent to retroactively apply the longer repose period to conduct that already took place as long as the lawsuit was filed on or after Sarbanes-Oxley's effective date – but not to claims for which the pre-existing repose period had already expired before that effective date. *Id.*; *Lieberman v. Cambridge Partners, LLC*, 432 F.3d 482, 487-91 (3d Cir. 2005). The court held that to "resurrect claims extinguished by a statute of repose," Congress must show its intent to do so "in the clearest possible terms." *Lieberman*, 432 F.3d at 490.

In sharp contrast to these examples, the language in the WTA – "This act shall take effect immediately" – does not use the word "retroactive," does not refer to events that occurred before the effective date, does not refer to causes of action that arose before the effective date, and does not refer to lawsuits that are commenced on or after the effective date.

Suppose the Legislature passed a law imposing a new requirement on employers and creating for employees a corresponding cause of action with a four-year limitations period, which was to "take effect immediately." It would be

implausible to interpret that as permitting an employee to sue the day after the law was passed for the employer's already-completed conduct over the past four years.[2] Revoking the repose period here on the basis of "This act shall take effect immediately" is just as unreasonable: It effectively creates a cause of action where it was not "valid" before. *See Lieberman*, 432 F.3d at 490 ("If, as the Supreme Court has suggested, extending a statute of limitations after the pre-existing period of limitations has expired would essentially create a new cause of action, then *a fortiori* applying Sarbanes-Oxley to claims extinguished by a period of *repose* would unequivocally create a new cause of action." (citing *Hughes Aircraft Co. v. U.S. ex rel. Schumer*, 520 U.S. 939, 950 (1997)) (emphasis in original)). In the absence of any clear indication that the Legislature intended to create such new causes of action, the Appellate Division should not have done so.

**2. Reviving Expired Claims Raises A Constitutional Issue**

Moreover, some courts have considered the retroactive application of an extended statute of repose to claims that expired under the pre-existing repose period

[2] In fact, the Appellate Division's retroactive application of *L.* 2019, *c.* 212, § 5 does precisely that – albeit with an even more troubling six-year look-back period – inasmuch as the WTA also created new retaliation causes of action against an employer (i) under the WHL for "other discriminatory acts taken in retaliation against the employee" because, among other things, the employee made a complaint to the employer, *L.* 2019, *c.* 212, § 5, now *N.J.S.A.* 34:11-56a25.1; and (ii) under the WPL for "tak[ing] a retaliatory action against an employee by discharging or in any other manner discriminating against the employee" due to, among other things, the employee instituting a proceeding. *L.* 2019, *c.* 212, § 2, now *N.J.S.A.* 34:11-4.10.

to be an unconstitutional violation of due process. They have characterized a defendant's immunity by way of an expired repose statute as a "substantive right" and thus held that even if the legislature clearly intended the amended repose period to have retroactive application and to revive extinguished claims, such intent was immaterial. *See, e.g., S. States Chem., Inc.*, 316 Ga. at 708-12 (holding "[b]ased on the nature of a statute of repose" that defendant had "a substantive, vested right to be free from liability" for claims under prior repose period so that "under the Due Process Clause of the federal and Georgia Constitutions," amended repose period could not apply retroactively); *Givens v. Anchor Packing, Inc.*, 237 Neb. 565, 569, 572 (1991) (holding that amendment to repose statute "cannot resurrect an action which the prior version of the statute had already extinguished" because "immunity afforded by a statute of repose" is a "substantive right[] recognized by Nebraska law and protected by its Constitution"); *see also State of Minn. ex rel. Hove v. Doese*, 501 N.W.2d 366, 369 (S.D. 1993) ("Most state courts addressing the issue of the retroactivity of statutes have held that legislation which attempts to revive claims which have been previously time-barred impermissibly interferes with vested rights of the defendant, and thus violates due process." (citing many cases)); *Agency for Health Care Admin. v. Associated Indus. of Fla., Inc.*, 678 So. 2d 1239, 1254 (Fla. 1996) (legislative abolition of statute of repose is "unconstitutional as violative of the due process clause" as to "claims which are already barred by the statute of

repose" because "[o]nce an action is barred, a property right to be free from a claim has accrued"). *But see Dekker/Perich/Sabatini Ltd.*, 137 Nev. at 531-32 (finding retroactive application of extended repose period does not violate due process).

When the Court can construe a statute in two possible ways, one constitutional and one not, it is "enjoined" by "canons of statutory interpretation and by prudence to choose the one that is constitutional." *G.D. v. Kenny*, 205 N.J. 275, 300 (2011); *see also State v. Johnson*, 166 N.J. 523, 540 (2001) ("Unless compelled to do otherwise, courts seek to avoid a statutory interpretation that might give rise to serious constitutional questions." (quotation omitted)). Here, the prospect of violating due process can be avoided entirely by concluding that "This act shall take effect immediately" means that *conduct* that occurs on or after August 6, 2019 is now subject to a six-year repose period, rather than that *lawsuits* that are filed on or after August 6, 2019 and complain of earlier conduct are now subject to a new six-year repose period. Accordingly, that is how the Court should interpret the WTA.

## II. A RETROACTIVE APPLICATION OF THE WTA VIOLATES DUE PROCESS AND IS MANIFESTLY UNJUST BECAUSE EMPLOYERS WOULD BE PUNISHED FOR COMPLETED CONDUCT WITHOUT ADVANCE NOTICE OF THE EXTENDED AND ENHANCED CONSEQUENCES THEREOF

In determining whether a statute should be applied retroactively, courts must consider two questions: (1) "whether the Legislature intended to give the statute retroactive application"; and (2) if so, "whether retroactive application is an

unconstitutional interference with 'vested rights' or will result in a 'manifest injustice.'" *Johnson v. Roselle EZ Quick LLC*, 226 N.J. 370, 387 (2016) (quotations omitted); *see also Nobrega v. Edison Glen Assocs.*, 167 N.J. 520, 537 (2001).[3] The Appellate Division, however, did not consider either of these questions, yet ruled that workers could sue and recover liquidated damages under the WTA for a six-year period measured back from the date the suit is commenced, resulting in the WTA being applied retrospectively to conduct preceding August 6, 2019.

For all the reasons set forth in Defendant's Supreme Court Brief (*see* Def. S. Ct. Br. at 15-24), it is clear that the Legislature did not intend to give the WTA retroactive application, thus answering the first of the two questions required by this Court in considering a statute's retroactive application. Even assuming *arguendo* that the WTA was intended to be applied retroactively, NJBIA submits that such an outcome is barred by the second part of the inquiry because retroactive application of the WTA would be unconstitutional and result in a manifest injustice.

[3] This additional layer of scrutiny is warranted by the Court's "guarded review of retroactive legislation" and "reflects a long-standing belief … that '[r]etrospective laws are, indeed, generally unjust; and … neither accord with sound legislation, nor with the fundamental principles of the social compact.'" *Nobrega*, 167 N.J. at 537 (quoting 2 Joseph Story, *Commentaries on the Constitution of the United States (Abridgment)* § 711 (1838)).

### A. Retroactive Application of the WTA Violates Due Process

Turning first to the question of constitutional interference, it is axiomatic that "all statutes with retroactive elements … are subject to scrutiny under the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution and the parallel provision of the New Jersey Constitution." *Nobrega*, 167 N.J. at 539. For purposes of its due process/retroactivity analysis, this Court considers whether retrospective application of a statute interferes with a "vested right," which is understood to be "a present fixed interest which ... should be protected against arbitrary state action." *Barila v. Bd. of Educ. of Cliffside Park*, 241 N.J. 595, 617-18 (2020) (quotations omitted).

As demonstrated in Point I above, the two-year statute of repose in the pre-WTA language of the WHL created vested rights in employers to be free from liability for claims that were extinguished and rendered invalid by that repose period. This is consistent with the *Barila* Court's recognition that "[*t*]*o become vested*, a right must have become a title, legal or equitable, to *the present or future enjoyment of* property, or to the present or future enforcement of a demand, or *a legal exemption from a demand made by another* ...." *Id.* at 618 (quotations omitted) (emphasis added). By retroactively applying the WTA's new six-year repose period to conduct

preceding August 6, 2017,[4] the Appellate Division's ruling has the improper effect of resurrecting claims that were conclusively rendered invalid by the pre-WTA repose period in *N.J.S.A.* 34:11-56a25.1, *L.* 1967, *c.* 216, § 1, thereby unconstitutionally interfering with New Jersey employers' vested rights to "a legal exemption from a demand made by another."

This constitutional infirmity is further illustrated by the Appellate Division's willingness to retroactively expose New Jersey employers to the new remedy of treble/liquidated damages under both the WPL and WHL (along with costs and attorney's fees under the WPL) for already-completed conduct occurring years before the WTA's effective date of August 6, 2019. It is well-established that the purpose of treble damages, attorney's fees, and costs of suit "is not only to make whole the victim's loss, but also *to punish the wrongdoer and to deter others* from engaging in similar fraudulent practices." *Furst v. Einstein Moomjy, Inc.*, 182 N.J. 1, 12 (2004) (emphasis added). Given these purposes of punishment and deterrence, it would truly be an "arbitrary and irrational" outcome in violation of due process rights, *Nobrega*, 167 N.J. at 545, to apply the WTA retroactively to a time when employers (i) had no advance notice of their potential future exposure to the punishment of treble damages, (ii) could not be deterred by such unknown future

[4] As of August 6, 2019, claims based on events prior to August 6, 2017 were not valid based on the previous two-year statute of repose.

punishment that may later be imposed on other employers, and (iii) had no ability to proceed with even greater care when navigating the complex requirements of the WHL and WPL in an effort to avoid the WTA's then-unknown, punitive future remedies (which also include new and enhanced criminal exposure for violators). *See Landgraf v. USI Film Products*, 511 U.S. 244, 281 (1994) ("Retroactive imposition of punitive damages would raise a serious constitutional question.").

### B. Retroactive Application of the WTA Leads to Manifest Injustice

Of course, this Court need not reach the constitutional question in reversing the Appellate Division because the retroactive application of the WTA would likewise result in manifest injustice to New Jersey employers like IEW. The "manifest injustice" test is "based on equitable concerns" and "is broader than that afforded by the constitution." *Nobrega*, 167 N.J. at 545 (quotations omitted); *see State Troopers Fraternal Ass'n of New Jersey v. State*, 149 N.J. 38, 54 (1997) (the "manifest-injustice analysis is a nonconstitutional, equitable doctrine designed to prevent unfair results that do not necessarily violate any constitutional provision"). The manifest injustice inquiry focuses on:

> whether the affected party relied, to his or her prejudice, on the law that is now to be changed as a result of the retroactive application of the statute, and whether the consequences of this reliance are so deleterious and irrevocable that it would be unfair to apply the statute retroactively.

*Nobrega*, 167 N.J. at 546 (quoting *Gibbons v. Gibbons*, 86 N.J. 515, 523-24 (1981)).

This analysis requires "a weighing of the public interest in the retroactive application of the statute against the affected party's reliance on previous law, and the consequences of that reliance." *Id.* at 547 (quotation omitted).

Putting aside the lack of any indicia that the Legislature intended to give the WTA retroactive effect (thus negating any public interest in retrospective application), the same factors discussed above regarding the due process violations flowing from retroactivity apply with equal force to the manifest injustice analysis. The Appellate Division's retroactive application of the WTA results in (i) a manifestly unjust interference with employers' reliance upon the vested rights created by the pre-WTA two-year statute of repose; and (ii) a manifestly unjust lack of advance notice to employers of their potential future exposure to the WTA's punishment of treble damages for already-completed conduct. This lack of notice of potential future exposure to treble damages is particularly unjust because employers obviously cannot go back in time to proceed with even greater care in making complicated judgments about complying with the fact-sensitive requirements of the WPL and WHL to avoid such punishment.

NJBIA respectfully submits that, despite their best efforts, New Jersey employers face real challenges in complying with the myriad requirements of this State's wage and hour and wage payment laws. Indeed, even the rare guidance that may be obtained from the New Jersey Department of Labor and Workforce

Development ("NJDOL") does not necessarily protect an employer in a court action. *See, e.g., Branch v. Cream-O-Land Dairy*, 244 N.J. 567, 591 (2021) (despite NJDOL communicating to defendant-employer "three times in the span of a decade that it was a trucking-industry employer exempt from the WHL's general overtime requirements under *N.J.S.A.* 34:11-56a4(f)," this Court found that defendant "was not entitled to assert the good-faith defense based on those determinations"). Further complicating employers' efforts to comply with their legal obligations and avoid unnecessary litigation, the NJDOL has not followed this Court's suggestion in *Branch* that it "develop a procedure whereby an employer can seek an opinion letter or other ruling from the Commissioner or Director regarding a claimed exemption from the WHL's overtime requirements." *Id.*

With the Appellate Division's retroactive application of the WTA, the challenges faced by New Jersey employers would be further compounded. As illustrated by *Branch* and cases like *Marx v. Friendly Ice Cream Corp.*, 380 N.J. Super. 302 (App. Div. 2005) (addressing the multiple factual considerations underlying exemptions from overtime pay requirements), businesses regularly make judgments about fact-sensitive exemptions and other compliance issues under the WHL and WPL, as does the NJDOL when it conducts investigations and audits. Yet, under *Branch*, employers cannot avoid lawsuits by relying on prior communications from the NJDOL suggesting they were already in compliance with the law. Nor can

employers obtain "real time" guidance to ensure legal compliance via opinion letters from the NJDOL. Now, by virtue of the erroneous opinion below, New Jersey businesses unfairly face triple the years of exposure to claims that were previously invalid under the pre-WTA statute of repose *and* retroactive imposition of the WTA's new punitive treble damage provision for past/completed conduct.

NJBIA's specific interests are directly implicated by this case because the Appellate Division's decision, if not overturned, will render New Jersey's businesses susceptible to increased employment-related litigation over claims that were barred by the statute of repose and for treble damages that unforeseeably – and unfairly – increase their liability for past conduct.

## CONCLUSION

For the foregoing reasons, NJBIA respectfully requests that this Court grant its Motion for Leave to Appear as Amicus Curiae, and reverse the Appellate Division's decision.

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By: *s/ Thomas F. Doherty*
Thomas F. Doherty

Dated: November 27, 2023