**No. 19-8011**

***In the***

# United States Court of Appeals

***for the***

# Seventh Circuit

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SUSIE BIGGER, on behalf of herself, individually, and on behalf of all others similarly situated

*Plaintiff-Respondent*,

v.

FACEBOOK, INC.,

*Defendant-Petitioner*.

---

From the United States District Court for the
Northern District of Illinois, Case No. 17-cv-7753
Honorable Harry D. Leinenweber

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## MOTION FOR LEAVE TO FILE BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT-PETITIONER FACEBOOK, INC.

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*Counsel for* Amicus Curiae *the Chamber of Commerce of the United States of America*

Pursuant to Rule 29(a)(3) of the Federal Rules of Appellate Procedure, the Chamber of Commerce of the United States of America (Chamber) respectfully moves this Court for leave to file the attached brief as *amicus curiae* in support of the Defendant-Petitioner Facebook, Inc.'s petition for permission to appeal. In support of this motion, the Chamber states:

1. The Chamber is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country.

2. One of the Chamber's most important responsibilities is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the Nation's business community, including cases involving the enforceability of arbitration agreements under the Federal Arbitration Act ("FAA"), 9 U.S.C. §1 *et seq*.

3. The Chamber and its members have a strong interest in this case. Many members of the Chamber and the broader business community have found that arbitration allows them to resolve disputes, including with employees, promptly and efficiently while avoiding the costs associated with traditional litigation. The order that Facebook seeks to appeal implicates the enforceability of such agreements—in particular, whether arbitration agreements may be

disregarded at the conditional certification stage of proposed collective actions under the Fair Labor Standards Act.

4. Because the simplicity, informality, and expedition of arbitration depend on the courts' consistent recognition and application of the principles underlying the FAA, the Chamber has filed numerous amicus briefs in cases involving the enforceability of arbitration agreements. *See, e.g., Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018); *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015); *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011). Accordingly, the Chamber is well positioned to assist the Court in evaluating the important issues this case raises the broader context of the law surrounding arbitration agreements.

7. Defendant-Petitioner has consented to the filing of the *amicus* brief. Counsel for the Chamber contacted counsel for Plaintiff-Respondent requesting consent to the filing, but has not received a response as of the time of filing.

WHEREFORE, the Chamber respectfully requests that the Court grant its motion for leave to file a brief as *amicus curiae*.

Dated: April 22, 2019

Respectfully submitted,

/s/ Andrew J. Pincus

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*Attorneys for* Amicus Curiae

**CERTIFICATE OF COMPLIANCE**

I hereby certify that this motion complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2) because it contains 410 words. I further certify that this motion complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and Circuit Rule 32(b) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because the motion was prepared in 12-point Century Schoolbook font using Microsoft Word.

Dated: April 22, 2019

/s/ *Andrew J. Pincus*
Andrew J. Pincus

**CERTIFICATE OF SERVICE**

Pursuant to Federal Rule of Appellate Procedure 25(c) and Circuit Rule 25(a), I hereby certify that on April 22, 2019, the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system, which will send a notification to the attorneys of record in this matter who are registered with the Court's CM/ECF system.

Dated: April 22, 2019

/s/ *Andrew J. Pincus*
Andrew J. Pincus

**No. 19-8011**

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# United States Court of Appeals

*for the*

# Seventh Circuit

SUSIE BIGGER, on behalf of herself, individually, and on behalf of all others similarly situated,

*Plaintiff-Respondent*,

*v.*

FACEBOOK, INC.,

*Defendant-Petitioner*.

From the United States District Court for the Northern District of Illinois
Case No. 1:17-cv-7753
Honorable Harry D. Leinenweber

## BRIEF OF AMICUS CURIAE THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF FACEBOOK'S PETITION FOR PERMISSION TO APPEAL

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**APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT**

Appellate Court No: 19-8011

Short Caption: Bigger v. Facebook, Inc.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

[ ] **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

The Chamber of Commerce of the United States of America

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Mayer Brown LLP

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

N/A

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

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Attorney's Signature: s/ Andrew J. Pincus Date: 4/22/2019

Attorney's Printed Name: Andrew J. Pincus

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** X **No** ____

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Attorney's Signature: s/ Archis A. Parasharami Date: April 22, 2019

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Attorney's Signature: s/ Lauren R. Goldman Date: April 22, 2019

Attorney's Printed Name: Lauren R. Goldman

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ____ **No** X

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Attorney's Signature: s/ Karen Lin Date: April 22, 2019

Attorney's Printed Name: Karen Lin

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ____ **No** X

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Attorney's Signature: s/ Steven P. Lehotsky Date: April 22, 2019

Attorney's Printed Name: Steven P. Lehotsky

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ____ **No** X

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## INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America is the world's largest business federation, representing 300,000 direct members and indirectly representing an underlying membership of more than three million U.S. businesses and professional organizations of every size and in every economic sector and geographic region of the country.[1] The Chamber regularly files *amicus* briefs in cases that raise issues of concern to the nation's business community, including cases involving the enforceability of arbitration agreements. *See, e.g., Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018); *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228 (2013); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011). Because the simplicity, informality, and expedition of arbitration depend on the courts' consistent recognition and application of the principles underlying the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*, the Chamber and its members have a strong interest in this case.

## PRELIMINARY STATEMENT

Facebook's petition raises an unsettled issue of national importance that has divided district courts within this Circuit and therefore warrants this Court's review. The issue is simple: Whether a district court may require that notice of a Fair Labor Standards Act collective action be sent to employees who have agreed to

[1] No counsel for a party authored this brief in whole or in part, and no person other than the *amicus curiae*, its members, or its counsel contributed money that was intended to fund the preparation or submission of this brief. *See* Fed. R. App. P. 29(a)(4)(E).

resolve their disputes by arbitration on an individual basis and thus have waived the ability to participate in collective or class actions.

The Fifth Circuit—the only appellate court to weigh in so far—has said that the answer is "no." But the court below held that such notice could be required—and that employees with arbitration agreements could initially opt in to the collective action. The court effectively treated the arbitration agreements as presumptively invalid, in contravention of the "emphatic federal policy" favoring enforcement of arbitration agreements. *KPMG LLP v. Cocchi*, 565 U.S. 18, 25 (2011) (internal quotation marks omitted).

Facebook's petition convincingly explains why the court's order satisfies Section 1292(b)'s criteria. As the district court recognized in granting certification, there is a substantial ground for a difference of opinion on the legal question that is presented. And the question is controlling because it "might save time for the district court, and time and expense for the litigants" (*Johnson v. Burken*, 930 F.2d 1202, 1206 (7th Cir. 1991) (internal quotation marks omitted)) by resolving whether the employees who are bound by their arbitration agreements—the vast majority of the potential group—can participate at all in this case. If, as Facebook argues, they are precluded from receiving notice and joining the action, then the case going forward will be a fraction of its current size, drastically reducing (1) the amount of time-consuming and costly group discovery, and (2) the need for further proceedings to dismiss each of the employees who agreed not to join this collective action. For

similar reasons, dramatically narrowing the scope of the action will materially advance the ultimate termination of the litigation.

For additional reasons, this case is especially appropriate for interlocutory appeal. The issue raised is recurring and affects many other litigants. Without this Court's review, businesses and their employees will be forced to incur the costs and delays of litigation that their arbitration agreements are designed to avoid.

Most importantly, an interlocutory appeal presents the only realistic prospect for review. After a final judgment, there will be little incentive for any defendant to seek review of such an order: there is no way to undo the notice once it has gone out, and in most cases either the employees subject to arbitration will ultimately be excluded from the collective action or the case will settle due to the pressure of collective certification.

This Court should accordingly grant Section 1292(b) review and reverse the order compelling notice to employees who agreed to individual arbitration.

## ARGUMENT

### I. REVIEW IS WARRANTED BECAUSE FACEBOOK'S PETITION RAISES AN UNSETTLED ISSUE OF NATIONWIDE IMPORTANCE.

Whether a district court can order that notice of an FLSA collective action be sent to employees who have agreed to individual arbitration is an issue of nationwide importance. Many Chamber members have entered into arbitration agreements with their employees to secure swift and informal resolution of workplace-related disputes rather than incurring the costs and delays of litigation. The district court's order calls into question the enforceability of these millions of

agreements at the conditional certification stage of an FLSA action by requiring the issuance of "court-approved written notice" to employees who have agreed to arbitrate and allowing those employees to "become parties to [the] collective action . . . by filing written consent with the court." *Genesis Healthcare Corp. v. Symczk*, 569 U.S. 66, 75 (2013).

This issue is by no means theoretical: It has arisen in *over 200 cases*—and counting—across the country. *See In re JPMorgan Chase & Co.*, 916 F.3d 494, 499 n.5 (5th Cir. 2019). The courts that have addressed the issue—even within this Circuit—have split, leaving employers and employees unsure of the status of their arbitration agreements. Some courts have held that courts cannot require notice of a pending FLSA collective action to employees who were precluded from joining a collective action due to binding arbitration agreements, while others have permitted notice to be sent to such employees. (Pet. at 2, 15-16.)

To date, only one appellate court has addressed the issue. The Fifth Circuit held earlier this year that district courts do not have discretion to require notice of a pending FLSA collective action to employees who are parties to arbitration agreements. *JPMorgan Chase & Co.*, 916 F.3d at 504. Notwithstanding the Fifth Circuit's opinion, the district court below ordered that notice be given to such employees, further deepening the division among the courts and adding to the uncertainty facing employers and employees. Accordingly, resolution of this "important and debatable" issue by this Court will aid not only the parties to this

action, but many others as well. *Intercon Solutions, Inc. v. Basel Action Network*, 791 F.3d 729, 731 (7th Cir. 2015).

## II. THE PETITION RAISES AN ISSUE THAT IS REVIEWABLE ONLY ON INTERLOCUTORY APPEAL.

The only way this Court will have the opportunity to review this important issue is on interlocutory appeal: As the Fifth Circuit recognized, this issue is "irremediable on ordinary appeal." *JPMorgan Chase & Co.*, 916 F.3d at 497.

The certification of an FSLA collective action takes place in two steps. The first is an order conditionally certifying the action and ordering notice to potential plaintiffs of the opportunity to opt in. That is the order that Facebook seeks to appeal. The parties then commence discovery, after which the district court reconsiders certification. *See Rottman v. Old Second Bancorp, Inc.*, 735 F. Supp. 2d 988, 990 (N.D. Ill. 2010). At that point, the district court likely will exclude from the collective action those employees who are bound by arbitration agreements—for the very same reason that they never should have been allowed to join in the first place. In the alternative, as is often the case, the conditional certification of the collective action may compel an employer to settle. *See, e.g., Lang v. DirecTV, Inc.*, 2011 WL 6934607, at *6 (E.D. La. Dec. 30, 2011) ("Too much leniency at the notice stage can lead to a frivolous fishing expedition conducted by the plaintiff at the employer's expense and can create great settlement pressure early in the case." (internal quotation marks omitted)).

In either scenario, an employer will be unable to appeal the notice order. It is no surprise then, that even though this issue has arisen more than 200 times, only

one appellate court has addressed the issue, and it did so on a petition for writ of mandamus (by addressing the merits of the issue while denying mandamus). *JPMorgan*, 916 F.3d at 497. But while the order itself will be unappealable, the *harm* to companies like Facebook will be enduring. Companies like Facebook will have incurred unjustified litigation costs and been deprived of a speedy resolution of any disputes with employees who agreed to arbitrate—the very rights Facebook seeks to vindicate in its petition for permission to appeal. And if the company settles, that settlement will be the product of a certification order that erroneously multiplies the size of the collective action.

Accordingly, the split in authority should, and can *only*, be settled through an interlocutory appeal. If this Court does not grant Facebook leave to appeal, this issue will evade review—leaving other employers in the same untenable situation.

## III. THE DISTRICT COURT ERRED IN ORDERING THAT NOTICE BE GIVEN TO EMPLOYEES WHO HAVE AGREED TO INDIVIDUALLY ARBITRATE DISPUTES.

The court below acknowledged that requiring that notice of the putative collective action be given to employees who agreed to resolve their disputes by individual arbitration—and allowing those employees to join the action, at least for a period of time—"conflict[s]" with the "liberal federal policy favoring arbitration agreements. Op. at 29 (quoting *Epic Sys. Corp.*, 138 S. Ct. at 1621). The court erred in overriding this policy.

Section 2 of the FAA provides that arbitration agreements are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Congress recognized that "arbitration

had more to offer than courts recognized—not least the promise of quicker, more informal, and often cheaper resolutions for everyone involved." *Epic Sys. Corp.*, 138 S. Ct. at 1621.

In accordance with Congress's legislative judgment, the Supreme Court has directed courts to "rigorously enforce arbitration agreements according to their terms,." *Italian Colors*, 570 U.S. at 233 (internal quotation marks and citations omitted). And it has rejected rules that would "frustrate[]" arbitration's objective of achieving "streamlined proceedings and expeditious results." *Preston v. Ferrer*, 552 U.S. 346, 357-358 (2008).

In particular, the Supreme Court has recognized that collective and class-wide proceedings are inherently at odds with the "fundamental attribute of arbitration": its "individualized and informal nature." *Epic Sys. Corp.*, 138 S. Ct. at 1622-23 (internal quotation marks omitted). Such proceedings are by definition not individualized, and are "slower, more costly, and more likely to generate procedural morass than final judgment." *Concepcion*, 563 U.S. at 347-348. Accordingly, the Court has repeatedly rejected efforts of "part[ies] in arbitration to demand classwide proceedings" (*Epic Sys. Corp.*, 138 S. Ct. at 1623) or to "invalidate arbitration agreements on the ground that they do not permit class arbitration" or class proceedings in court. *Italian Colors*, 570 U.S. at 232. The Court has applied the same principles in the collective action context, holding last year that the National Labor Relations Act did not displace the FAA and justify a refusal to enforce employment arbitration agreements. *Epic Sys. Corp.*, 138 S. Ct. at 1632. As the

Court put it, the FAA "seems to protect pretty absolutely" arbitration agreements that require "individualized rather than class or collective action procedures." *Id.* at 1621.

The district court's order undermines this longstanding federal policy and the millions of arbitration agreements made pursuant to that policy. It permits employees who have *waived* the ability to be part of a collective action to nonetheless opt in to a collective action—effectively treating those employees' arbitration agreements as presumptively invalid.

Although the order leaves open the possibility that Facebook could subsequently move to decertify or exclude from the collective action those employees who are parties to arbitration agreements, that opportunity will not arise until later in the proceedings. In the meantime, employees will be entitled to participate in the collective action—a procedural mechanism that "lacks" and "interferes with" arbitration's advantages (*Concepcion*, 563 U.S. at 344, 351) in multiple ways.

*First*, the district court's "notice first, address arbitration later" approach "hinder[s] the speedy resolution of the controversy." *Concepcion*, 563 U.S. at 346. Rather than "swiftly proceeding to arbitration, as federal law contemplates," *ChampionsWorld, LLC v. U.S. Soccer Fed'n*, 2007 WL 2198366, at *4 (N.D. Ill. July 31, 2007), an employer must first give notice to employees who agreed to individual arbitration and afford them an opportunity to opt into the collective action despite their express contractual agreement to the contrary. Only after that expense and delay can the employer litigate the enforceability of the arbitration agreements.

*Second*, employers are forced to incur further costs and burdens that would be avoided under an arbitration agreement. For example, employers will have to engage in more costly group discovery, which can last for more than a year. *See, e.g., Sarviss v. Gen. Dynamics Info. Tech., Inc.*, 663 F. Supp. 2d 883, 904 (C.D. Cal. 2009). They will also be subject to more formal (and therefore slower) procedures—for example, in raising and resolving discovery disputes.

*Third*, the notice will likely encourage many employees to opt in to the litigation who would not have done so if they had not received a notice that (inaccurately) suggests that it is proper for them to do so. Employees who otherwise would have honored their arbitration agreements may be confused by a court-sponsored notice into believing that they can, and should, join the collective action. The employer will then be required to expend resources and time that it ordinarily would not have had to spend to compel arbitration of these employees' claims (or to decertify the action). And the employees will waste their time and delay their ability to pursue their own claim in arbitration.

*Fourth*, the notice requirement increases the pressure on employers to settle even questionable claims. The evidence here is that over *three-quarters* of the employees who are covered by the conditionally certified collective action agreed to individual arbitration; in *JPMorgan*, *85%* of the employees to whom notice was ordered had signed similar arbitration agreements. The notice requirement thus can substantially ratchet up the stakes for companies like Facebook. Because the damages potentially owed might be aggregated and decided at once in a collective

action, even the "small probability" of an adverse judgment puts "intense pressure to settle" on Facebook and other companies. *In re Rhone-Poulenc Rorer*, 51 F.3d 1293, 1298 (7th Cir. 1995).

Accordingly, the district court's order deprives Facebook—and its employees—of many of the benefits and advantages of arbitration, contrary to law. As the Supreme Court has made clear, only a "congressional command" that is "clear and manifest" can override the FAA's mandate that arbitration agreements be enforced according to their terms. *CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 98 (2012) (internal quotation marks omitted); *Epic Sys. Corp.*, 138 S. Ct. at 1624. No such command exists here.

The FLSA merely provides that an employee may maintain an action against an employee on behalf of himself "and other employees similarly situated." 29 U.S.C. § 216(b). While the Supreme Court has stated that district courts have "discretion" to implement 29 U.S.C. § 216(b) by facilitating notice to potential plaintiffs (*Hoffman-La Roche Inc. v. Sperling*, 493 U.S. 165, 169 (1989)), that is not anything close to a *command* to override arbitration agreements, much less a clear and manifest congressional command. *Cf. Epic Sys. Corp.*, 138 S. Ct. at 1617 (noting that the employees "do not suggest that the FLSA displaces the [FAA], presumably because the Court has held that an identical collective action scheme does not prohibit individualized arbitration proceedings") (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991)).

## CONCLUSION

This Court should grant Facebook's petition for leave to appeal.

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Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE WITH RULE 32**

Pursuant to Federal Rule of Appellate Procedure 32(g), I certify that this brief:

(i) complies with the type-volume limitation of Federal Rule of Appellate Procedure Rules 29(a)(5) and 5(c), because it contains 2,599 words, including footnotes and excluding the parts of the brief exempted by Federal Rule of Appellate Procedure Rule 32(f); and

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6), as modified by Circuit Rule 32, because it has been prepared using Microsoft Office Word 2016 and is set in Century Schoolbook font, size 12 points.

Dated: April 22, 2019 /s/ Andrew J. Pincus

**CERTIFICATE OF SERVICE**

I certify that on April 22, 2019, the foregoing brief and appendix were served electronically via the Court's CM/ECF system upon all counsel of record.

Dated: April 22, 2019 /s/ Andrew J. Pincus