No. 19-1944

In the

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-Appellee,

VS.

FACEBOOK, INC.,
Defendant-Appellant.

On appeal from the United States District Court
for the Northern District of Illinois, No. 1:17-cv-7753
The Honorable Harry D. Leinenweber

BRIEF OF *AMICUS CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF APPELLANT

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 19-1944

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.**

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(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:

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Attorney's Printed Name: Lauren R. Goldman

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Attorney's Signature: s/ Karen Lin Date: July 1, 2019

Attorney's Printed Name: Karen Lin

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Attorney's Signature: s/ Steven P. Lehotsky Date: July 1, 2019

Attorney's Printed Name: Steven P. Lehotsky

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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. §§ 1-16, the Chamber and its members have a strong interest in this case.

PRELIMINARY STATEMENT

Since 1925, there has been a clear and "emphatic federal policy" in favor of enforcing arbitration agreements. *KPMG LLP v. Cocchi*, 565 U.S. 18, 25 (2011) (internal quotation marks omitted). Congress passed the Federal Arbitration Act ("FAA") to stop judicial hostility to arbitration from interfering with the ability of parties to contract for swift and informal resolution of disputes—in lieu of costly

[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).

and prolonged litigation. Thousands of companies—including Facebook and many Chamber members—have since entered into millions of arbitration agreements with their employees in expectation of realizing those benefits.

The district court's order calls into question the enforceability of these agreements in the context of a Fair Labor Standards Act ("FLSA") collective action. The issue on appeal is whether a district court may conditionally certify a collective action, and order that notice be sent to the potential members of the collective, when some of those individuals—here, more than *half* the potential members—have agreed to resolve their disputes by arbitration on an individual basis and waived the ability to participate in collective or class actions. By answering this question "yes," the court below permitted those employees to "become parties to [the] collective action" simply by "filing written consent with the court." *Genesis Healthcare Corp. v. Symczk*, 569 U.S. 66, 75 (2013).

The district court's order thus treats the arbitration agreements between Facebook and its employees as presumptively unenforceable, in direct contravention of the FAA. The fact that Facebook may *later* have an opportunity to exclude these employees from the collective does not cure this problem, because, in the meantime, Facebook will suffer the delays, costs, and increased settlement pressure that arise from certifying an artificially large group of employees. Those are the precise harms that the arbitration agreements were designed to avoid.

There is no legal basis for the district court's disregard for the arbitration agreements between Facebook and its employees—and its disregard for the FAA's

mandate that those agreements be enforced. Nothing in the FLSA overrides the FAA and authorizes such an approach.

The district court's order threatens to turn back the clock and return to a time when judicial skepticism of arbitration deprived parties of the benefits of arbitration agreements. This Court should reverse that course, in accordance with Congress's command to "enforce, not override, the terms of the arbitration agreements." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1623 (2018).

ARGUMENT

I. UNDER THE FEDERAL ARBITRATION ACT, AGREEMENTS TO ARBITRATE ON AN INDIVIDUAL BASIS ARE FULLY ENFORCEABLE.

For decades, Congress and the Supreme Court have recognized that arbitration offers a number of benefits to parties—"not least the promise of quicker, more informal, and often cheaper resolutions [than litigation] for everyone involved." *Epic Sys. Corp.*, 138 S. Ct. at 1621. In recognition of these benefits, and in response to a history of judicial refusal to enforce arbitration agreements, Congress in 1925 enacted the FAA (9 U.S.C. § 1 *et seq.*). *See Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510-11 & n.4 (1974). In the FAA, Congress sought to "place arbitration agreements on the same footing as other contracts," *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991), and foreclose attempts to "undercut the enforceability of arbitration agreements," *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984).

The FAA thus establishes a "liberal federal policy favoring arbitration agreements," *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24

(1983), and ensures that the "arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts," *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967). It does so primarily through Section 2, which provides emphatically and unambiguously that "a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . shall be 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.

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). It has recognized that the FAA protects against "new devices and formulas that would achieve . . . the same result today" as pre-FAA "devices and formulas declaring arbitration against public policy." *Epic Sys. Corp.*, 138 S. Ct. at 1623 (internal quotation marks omitted). Accordingly, the Court has repeatedly rejected rules that would "frustrate[]" arbitration's objective of achieving "streamlined proceedings and expeditious results." *Preston v. Ferrer*, 552 U.S. 346, 357-58 (2008).

The Supreme Court has expressly held that collective and class-wide proceedings are inherently at odds with a "fundamental attribute of arbitration": its "individualized and informal nature." *Epic Sys. Corp.*, 138 S. Ct. at 1622-23. 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 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 does 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.

II. THE DISTRICT COURT'S DECISION VIOLATES THE FEDERAL ARBITRATION ACT.

The district court's order—like similar orders of other district courts across the country—flouts decades of Supreme Court precedent interpreting and applying the FAA. Instead of giving effect to the arbitration agreements entered into by Facebook and hundreds of its employees, the district court treated those contracts as presumptively *unenforceable* and ordered that notice—and an opportunity to opt-in to the collective action—be given to employees who agreed to individualized arbitration. In so doing, the court contravened the FAA's mandate that arbitration agreements be presumed enforceable and deprived the parties to those agreements of the benefits of arbitration.

A. The District Court Treated Arbitration Agreements As Presumptively Unenforceable, In Violation Of The FAA.

Like many other courts, the court below adopted a two-step certification process for a putative FLSA collective action.[2] Under the first step of that process, the court conditionally certifies the collective if the plaintiff makes a "'modest factual showing' that she and similarly situated employees were victims of a common policy." 375 F. Supp. 3d 1007, 1024 (N.D. Ill. 2019). Notice is sent to the members of the conditionally certified collective, who then "become parties to [the] collective action" simply by filing written consent with the court. *Genesis Healthcare Corp.*, 569 U.S. at 75; *see also* 29 U.S.C. § 216(b).

After notice is sent, the parties engage in group-wide discovery. 375 F. Supp. 3d at 1021; *see Rottman v. Old Second Bancorp, Inc.*, 735 F. Supp. 2d 988, 990 (N.D. Ill. 2010). And after discovery is completed, the court conducts the second step, in which it "reevaluate[s] the conditional certification to determine whether there is sufficient similarity between the named and opt-in plaintiffs to allow the matter to proceed to trial on a collective basis." 375 F. Supp. 3d at 1021.

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[2] The FLSA is silent as to how a collective action under its terms should be certified and as to whether and how notice of the action should be given. In *Hoffman-La Roche v. Sperling*, 493 U.S. 165 (1989), the Supreme Court held that district courts have discretion to facilitate notice to "potential plaintiffs," but did not elaborate on who "potential plaintiffs" might be and what procedure to use.

Although many courts do follow the two-step process, they are not required to do so, *see Hipp v. Liberty Nat'l Life Ins. Co.*, 252 F.3d 1208, 1219 (11th Cir. 2001), and some do not, *see Shushan v. Univ. of Colo. at Boulder*, 132 F.R.D. 263, 265 (D. Colo. 1990) (applying Rule 23 to certification of collective action).

The district court here, engaging in the first step of this process, conditionally certified a putative collective action, and ordered that notice be sent to the defined collective group—despite recognizing that the putative collective includes employees who have agreed to arbitrate their claims individually. The court's order permits those employees—who have *waived* the ability to be part of a collective action—to nonetheless opt-in to the collective action simply by filing a consent with the court.

The court thus necessarily treated the arbitration agreements as *unenforceable*. Indeed, the district court acknowledged that its action had that effect: Despite having no reason to question the enforceability of the arbitration agreements, the court ordered that notice be given to employees who are parties to arbitration agreements "based on the proposition that the agreements *might be unenforceable*." *Id.* at 1023 (emphasis added).

As explained above, however, this judicial skepticism toward arbitration agreements is precisely what the FAA was enacted to counteract. It is settled that the FAA was "designed to promote arbitration." *Concepcion*, 563 U.S. at 345. That pro-arbitration policy includes favoring the enforcement of "'terms that specify *with whom* the parties choose to arbitrate their disputes and *the rules* under which that arbitration will be conducted.'" *Epic Sys. Corp.*, 138 S. Ct. at 1621 (quoting *Italian Colors Rest.*, 570 U.S. at 233). Thus, the FAA "seems to protect pretty absolutely" parties' specification of rules that "indicat[e] their intention to use individualized rather than class or collective action procedures." *Id.*

Doubts about arbitrability are insufficient to abrogate that protection. As the Supreme Court has explained in a related context: "The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24-25; *see also Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1418-19 (2019) (citing *Moses H. Cone)*; *id.* at 1416 ("[A]mbiguity does not provide a sufficient basis to conclude that parties to an arbitration agreement agreed to 'sacrifice[] the principal advantage of arbitration.'" (quoting *Concepcion*, 563 U.S. at 348)).

The district court's amorphous concerns about whether the employees' claims are arbitrable therefore should have been resolved in favor of *arbitration*, not in favor of allowing the employees to join the collective action.

B. The District Court's Order Frustrates The Purpose Of Arbitration Agreements.

The district court's violation of the FAA has significant negative consequences for employers and employees. Requiring that notice, and an opportunity to opt-in to the collective action, be given to employees who have agreed to individually arbitrate their claims subjects employers to the very costs and procedures they bargained to avoid, thereby vitiating the benefits of arbitration Congress intended to protect. Even though 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 led to believe, incorrectly, that the collective action, rather than arbitration, is the available route for vindicating their rights—channeling their claims into a procedural mechanism that "interfere[s] with fundamental attributes of arbitration" and imposes "new risks and costs for both sides." *Epic Sys. Corp.*, 138 S. Ct. at 1623.

1. The District Court's Order Makes It Slower And More Costly To Move Parties Into Arbitration.

The district court's "notice first, address arbitration later" approach "hinder[s] the speedy resolution of the controversy." *Concepcion*, 563 U.S. at 346. The FAA seeks "to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible." *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 22. The district court's order, however, erects numerous hurdles to getting the parties into arbitration: An employer must first give notice to employees who agreed to individual arbitration. It must then afford the employees time and an opportunity to opt-in to 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, at the cost of further delay and expense to the parties.

What's more, the costs and delays associated with litigating the enforcement of arbitration agreements will be far greater than what the employer would have faced if the notice had not been sent to employees who are bound by arbitration agreements. That is because the district court's order does not just permit

employees who have agreed to arbitrate to breach their contracts and become parties to the collective action, it also is likely to *encourage* them to do so.

Courts have repeatedly recognized, in both the collective and class action context, that sending notice to an overbroad group "would constitute a waste of resources and would risk misleading those individuals into thinking they will be able to join the lawsuit." *Hudgins v. Total Quality Logistics, LLC*, 2017 WL 514191, at *4 (N.D. Ill. Feb. 8, 2017); *see also In re JPMorgan Chase & Co.*, 916 F.3d 494, 502 (5th Cir. 2019) ("[A]lerting those who cannot ultimately participate in the collective 'merely stirs up litigation,' which is what *Hoffman-La Roche* flatly proscribes."); *Skelton v. Gen. Motors Corp.*, 1987 WL 6281, at *3 n.3 (N.D. Ill. Feb. 5, 1987) (declining to send notice to overinclusive list because it "could mislead many thousands of ineligible consumers into thinking that they qualify to recover in this action"); *In re Domestic Air Transp. Antitrust Litig.*, 141 F.R.D. 534, 539-46 (N.D. Ga. 1992) (sending notice to group that includes non-class members is inappropriate because it likely "confuse[s] the recipients and encourage[s] claims by non-class members"); *DeHoyos v. Allstate Crop.*, 240 F.R.D. 269, 297 (W.D. Tex. 2007) (noting that "sending individual direct notice to millions of policyholders who are not class members would likely result in unneeded confusion on the part of the non-class member recipients"); *Marcarz v. Transworld Sys., Inc.*, 201 F.R.D. 54, 64 (D. Conn. 2001) ("[S]ending notice to the admittedly over-inclusive group here would 'most likely confuse the recipients and encourage [responses] by non-class members'").

Here, employees who otherwise would have honored their arbitration agreements may be confused by a court-authorized notice into believing that they can, and should, join the collective action. The employer will then be required to expend additional resources and time to compel arbitration of every one of those employees' claims (or to wait and decertify the action after expensive discovery, *see* pp.12-13 *infra*). And the employees will waste their time on a lawsuit in which they cannot participate. Their ability to pursue their own claim in arbitration will also have been delayed.

The increased costs and delays occasioned by an overbroad notice are significant. The evidence here is that over *half* of the employees who are covered by the conditionally certified collective action agreed to individual arbitration; in *JPMorgan*, *85%* of the 42,000 employees to whom notice was ordered had signed similar arbitration agreements. *In re JPMorgan*, 916 F.3d at 497; *see also Hudgins*, 2017 WL 514191, at *4 (5,100 of the 5,800 potential class members signed arbitration agreements).

Accordingly, it is likely to be many months, and significant resources spent, from the time the court conditionally certifies the collective action until an employer is able to complete litigation of the enforceability of arbitration agreements with potentially thousands of opt-in plaintiffs—with the likely end result being that the court excludes from the collective action the employees who are bound by arbitration agreements for the very same reason that they should never have been

allowed to join in the first place. At that point, both the employer and employee will have lost one of the key benefits of arbitration: quick resolution of the claims.

2. The District Court's Order Subjects Employers To Costs And Procedures That Arbitration Is Intended To Avoid.

Rather than try to litigate the enforceability of each of the relevant employees' arbitration agreements at the same time, an employer may find it more efficient to argue at the second step of certification that the collective action should be decertified in light of the arbitration agreements—particularly if there are thousands of employees who agreed to arbitrate. But that choice subjects the employer to another set of costs that arbitration is intended to avoid. Employers will have to engage in group discovery that is more costly because it encompasses the employees with arbitration agreements.

That judicially-supervised discovery under court rules—rules that would not apply under the more informal procedures that govern arbitration—can last, and therefore delay arbitration, 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) (over a year of discovery); *Prescott v. Prudential Ins. Co.*, 729 F. Supp. 2d 357, 366 (D. Me. 2010) (five-and-a-half months of discovery).

In addition, employers will also be subject to more formal (and therefore slower) dispute resolution procedures. For example, parties in arbitration may often resolve discovery disputes through telephonic hearings or discussions and letter briefs, as opposed to formally noticed motions with accompanying legal briefs as is typically required in court. *See, e.g.*, JAMS, Arbitration Discovery Protocols

(2010), https://www.jamsadr.com/arbitration-discovery-protocols/. Moreover, one of the long-recognized benefits of arbitration is that it allows for more efficient discovery than the comparatively free-ranging discovery available under the Federal Rules of Civil Procedure. Employers lose the benefit of these streamlined procedures when courts permit employees who are bound by arbitration agreements to opt-in to and become parties to collective actions.

3. The District Court's Order Will Put Undue Pressure On Employers To Settle.

The notice requirement also increases the pressure on employers to settle questionable claims. As noted above, including employees who are not entitled to join the collective action in this case more than doubles the size of the collective action; in other cases, the effect can be much greater. The notice requirement thus can substantially ratchet up the stakes for companies like Facebook, for two reasons.

First, the cost of proceeding to litigate the claims is multiplied. As one court has observed, "[t]oo 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." *Lang v. DirecTV, Inc.*, 2011 WL 6934607, at *6 (E.D. La. Dec. 30, 2011) (internal quotation marks omitted); *see also* Rachel K. Alexander, *Federal Tails and State Puppy Dogs: Preempting Parallel State Wage Claims to Preserve the Integrity of Federal Group Wage Actions*, 58 Am. U. L. Rev. 515, 541 (2009) (observing that authorizing notice of collective action "can create settlement pressure early in the action . . . because it signals the potential

expansion of the case and the need for significant and expensive class-wide discovery").

Second, the employer's potential exposure is unjustifiably multiplied. 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 companies. *In re Rhone-Poulenc Rorer*, 51 F.3d 1293, 1298 (7th Cir. 1995); *see also Epic Sys. Corp.*, 138 S. Ct. at 1632 ("[I]t's also well known that [class and collective actions] can unfairly place pressure on the defendant to settle even unmeritorious claims.") (internal quotation marks and alterations omitted).

C. The FLSA Does Not Clearly Mandate Overriding The FAA.

The district court's order appeared to rely on policy considerations that the court grounded in the FLSA. But the Supreme Court has made clear that only a federal statute containing a "contrary congressional command" can override the FAA's mandate that arbitration agreements be enforced according to their terms. *CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 98, 103 (2012) (internal quotation marks omitted). Congress's intent to do so must be "clear and manifest." *Epic Sys. Corp.*, 138 S. Ct. at 1624. Indeed, "[i]n every case the Supreme Court has considered involving a statutory right that does not explicitly preclude arbitration, it has upheld the application of the FAA." *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 357 n.8 (5th Cir. 2013) (internal quotation marks omitted).

Because, as courts have repeatedly held, there is no contrary congressional comment in the FLSA, the FAA's pro-arbitration policy must prevail.

1. There Is No Congressional Command Overriding The FAA.

The FLSA contains no clear and manifest congressional command to disregard an agreement to arbitrate. The FLSA does not explicitly preclude arbitration; it does not say anything about arbitration. The statute 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).

For that reason, courts have held time and again that there is no conflict between the FLSA and the FAA's arbitration requirement because the FLSA does not reflect a command by Congress to disregard arbitration. *See, e.g., Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1052-55 (8th Cir. 2013) (collecting cases). As the Supreme Court explained in *Epic Systems*, the employees did "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." *Epic Sys. Corp.*, 138 S. Ct. at 1617 (citing *Gilmer*, 500 U.S. at 32).

The district court nevertheless found that there was a "conflict" between the "liberal federal policy favoring arbitration agreements" and the "modest factual showing" that a plaintiff must make to obtain conditional certification of a collective action under the FLSA. 375 F. Supp. 3d at 1022 (internal quotation marks omitted). It reasoned that adopting Facebook's position would require the parties to litigate, and the court to determine, the enforceability of the arbitration agreements at the conditional certification stage; and it concluded that the longstanding federal

policy favoring arbitration agreements must give way to the two-step certification process it adopted. *Id.* at 1022-23.

But a district court's procedural preferences cannot substitute for a congressional command: *Congress* has not mandated that courts use the two-step certification process, and *Congress* has not mandated that courts disregard the existence and presumptive validity of arbitration agreements at the first step of that process.[3] The FLSA is silent as to when and how a court should determine whether employees are "similarly situated." Accordingly, any inconsistency between the judicially-created two-step certification procedure and the FAA must be resolved in favor of honoring the FAA's dictates—because there is no contrary congressional command in the FLSA.[4]

2. Courts Can Honor The FAA While Performing The Two-Step Certification Process.

Even if the two-step procedure followed by the district court were mandated by the FLSA, there is no inherent conflict between that procedure and the FAA. After all, courts following the two-step procedure *have* taken account of the existence of arbitration agreements between a defendant employer and putative

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[3] *See* p.6 n.2 *supra*.

[4] Nothing prevents employees who believe their arbitration agreements are invalid to attempt to opt-in to the collective action or to bring individual claims in court in the absence of receiving notice. *See In re JPMorgan*, 916 F.3d at 503 n.19. The question here is whether *notice* and an automatic ability to opt-in to the class should be given to employees who have agreed to individually arbitrate their claims. There is no right to such notice; it is merely a judicially created tool that the Supreme Court held district courts have *discretion* to facilitate in the interest of efficiency. *Hoffmann-La Roche Inc.*, 493 U.S. at 171-73.

collective members at the conditional certification stage—and held that notice of a putative collective action cannot be sent to employees who have entered into arbitration agreements. *See, e.g., In re: JPMorgan*, 916 F.3d at 500-03; *Dietrich v. C.H. Robinson Worldwide, Inc.*, 2019 U.S. Dist. LEXIS 4855, at *4 (N.D. Ill. Mar. 20, 2019); *Hudgins*, 2017 WL 514191, at *4.

The district court here claimed that it had to presume that the arbitration agreements were unenforceable because it was not permitted to make merits determinations—including whether the arbitration agreements are enforceable—at the conditional certification stage. *Bigger*, 375 F. Supp. 3d at 1023. But the Supreme Court has stated only that when facilitating notice to potential plaintiffs, courts must "avoid even the appearance of judicial endorsement of the *merits of the action*." *Hoffman-LaRoche Inc. v. Sperling*, 493 U.S. 165, 174 (1989) (emphasis added). The question whether proposed members are bound to arbitrate does not go to the *merits of the action*; a court expresses no "judicial endorsement of the merits of the action" by addressing the collateral issue of the existence of arbitration agreements governing the claims of proposed members of the collective.

Moreover, a court need not even make a determination about the validity of each arbitration agreement at this stage. The only question is whether members of the proposed opt-in collective who have signed arbitration agreements are "similarly situated" to a plaintiff employee who has not. The answer to that question is no, regardless of whether all of the arbitration agreements are ultimately determined to be enforceable.

Many courts have found in the Rule 23 class action context that a plaintiff who is not subject to an arbitration agreement "stands in a different position legally than many class members" who *are* parties to such agreements based on the mere existence of those agreements. *Renton v. Kaiser Found. Health Plan, Inc.*, 2001 WL 1218773, at *7 (W.D. Wash. Sept. 24, 2001); *see, e.g., Avilez v. Pinkerton Gov't Servs., Inc.*, 596 F. App'x 579 (9th Cir. 2015) (vacating certification of class that included employees who signed class action waivers); *Jensen v. Cablevision Sys. Corp.*, 372 F. Supp. 3d 95, 123-24 (E.D.N.Y. 2019) ("At class certification, the question for this Court to decide is not the validity of the agreement but whether the presence of class members that are potentially subject to the provision satisfies the requirements of Rule 23," and holding that it does not); *Tan v. Grubhub, Inc.*, 2016 WL 4721439, at *3 (N.D. Cal. July 19, 2016) (holding that plaintiff, who opted out of class action waiver provision, could not satisfy typicality or adequacy requirement because he "is in a position unique from all but one other [putative class members] . . . who are potentially bound by the arbitration and class action waiver provisions"); *Quinlan v. Macy's Corporate Servs., Inc.*, 2013 WL 11091572, at *3 (C.D. Cal. Aug. 22, 2013) (because plaintiff was not subject to arbitration but most of the employees who he sought to represent were, plaintiff could not satisfy Rule 23 typicality requirement even though "the enforceability and effect of the arbitration clause are not presently before the court").

The fact that unnamed putative class members are parties to arbitration agreements raises separate defenses and issues that defeat typicality and adequacy

under Rule 23. *Tan*, 2016 WL 4721439, at *3. Accordingly, courts have found that "[t]he mere potential that the relevant arbitration provision is valid is sufficient to preclude a named plaintiff who opted out of the provision from representing a class largely made up of individuals that may be subject to the agreement." *Jensen*, 372 F. Supp. 3d at 123.

There is no reason that the conditional certification of an FLSA collective action should be treated differently from the certification of a Rule 23 class. As this Court has observed, "there isn't a good reason to have different standards for the certification of the two different types of action[.]" *Espenscheid v. DirectSat USA, LLC*, 705 F.3d 770, 772 (7th Cir. 2013).

And that is particularly so because FLSA collective actions were intended to be *narrower* than Rule 23 class actions. Congress specifically made FLSA collective actions opt-in, as opposed to opt-out like most Rule 23 class actions, "to prevent large group actions, with their vast allegations of liability, from being brought on behalf of employees who had no real involvement in, or knowledge of, the lawsuit." *Cameron-Grant v. Maxim Healthcare Servs., Inc.*, 347 F.3d 1240, 1248 (11th Cir. 2003) (internal quotation marks and brackets omitted); *see also Hoffman-LaRoche*, 493 U.S. at 173 (opt-in requirement of FLSA "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"). Thus, permitting an unjustifiably broad collective action to move forward is inconsistent with the legislative history of the FLSA.

CONCLUSION

This Court should vacate the district court's order conditionally certifying the collective action and ordering that notice be provided to the collective.

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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), as modified by Circuit Rule 29, because it contains 5,025 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: July 3, 2019 /s/ Andrew J. Pincus

CERTIFICATE OF SERVICE

I certify that on July 3, 2019, the foregoing brief and appendix were served electronically via the Court's CM/ECF system upon all counsel of record.

Dated: July 3, 2019 /s/ Andrew J. Pincus