STIRRING UP WORKER LITIGATION: WHY COURTS SHOULD NOTIFY ARBITRATION-BOUND PLAINTIFFS OF FLSA COLLECTIVE ACTIONS

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When an employer violates minimum wage and overtime laws, the Fair Labor Standards Act (FLSA) empowers a worker to bring a collective action on behalf of themselves and their affected coworkers. As an early step in such suits, courts authorize notice to the plaintiff's coworkers so that they can join the litigation. However, employers increasingly require workers, as a condition of employment, to agree to arbitrate such claims and waive the right to sue in court under the FLSA. Courts in several circuits have begun to go along with employers who have pointed to alleged arbitration agreements as a reason the court should not notify a plaintiff's coworkers of an ongoing suit. This Note explains that courts should reject this reasoning and argues that preventing workers—even those purportedly bound to arbitration—from learning of a collective action is contrary to the goals of the FLSA and the Supreme Court's original rationale for authorizing lower courts to issue notice. Rather, notifying arbitration-bound plaintiffs of FLSA collective actions will result in more efficient and effective resolutions of lawsuits alleging minimum wage and overtime violations.

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INTRODUCTION

In 2014, Marion Graham began working as a delivery driver for a chain of Michigan pizza parlors, which paid her the state minimum wage of roughly eight dollars per hour. Like many such companies, the chain required Graham to use her own car to make deliveries and to pay her own gas and maintenance costs. Graham later sued, arguing that this policy took money out of her pocket, meaning the company effectively paid her less than minimum wage, in violation of federal law.[1] Graham filed suit on behalf of herself and more than 100 other employees who had received similar treatment. The company responded by pointing to its employee handbook, which it had forced all employees to sign when they started working, and which obliged them to take their disputes to arbitration.[2] Consequently, the federal court where Graham had filed suit ruled that, whatever the merits of her allegations that the minimum wage law was violated, the 100 employees who had signed the handbook could not even be notified of the existence of her lawsuit, much less join it.[3]

The outcome of Graham's suit is typical of many recent minimum wage and overtime suits, as employers have increasingly insisted that workers, as a condition of employment, sign these types of mandatory arbitration agreements.[4] Such agreements typically prohibit workers from suing their employer over workplace-related issues such as harassment, discrimination, or minimum wage and overtime violations

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[1] Collective and Class Action Complaint at 18–21, Graham v. Word Enters. Perry, LLC, No. 18-CV-10167, 2019 U.S. Dist. LEXIS 114655 (E.D. Mich. June 18, 2019).

[2] Supplemental Brief in Support of Defendant's Motion to Dismiss at 15, *Graham*, 2019 U.S. Dist. LEXIS 114655.

[3] *Graham*, 2019 U.S. Dist. LEXIS 114655, at *15–16.

[4] *See* Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration*, ECON. POL'Y INST. (Apr. 6, 2018), https://epi.org/144131 [https://perma.cc/SNS4-BC2Y] (reporting that the percentage of nonunion workers subject to mandatory arbitration provisions increased from approximately two percent in 1992 to more than fifty percent by 2018); Erin Mulvaney, *Mandatory Arbitration at Work Surges Despite Efforts to Curb It*, BLOOMBERG L. (Oct. 28, 2021, 1:01 PM), https://www.bloomberglaw.com/bloomberglawnews/daily-labor-report/X4V73F0O000000?bna_news_filter=daily-labor-report#jcite [https://perma.cc/YV2G-VFCK] (reporting a sixty-six percent increase in arbitrated employment disputes from 2018 to 2020); Lauren Weber, *Careers: Companies Block Staff from Filing Suits*, WALL ST. J. (Mar. 31, 2015, 1:51 PM), https://www.wsj.com/articles/more-companies-block-staff-from-suing-1427824287 [https://perma.cc/4UBN-AKLB] (reporting that forty-three percent of companies used arbitration clauses with class action waivers in 2014, up from sixteen percent in 2012).

under the Fair Labor Standards Act (FLSA).[5] Instead, these workers must try to resolve these disputes in private arbitration, an avenue which disadvantages those seeking to remedy employer mistreatment.[6]

In addition to hindering arbitration-bound workers' efforts to redress illegal activity by employers, mandatory arbitration agreements also challenge the ability of courts to administer collective actions brought under the FLSA by plaintiffs unbound by such agreements.[7] Unlike conventional class actions, workers must opt *in* to a collective action brought under the FLSA in order to participate in the litigation.[8] In order to opt in, these other workers must first be notified, leaving courts to grapple with the difficult question of whether to provide notice to workers whom an employer argues are bound to arbitrate.

Recently, several circuit courts have sought to provide an answer. The Fifth Circuit in In re *JPMorgan Chase & Co.*[9] and the Seventh Circuit in *Bigger v. Facebook, Inc.*[10] each held that courts may not notify employees of an FLSA collective action if the employer demonstrates those employees have signed arbitration agreements. The Sixth Circuit, drawing on a related Fifth Circuit holding on the proper procedure for administering FLSA collective actions,[11] subsequently devised its own approach, requiring the named plaintiffs in FLSA collective actions to demonstrate a "strong likelihood" that other plaintiffs are not arbitration-bound before notifying them of the potential to opt in.[12] While some district courts in other circuits have begun following

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5 *See* Colvin, *supra* note 4.

6 *See* Craig Smith & Eric V. Moye, *Outsourcing American Civil Justice: Mandatory Arbitration Clauses in Consumer and Employment Contracts*, 44 Tex. Tech L. Rev. 281, 298–99 (2012) (describing how "repeat player bias" favors in employers in consumer and employment arbitration); Alexander J.S. Colvin, *Mandatory Arbitration and Inequality of Justice in Employment*, 35 Berkeley J. Emp. & Lab. L. 71, 89–90 (2014) (describing the way in which mandatory employment arbitration serves to suppress the damages workers receive and "exacerbate[] inequality in access to justice in the workplace").

7 *See In re* JPMorgan Chase & Co., 916 F.3d 494, 499 & n.5 (5th Cir. 2019) (noting that the challenge of providing notice to arbitration-bound employees is an "increasingly recurring issue" and that courts have wrestled with the issue in at least 210 decisions, all but six of which were after 1999).

8 *See infra* Section I.A.

9 *JPMorgan*, 916 F.3d at 504 (holding it was error for the district court to send notice of a FLSA collective action to employees who were unable to join because of binding arbitration agreements).

10 Bigger v. Facebook, Inc., 947 F.3d 1043, 1050 (7th Cir. 2020) (holding that "a court may not authorize notice to individuals whom the court has been shown entered mutual arbitration agreements waiving their right to join the action").

11 Swales v. KLLM Transp. Servs., LLC, 985 F.3d 430, 441 (5th Cir. 2021) (rejecting a conventional two-step approach to conditional certification of an FLSA collective action).

12 Clark v. A&L Home Care & Training Ctr., LLC, 68 F.4th 1003, 1011 (6th Cir. 2023) ("[W]e hold that, for a district court to facilitate notice of an FLSA suit to other employees,

the approach of the Fifth and Seventh circuits,[13] others have taken an alternate tack, and persisted in authorizing notice,[14] leaving the case law knotted. This Note seeks to cut through this tangle with a simple approach: always notify the plaintiff's coworkers. Doing so, this Note will argue, is most consistent with both the aims of the FLSA and the relevant Supreme Court precedent.

The question of whether employees receive notice of a collective action under the FLSA is crucial because the decision to distribute notice either broadly or narrowly affects the number of workers able to seek redress of FLSA violations by learning of the litigation and joining in. This decision assumes added importance for the effectiveness of FLSA enforcement because of the statute's distinctive opt-in mechanism for collective actions,[15] which already lets employers off the hook for some number of violations relative to conventional, opt-out class actions.[16] While less than one percent of class members generally opt *out* of a

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the plaintiffs must show a 'strong likelihood' that those employees are similarly situated to the plaintiffs themselves.").

13 *See, e.g.*, Kuchar v. Saber Healthcare Holdings, No. 20-CV-02542, 2021 U.S. Dist. LEXIS 179807, at *2–3 (N.D. Ohio Sept. 21, 2021) (opting to "follow the emerging trend" of considering arbitration agreements at the notice stage); Menucci v. Randstad Pros. US, LLC, No. 19-CV-4693, 2021 U.S. Dist. LEXIS 120414, at *10 (N.D. Ga. Mar. 2, 2021) (following the Fifth Circuit's *JPMorgan* decision by refusing to send notice to a putative class of arbitration-bound plaintiffs); Graham v. Word Enters. Perry, LLC, No. 18-CV-10167, 2019 U.S. Dist. LEXIS 114655, at *14–15 (E.D. Mich. June 18, 2019) (citing *JPMorgan* in refusing to provide notice to arbitration-bound plaintiffs).

14 *See, e.g.*, Zambrano v. Strategic Delivery Sols., LLC, No. 15-CV-8410, 2021 U.S. Dist. LEXIS 186197, at *27–29 (S.D.N.Y. Sept. 28, 2021) (declining to follow *Bigger* and *JPMorgan* and authorizing notice to plaintiffs who may have signed arbitration agreements); Barone v. Laz Parking Ltd, LLC, No. 17-CV-01545, 2019 U.S. Dist. LEXIS 181126, at *15–16 (D. Conn. Oct. 20, 2019) (finding *JPMorgan* to be inconsistent with Second Circuit authority); Pogue v. Chisholm Energy Operating, LLC, No. 20-CV-00580, 2021 U.S. Dist. LEXIS 237107, at *23–24 (D.N.M. Dec. 10, 2021) (citing Judd v. Keypoint Gov't Sols., Inc., No. 18-CV-00327, 2018 U.S. Dist. LEXIS 220807, at *11–12 (D. Colo. Dec. 4, 2018)) (declining to follow *JPMorgan* and *Bigger*); Agerkop v. Sisyphian LLC, No. 19-CV-10414, 2021 U.S. Dist. LEXIS 190333, at *8–9 (C.D. Cal. Aug. 4, 2021) (rejecting defendants' reliance on *JPMorgan* and *Bigger*).

15 *See, e.g.*, Smith v. T-Mobile USA, Inc., 570 F.3d 1119, 1122–23 (9th Cir. 2009) (explaining how the "key difference" between class actions under Rule 23 of the Federal Rules of Civil Procedure and collective actions under the FLSA is that plaintiffs must opt in to FLSA collective actions).

16 *See* Matthew W. Lampe & E. Michael Rossman, *Procedural Approaches for Countering the Dual-Filed FLSA Collective Action and State-Law Wage Class Action*, 20 Lab. L. 311, 313 (2005) ("Section 216(b)'s opt-in mechanism tends to limit the size of FLSA classes and, consequently, an employer's exposure to damages in a given case."); Andrew C. Brunsden, *Hybrid Class Actions, Dual Certification, and Wage Law Enforcement in the Federal Courts*, 29 Berkeley J. Emp. & Lab. L. 269, 297 (2008) (identifying the collective action problem created by the FLSA opt-in regime and its "far-reaching consequences for the remedial goals of wage law enforcement"); *see also* Ellis v. Edward D. Jones & Co., 527 F. Supp. 2d 439, 445 (W.D. Pa. 2007) (quoting De Asencio v. Tyson Foods, Inc., 342 F.3d 301, 310 (3d Cir. 2003)) ("[F]or similar causes of action, Rule 23 classes are much larger than the corresponding

Rule 23 class action,[17] as few as fifteen percent of potential class members typically opt *in* to a collective action under the FLSA.[18] Inertia,[19] fear of retaliation,[20] poverty,[21] and immigration issues[22] all deter worker participation in opt-in actions. When coupled with the existing ambient,

§ 216(b) collective action groups; they may even be 'exponentially greater' and 'number[] in the millions.'").

17 *See* Thomas E. Willging, Laural L. Hooper & Robert J. Niemic, Fed. Jud. Ctr., Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules 52 (1996) (reviewing data from four districts showing a median opt-out rate of either 0.1 percent or 0.2 percent of total class membership); Theodore Eisenberg & Geoffrey Miller, *The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues*, 57 Vand. L. Rev. 1529, 1548 (2004) ("The median opt-out rate is about one percent or less for all case types other than mass tort.").

18 *See* Brunsden, *supra* note 16, at 292–94 (finding an average opt-in rate of 15.71 percent in a review of twenty-one collective actions under the FLSA); Charlotte S. Alexander, *Would an Opt In Requirement Fix the Class Action Settlement? Evidence from the Fair Labor Standards Act*, 80 Miss. L.J. 443, 466–67 (2010) (calculating a median opt-in rate of fifteen percent based on a review of 250 closed collective actions under the FLSA).

19 *See* Julius Getman & Dan Getman, *Winning the FLSA Battle: How Corporations Use Arbitration Clauses to Avoid Judges, Juries, Plaintiffs, and Laws*, 86 St. John's L. Rev. 447, 451 (2012) ("Inertia seems to be the largest factor in determining participation."); Brunsden, *supra* note 16, at 295 ("Fundamentally, the reason for low opt-in rates is inaction. Individuals tend to do nothing in response to class notices.").

20 *See* Getman & Getman, *supra* note 19, at 451 ("Since employees must take affirmative steps to join the case, current employees are reluctant to join out of fear of retaliation."). Because most workers are at-will employees, whom employers can fire at their discretion, many may hesitate to take action against the boss, lest they risk their job or benefits. *See* Brunsden, *supra* note 16, at 296–97 (describing the effect of at-will employment on opt-in rates).

21 Private attorneys are less likely to represent low-wage workers in pursuing FLSA collective actions, because those workers' lower wages reduce the size of potential backpay awards, meaning correspondingly smaller attorneys' fees are available. *See* Myriam Gilles, *Class Warfare: The Disappearance of Low-Income Litigants from the Civil Docket*, 65 Emory L.J. 1531, 1554 (2016) (observing that "low-income consumers and employees will almost never . . . attract counsel on a contingent fee basis"); Sharon M. Dietrich, *When Working Isn't Enough: Low-Wage Workers Struggle to Survive*, 6 U. Pa. J. Lab. & Emp. L. 613, 623 (2004) (noting that "[p]rivate attorneys seldom take the cases of low-wage workers, despite the availability of attorneys' fees under most employment law statutes," in part due to lower potential contingency fees).

22 Immigrant workers, for whom English may not be a first language, may have more difficulty responding to notice forms. *See* Getman & Getman, *supra* note 19, at 451 ("Immigrant workers who may speak languages other than English and less-educated workers are likely to pass on the daunting forms."). Undocumented immigrant workers may also fear that voicing complaints by joining collective actions could reveal their immigration status, a further deterrent to participation. *See* Rebecca Smith & Catherine Ruckelshaus, *Solutions, Not Scapegoats: Abating Sweatshop Conditions for All Low-Wage Workers as a Centerpiece of Immigration Reform*, 10 N.Y.U. J. Legis. & Pub. Pol'y 555, 565 (2007) (observing that undocumented workers face the "very real daily fear of being turned over to immigration authorities, making them even less likely to raise complaints about workplace violations"); *see also* Rivera v. NIBCO, Inc., 364 F.3d 1057, 1064 (9th Cir. 2004) (discussing "the chilling effect that the disclosure of plaintiffs' immigration status could have upon their ability to effectuate their rights").

suppressive effect of the opt-in mechanism on FLSA enforcement, a decision to send notice to fewer potential plaintiffs may have serious repercussions on the efficacy of the statute.[23]

Additionally, the underlying arbitration agreements that employers argue should preclude notice have a separate, suppressive impact on workers' ability to address FLSA violations.[24] Because actions under the FLSA often concern small violations accrued over multiple years, the cost of pursuing claims in individual arbitration often exceeds the potential return, rendering collective actions, which disperse litigation costs across multiple workers, the only viable mechanism for holding employers accountable.[25] Concerns about the stifling effect of arbitration clauses on FLSA enforcement are especially acute with respect to low-wage workers, who on average fall victim to more violations than their higher-wage peers[26] and can neither meaningfully negotiate terms of employment nor afford to decline job offers on account of objectionable arbitration provisions.[27] The very purpose of providing notice of FLSA collective actions—articulated by the Supreme Court in authorizing judicial provision of notice—is to advance the "twin goals" of both *enforcing* the statute by attempting to ensure all affected workers are made aware of opportunities to remedy violations, and *efficiently* resolving allegations by bringing together as many potential

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23 *See* Lampe & Rossman, *supra* note 16, at 315–16 (describing the effects of broader and narrower notice on potential employer liability).

24 *See* Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. Rev. 679, 696 (2018) (finding that "well under two percent of the employment claims that one would expect to find in some forum, but that are covered by [mandatory arbitration agreements], ever enter the arbitration process"). The imposition of arbitration clauses with class action waivers may prevent workers from recovering billions in unpaid wages each year. *See* Hugh Baran & Elisabeth Campbell, *Forced Arbitration Helped Employers Who Committed Wage Theft Pocket $9.2 Billion in 2019 from Workers in Low-Paid Jobs*, Nat'l Emp. L. Project (June 7, 2021), https://s27147.pcdn.co/wp-content/uploads/Data-Brief-Forced-Arbitration-Wage-Theft-Losses-June-2021.pdf [https://perma.cc/6GLT-72XG] (calculating the amount of wages lost due to minimum wage violations that workers are unable to recover due to the claim-suppressive effect of forced arbitration).

25 *See* Cynthia Estlund, *Between Rights and Contract: Arbitration Agreements and Non-Compete Covenants as a Hybrid Form of Employment Law*, 155 U. Pa. L. Rev. 379, 428–29 (2006) (observing that because so many individual FLSA claims seek less than the cost of adjudication, "for employees who are bound by a class action waiver, an employer has a virtual free pass to engage in these illegal practices").

26 *See* Ioana Marinescu, Yu Qiu & Aaron Sojourner, *Wage Inequality and Labor Rights Violations* 14–18 (Nat'l Bureau of Econ. Rsch., Working Paper No. 28475, 2021) (finding industries with higher wages are associated with lower rates of labor and employment violations).

27 *See* Gilles, *supra* note 21, at 1555 ("[M]ost low-wage employees cannot negotiate employment terms or afford to lose a job opportunity by refusing to sign an arbitration clause.").

plaintiffs as possible into a single collective action.[28] So, in evaluating whether courts should authorize notice to potentially arbitration-bound plaintiffs, these background concerns about existing inefficiencies and underenforcement of the FLSA provide crucial context for the analysis. Viewed in this light, it is clear the goals of the FLSA are best served by rejecting the holdings of *JPMorgan* and its progeny and by providing notice of collective actions to a bigger pool of workers, including those that may have signed arbitration agreements. Some potentially arbitration-bound workers will ultimately be able to join such a suit—for instance, if the underlying arbitration agreement is invalid—advancing the efficiency aims of notice provision. Additionally, there is inherent value in sending notice even to those ultimately excluded from the action; such notice provision will enhance awareness of the FLSA and its protections, cultivating a workforce that is better able to police violations, and advancing the other twin goal of improving enforcement of the statute.

To demonstrate why this is so, this Note first reviews the history of the FLSA, its provisions for collective action, and the Supreme Court precedent that authorizes courts to notify workers of collective actions. This Note then demonstrates that the efficiency and enforcement aims of collective actions are better served by providing notice to potentially arbitration-bound plaintiffs, and that the *JPMorgan* line of cases that would hold otherwise misinterpret the relevant Supreme Court precedent. Lastly, this Note concludes by reviewing the constitutional issues at stake in the notice decision and explains why justiciability doctrines militate in favor of expansive provision of notice.

I
Overview of Collective Actions Under the FLSA

A. Origins of the FLSA

Congress enacted the FLSA in the wake of the Great Depression in 1938,[29] aiming to raise substandard pay and provide workers additional overtime compensation.[30] In particular, the FLSA aimed to

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[28] *See* Bigger v. Facebook, Inc., 947 F.3d 1043, 1049 (7th Cir. 2020) (citing Hoffmann-La Roche v. Sperling, 493 U.S. 165, 170–71 (1989)) (describing the "twin goals" of enforcement and efficiency).

[29] For an overview of the background to the FLSA's enactment, see Jonathan Grossman, *Fair Labor Standards Act of 1938: Maximum Struggle for a Minimum Wage*, U.S. Dep't of Labor, https://www.dol.gov/general/aboutdol/history/flsa1938 [https://perma.cc/65XF-FYE4].

[30] *See* United States v. Darby, 312 U.S. 100, 122 (1941) ("[T]he evils aimed at by the Act are the spread of substandard labor conditions through the use of the facilities of interstate

protect non-unionized workers, who had less bargaining power than their organized counterparts and were consequently less able to secure adequate wages and working conditions.[31]

In response to an early wave of lawsuits brought by unions seeking compensation for travel time on behalf of workers,[32] Congress amended the FLSA with the Portal-to-Portal Act of 1947, which required employees to affirmatively "opt in" if they wished to participate in an FLSA action.[33] As currently constructed, the FLSA authorizes collective actions in which one or more employees bring an action against their employer to recover unpaid wages, overtime compensation, or liquidated damages "for and on behalf of himself or themselves and other employees similarly situated."[34] Employees wishing to participate must consent in writing and file that notice with the court.[35] Collective actions under the FLSA thus differ crucially from conventional class actions brought under Rule 23 of the Federal Rules of Civil Procedure (Rule 23), which consider each person within the certified class definition a member unless that person "opts out."[36] This distinction means the opt-in approach is the exclusive way in which plaintiffs can

commerce . . . and the consequent dislocation of the commerce itself . . . ."); United States v. Rosenwasser, 323 U.S. 360, 361 (1945) ("This legislation was designed to raise substandard wages and to give additional compensation for overtime work as to those employees within its ambit . . . .").

31 *See* Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 707 n.18 (1945) ("The legislative debates indicate that the prime purpose of the legislation was to aid the unprotected, unorganized and lowest paid of the nation's working population; that is, those employees who lacked sufficient bargaining power to secure for themselves a minimum subsistence wage.").

32 In its original formulation, the FLSA permitted actions in which an employee, rather than bringing suit themselves, "designate[d] an agent or representative to maintain such action for and in behalf of all employees similarly situated." Fair Labor Standards Act, ch. 676, § 16(b), 52 Stat. 1060, 1069 (1938). Most suits initially brought under § 16(b) were brought by unions. *See Regulating the Recovery of Portal-to-Portal Pay, and for Other Purposes: Hearings Before Subcomm. No. 2 of the H. Comm. on the Judiciary*, 80th Cong. 166 (testimony of Lee Pressman, General Counsel, CIO) (testifying that "I do not know of any suits where there have been unorganized workers," rather than organized workers, initiating the action); *Knepper v. Rite Aid Corp.*, 675 F.3d 249, 254 (3d Cir. 2012) ("Nearly all the suits filed under [the original] § 16(b) were brought by unions."). The Portal-to-Portal Act's "outright prohibition of these representative actions . . . was clearly designed as an attack on union-organized litigation." Marc Linder, *Class Struggle at the Door: The Origins of the Portal-to-Portal Act of 1947*, 39 Buff. L. Rev. 53, 172 (1991).

33 The Portal-to-Portal Act amended the FLSA to provide that "[n]o employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought." 29 U.S.C. § 216(b).

34 *Id.*

35 *Id.* ("No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.").

36 *See* Fed. R. Civ. P. 23.

pursue minimum wage, overtime, and other violations under the FLSA on a class basis.[37]

B. Judicial Discretion to Authorize Notice

Because the FLSA requires participants to opt in to the litigation early on, the question of how and when notice is provided to potential class members is critical.[38] The provision of notice is additionally important under the FLSA because the statute of limitations continues to run with respect to each potential plaintiff's claims until their written consent is filed with the court,[39] in contrast to Rule 23 class actions in which the statute of limitations is tolled for all putative class members at the outset.[40] In *Hoffmann-La Roche v. Sperling*,[41] the Supreme Court confirmed that courts have the authority to facilitate notice to potential plaintiffs in collective actions under the FLSA.[42] However, in affirming courts' discretion to involve themselves in providing notice, the Supreme Court declined

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[37] *See, e.g.*, Hipp v. Liberty Nat'l Life Ins. Co., 252 F.3d 1208, 1216 (11th Cir. 2001) (noting that plaintiffs that want to sue as a class under the FLSA or Age Discrimination in Employment Act of 1967 "must utilize the opt-in class mechanism provided in 29 U.S.C. § 216(b) instead of the opt-out class procedure provided in [Rule 23]"); *see also* LaChapelle v. Owens-Illinois, Inc., 513 F.2d 286, 289 (5th Cir. 1975) (describing the opt-in and opt-out mechanisms as "mutually exclusive and irreconcilable").

[38] *See* Hoffmann-La Roche v. Sperling, 493 U.S. 165, 170 (1989) (noting that access to rights under the ADEA or FLSA "depend[s] on employees receiving accurate and timely notice concerning the pendency of the collective action, so that they can make informed decisions about whether to participate"); Gronefeld v. Integrated Prod. Servs., No. 16-CV-55, 2016 U.S. Dist. LEXIS 192476, at *14 (W.D. Tex. Apr. 26, 2016) ("Notice is crucial to the remedial aims of the FLSA.").

[39] *See Gronefeld*, 2016 U.S. Dist. LEXIS 192476, at *14–15 (noting that "[n]otice is particularly important for FLSA collective actions as potential plaintiffs' statutes of limitations continue to run unless and until a plaintiff [opts in]"); Montoya v. S.C.C.P. Painting Contractors, Inc., No. CCB-07-455, 2008 U.S. Dist. LEXIS 16354, at *11–12 (D. Md. Feb. 26, 2008) (reasoning that since the statute of limitations period keeps running for each plaintiff's collective action claim until the written consent form is filed, "court-facilitated notice is crucial").

[40] *See* Am. Pipe & Constr. Co. v. Utah, 414 U.S. 538, 553–54 (1974) (holding that "the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class").

[41] 493 U.S. 165 (1989).

[42] *Id.* at 172–73. Prior to *Hoffmann-La Roche*, there had been a circuit split, with some courts authorizing notice and others declining to do so. *Id.* at 167 n.1. For instance, prior to 1989, the Eighth and Ninth Circuits had disapproved court-authorized notice, while the Second and Seventh Circuits had permitted it. *Compare* McKenna v. Champion Int'l Corp., 747 F.2d 1211 (8th Cir. 1984), *and* Kinney Shoe Corp. v. Vorhes, 564 F.2d 859 (9th Cir. 1977), *with* Braunstein v. E. Photographic Lab'ys, Inc., 600 F.2d 335 (2d Cir. 1978) (per curiam), *and* Woods v. N.Y. Life Ins. Co., 686 F.2d 578 (7th Cir. 1982).

to specify the precise timing, form, or contents of the notice, leaving that to the discretion of individual trial courts.[43]

In subsequently applying that discretion to evaluate the appropriateness of certification and notice in FLSA collective actions, most district courts adopted a two-stage analysis.[44] At the first stage, courts require only a "modest factual showing"[45] from plaintiffs to justify conditional class certification and notification of potential participants, typically in the form of a demonstration by named plaintiffs that other class members were affected by the same improper decision, policy, or practice.[46] Then, at the second stage, following discovery, courts consider decertification motions and more stringently scrutinize whether the case should continue as a collective action.[47] When a court grants conditional certification at the first step, it will approve the text of a notice to be

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[43] *Hoffmann-La Roche*, 493 U.S. at 171 ("Because trial court involvement in the notice process is inevitable in cases with numerous plaintiffs where written consent is required by statute, it lies within the discretion of a district court to begin its involvement early, at the point of the initial notice, rather than at some later time.").

[44] *See* Allan G. King, Lisa A. Schreter & Carole F. Wilder, *You Can't Opt Out of the Federal Rules: Why Rule 23 Certification Standards Should Apply to Opt-In Collective Actions Under the FLSA*, 5 FED. CTS. L. REV. 1, 8 (2011) ("The most common procedure is a two-step process, often called the *Lusardi* two-step, after the widely cited case that seems to have begun the practice."); *see also* Lusardi v. Xerox Corp., 118 F.R.D. 351 (D.N.J. 1987) (outlining a two-step test to determine whether a case should proceed as a collective action); Comer v. Wal-Mart Stores, Inc., 454 F.3d 544, 546 (6th Cir. 2006) (noting that a two-step approach with bifurcated discovery is "the approach typically used by courts in suits filed under 29 U.S.C. § 216(b)"); Mielke v. Laidlaw Transit, Inc., 313 F. Supp. 2d 759, 762 (N.D. Ill. 2004) ("The majority of courts have employed, or implicitly approved, a two-step *ad hoc* method.").

[45] *See, e.g.*, Myers v. Hertz Corp., 624 F.3d 537, 555 (2d Cir. 2010) (finding the "modest factual showing" required at the first stage "should remain a low standard of proof because the purpose of this first stage is merely to determine whether 'similarly situated' plaintiffs do in fact exist"); Symczyk v. Genesis Healthcare Corp., 656 F.3d 189, 193 (3d Cir. 2011) (finding a first-stage requirement that plaintiff make a modest showing of some evidence beyond "pure speculation" best comports with congressional intent), *rev'd on other grounds*, 569 U.S. 66 (2013).

[46] *See, e.g.*, Poreda v. Boise Cascade, LLC, 532 F. Supp. 2d 234, 239 (D. Mass. 2008) ("A plaintiff can meet this standard by making a modest factual showing or asserting substantial allegations that the putative class members were together the victims of a single decision, policy, or plan that violated the law." (internal citations omitted)).

[47] *See, e.g.*, Morgan v. Fam. Dollar Stores, 551 F.3d 1233, 1261 (11th Cir. 2008) (noting that the second stage is triggered by an employer's motion for certification, at which point the court is "less lenient, and the plaintiff bears a heavier burden"). Neither the Act itself, nor the Supreme Court's decision in *Hoffmann-La Roche*, requires courts to adopt this two-step approach. *See Myers*, 624 F.3d at 554 (noting that the two-step approach, though widely adopted, is "not required by the terms of the FLSA"). In 2021 the Fifth Circuit expressly rejected this method, reasoning that it had led to unpredictable outcomes and tended to blind district courts to merits-based issues—including the existence of arbitration agreements—that ought to be considered at an earlier stage in the litigation. Swales v. KLLM Transp. Servs., LLC, 985 F.3d 430, 440–41 (5th Cir. 2021). Some district courts outside the circuit have subsequently begun taking up this approach. *See* Broome v. CRST Malone, Inc., No. 19-CV-01917, 2022 U.S. Dist. LEXIS 11329, at *9–11 (N.D. Ala. Jan. 21, 2022) (using the Fifth

mailed to potential class members, explaining how they may opt in to the litigation.[48] This means that in a suit like Marion Graham's, alleging she and her fellow pizza delivery drivers were illegally paid below the minimum wage, the court would notify the other drivers of the collective action, enabling them to join if they so choose.

II
Current Judicial Approaches to Authorizing Notice to Potentially Arbitration-Bound Plaintiffs

In hundreds of recent cases, employers have sought to limit the number of workers that receive such notice by arguing that some or all putative class members have signed arbitration agreements that prevent them from joining the collective action.[49] In evaluating these objections by employers, district courts have historically reached widely varying conclusions.[50] On one end of the spectrum, some have permitted notice to workers with signed arbitration agreements, either finding workers had a right to receive notice notwithstanding their arbitration agreements,[51] or reasoning that limiting notice may "prematurely assume[] that such arbitration agreements are enforceable."[52] On the other end, some have refused to send notice to such workers, often by excluding those with signed agreements from the definition of the conditionally certified class.[53]

Circuit's new approach to conditional class certification rather than the traditional two-step process).

[48] *See* Allan G. King & Camille C. Ozumba, *Strange Fiction: The Class Certification Decision in FLSA Collective Actions*, 24 Lab. Law. 267, 274–75 (2009) (explaining the typical process for approval of notice at the first stage of conditional certification). Once a putative class member opts in, they become a "party plaintiff" to the collective action. *Id.*; 29 U.S.C. § 216(b).

[49] *See In re* JPMorgan Chase & Co., 916 F.3d 494, 499, 499 n.5 (5th Cir. 2019) (noting that challenges to notice to arbitration-bound employees is an "increasingly recurring issue" and that courts have wrestled with the issue in at least 210 decisions, all but six of which were after 1999).

[50] *See* Romero v. Clean Harbors Surface Rentals USA, Inc., 404 F. Supp. 3d 529, 531–32 (D. Mass. 2019) (reviewing the conclusions of various district courts); *JPMorgan*, 916 F.3d at 499, 499 n.6 (5th Cir. 2019) (noting that district courts had resolved the issue in at least three ways).

[51] *See, e.g.*, Williams v. Omainsky, No. 15-0123, 2016 U.S. Dist. LEXIS 7419, at *32 (S.D. Ala. Jan. 21, 2016) ("By signing the [arbitration agreement], putative opt-in plaintiffs did not forfeit the right to receive notice of this litigation . . . .").

[52] Gordon v. TBC Retail Grp. , Inc., 134 F. Supp. 3d 1027, 1039 n.9 (D.S.C. 2015); *see also, e.g.*, Davis v. Novastar Mortg., Inc., 408 F. Supp. 2d 811, 817–18 (W.D. Mo. 2005) (postponing evaluation of the validity of arbitration agreements until after identification of, and provision of notice to, potential class members).

[53] *See, e.g.*, Daugherty v. Encana Oil & Gas (USA), Inc., 838 F. Supp. 2d 1127, 1133 (D. Colo. 2011) (certifying a conditional class of workers "who did not sign an Independent

A. JPMorgan *and* Bigger

In 2019, the Fifth Circuit in In re *JPMorgan Chase & Co.*[54] became the first circuit to take up the question of whether the purported existence of valid arbitration agreements ought to affect the provision of notice to potential plaintiffs under the FLSA. In that case, the district court had conditionally certified a class of call center employees in an FLSA suit alleging the bank had failed to pay overtime wages for "off-the-clock" work.[55] Despite JPMorgan's objection that most opt-in plaintiffs were subject to arbitration agreements, the district court authorized notice to all putative class members.[56] The plaintiffs themselves did not dispute the existence of valid arbitration agreements.[57]

On appeal, the Fifth Circuit found the district court had erred by sending notice to the arbitration-bound plaintiffs.[58] The Fifth Circuit held "district courts may not send notice to an employee with a valid arbitration agreement unless the record shows that nothing in the agreement would prohibit that employee from participating in the collective action."[59] The circuit court added that the discretion to facilitate notice authorized by *Hoffmann-La Roche* does not permit sending notice of an FLSA action to employees who are unable to join because of binding arbitration agreements,[60] emphasizing that courts' discretion on this issue is intended to promote judicial efficiency,[61] and that notifying employees with signed arbitration agreements would undermine that objective by "stir[ring] up litigation."[62]

Contract Agreement containing an arbitration provision"); Adami v. Cardo Windows, Inc., 299 F.R.D. 68, 81–82 (D.N.J. 2014) (excluding workers who signed arbitration agreements from the collective action).

54 916 F.3d 494 (5th Cir. 2019).

55 Rivenbark v. JPMorgan Chase & Co., 340 F. Supp. 3d 619, 621, 625 (S.D. Tex. 2018).

56 *Id.* at 626.

57 *Id.* at 622.

58 *In re* JPMorgan Chase & Co., 916 F.3d 494, 504 (5th Cir. 2019). JPMorgan had asked the Fifth Circuit for a writ of mandamus directing the district court to prevent any employee who had signed such an arbitration agreement from receiving notice. *Id.* at 497. Although the Fifth Circuit found that the district court had erred, it determined the district court had neither abused its discretion nor erred "clearly and indisputably" as required to issue a writ of mandamus. *Id.* at 504.

59 *Id.* at 501.

60 *Id.* at 504.

61 *Id.* at 500 (quoting Hoffmann-La Roche v. Sperling, 493 U.S. 165, 170 (1989)) ("Permitting the court to facilitate notice helps ensure both 'efficient resolution in one proceeding of common issues' and that 'employees [will] receiv[e] accurate and timely notice concerning the pendency of the collective action, so that they can make informed decisions about whether to participate.'").

62 *Id.* at 502 (quoting *Hoffmann-La Roche*, 493 U.S. at 174 (observing that notifying arbitration-bound employees reaches into disputes beyond the single proceeding and

The Fifth Circuit noted that when there is a disagreement about the existence or validity of an arbitration agreement—which was not the case in *JPMorgan*—an employer seeking to avoid a collective action as to a particular employee would bear the burden of showing by a preponderance of the evidence the existence of a valid arbitration agreement for that employee.[63] Thus, the Fifth Circuit added, district courts should permit evidence concerning arbitration agreements at the conditional certification stage.[64]

Less than a year later, the Seventh Circuit likewise found in *Bigger v. Facebook, Inc.*[65] that it is improper for a district court to send notice of an FLSA collective action to any employee whom the employer can show has entered a valid arbitration agreement. The underlying dispute in *Bigger* concerned sales and account managers whom the plaintiff alleged Facebook had wrongly classified as overtime-exempt.[66] Facebook contended that most of the class had executed arbitration agreements and class action waivers,[67] but unlike her counterparts in *JPMorgan*, the plaintiff in *Bigger* disputed the existence and validity of these agreements.[68] Over Facebook's objections, the district court authorized notice to all potential opt-in plaintiffs, reasoning that the enforceability of the agreements was a merits determination better considered at the second stage of certification.[69]

On appeal, the Seventh Circuit came to a similar conclusion as the Fifth Circuit. While recognizing the potential efficiency of sending notice to arbitration-bound plaintiffs,[70] the Seventh Circuit based its decision on countervailing efficiency concerns,[71] namely the potential for "abuse of the collective-action device."[72] The circuit court also expressed

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that "alerting those who cannot ultimately participate in the collective 'merely stirs up litigation'").

63 *Id.* at 502–03. The Fifth Circuit suggested that in most cases plaintiffs would be unlikely to raise a genuine dispute as to the existence of arbitration agreements. *Id.* at 503 n.17.

64 *Id.* at 503.

65 947 F.3d 1043, 1050, 1055 (7th Cir. 2020).

66 Bigger v. Facebook, Inc., 375 F. Supp. 3d 1007, 1012 (N.D. Ill. 2019).

67 *Id.* at 1021–22.

68 *Bigger*, 947 F.3d at 1051 n.7.

69 *Bigger*, 375 F. Supp. 3d at 1023 ("The Court will determine whether to exclude [potential plaintiffs] who signed arbitration agreements at the conclusion of discovery, when it can properly analyze the validity of any arbitration agreements to which the opt-in plaintiffs may be party.").

70 *Bigger*, 947 F.3d at 1050 ("As a general matter, it may be efficient to first send notice to a group of people and then weed out those who opt in but are in fact ineligible to join.").

71 *Id.* ("[I]n the specific situation where the court has been shown certain individuals may not join the action, it may be *in*efficient to send notice to those people—because the notice may serve only to prompt futile attempts at joinder or the assertion of claims outside the collective proceeding.").

72 *Id.*

concern that permitting notice to arbitration-bound employees could unfairly "inflate settlement pressure."[73] Where arbitration agreements are disputed, the Seventh Circuit echoed the Fifth Circuit by requiring the submission of evidence on the existence and validity of the purported agreements[74] and in prohibiting notice to any employee shown to be bound by a valid arbitration agreement.[75]

B. Swales *and* Clark

In 2021, the Fifth Circuit returned to the notice question in *Swales v. KLLM Transport Services, LLC*,[76] a case in which the court dispensed altogether with the conventional two-step framework to class certification.[77] Instead, the Fifth Circuit collapsed the analysis into a single step, in which the question of whether workers are similarly situated—and notification appropriate—is to be "rigorously scrutinize[d] . . . from the outset of the case."[78]

In *Swales*, four truck drivers working for KLLM alleged that the company had misclassified them as independent contractors, wrongfully forcing the truckers to shoulder their own fuel and maintenance costs and paying them less than the minimum wage under the FLSA.[79] Unlike in *JPMorgan* or *Bigger*, the district court was not confronted with potential arbitration agreements in evaluating provision of notice to other truckers; instead the court considered to what extent it should provide notice to—and certify a conditional class of—other truck drivers that might be similarly situated.[80] The district court, using the two-step framework, found there was more than the minimal evidence needed to justify conditional certification of a class of truckers who had signed similar independent contractor agreements to the plaintiffs, and directed notice of the suit to be sent to them.[81]

The Fifth Circuit reversed, finding that the two-step framework itself "frustrates, rather than facilitates, the notice problem."[82] Drawing on its holding in *JPMorgan*, the Fifth Circuit analogized the merits issue of arbitration agreements in that case to the merits issue in *Swales* of

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73 *Id.*

74 *Id.* (citing *In re* JPMorgan Chase & Co., 916 F.3d 494, 502–03 (5th Cir. 2019)).

75 *Id.* The Seventh Circuit noted that some arbitration agreements, though valid, may nevertheless not prohibit an employee from participation. *Id.*

76 985 F.3d 430 (5th Cir. 2021).

77 *Id.* at 434.

78 *Id.*

79 Swales v. KLLM Transp. Servs., LLC, 410 F. Supp. 3d 786, 789 (S.D. Miss. 2019).

80 *Id.* at 792.

81 *Id.* at 793–94.

82 *Swales*, 985 F.3d at 439.

whether truckers were misclassified, noting that both are potentially dispositive threshold questions.[83] From there, the court observed that "[t]he fact that a threshold question is intertwined with a merits question does not itself justify deferring those questions until after notice is sent out,"[84] and consequently instructed the district court to "consider all of the available evidence" before determining whether and to whom to send notice.[85] District courts should exercise broad discretion in evaluating this evidence and deciding, the Fifth Circuit held, cabined only by the FLSA's "similarly situated" requirement and the *Hoffmann-La Roche* decision.[86] The Fifth Circuit has since applied this approach to cases centering on arbitration agreements and prevented notice from going to potentially arbitration-bound plaintiffs.[87]

Most recently, in *Clark v. A&L Home Care & Training Center, LLC*,[88] the Sixth Circuit moved in the direction of the Fifth and Seventh Circuits, rejecting the two-step conditional certification framework and requiring plaintiffs to demonstrate there is a "strong likelihood" that the other workers to whom notice would go would be similarly situated.[89] *Clark* concerned home health care workers who alleged that they were not paid proper overtime or wages for traveling between clients' homes.[90] The district court, relying on *JPMorgan* and *Bigger*, accepted the proposition that notice should not go to employees whom the employer could demonstrate had signed arbitration agreements.[91] The district court certified a conditional class and authorized notice to it notwithstanding the existence of potential arbitration agreements, but provided the employer an opportunity to present individualized evidence of arbitration agreements to prevent notice from going to particular workers.[92]

The Sixth Circuit vacated the district court's decision, holding that in order to authorize notice to potential opt-in plaintiffs, a district court must require more than a "modest showing" of similarity.[93] Rather, the

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83 *Id.* at 441 ("Just as the existence of a valid arbitration agreement bars an employee from bringing a lawsuit in general, a valid independent-contractor classification bars application of the FLSA.").

84 *Id.*

85 *Id.* at 442.

86 *Id.* at 443.

87 *See, e.g.*, *In re* A&D Ints., Inc., 33 F.4th 254, 259 (5th Cir. 2021).

88 68 F.4th 1003 (6th Cir. 2023).

89 *Id.* at 1011.

90 Holder v. A&L Home Care & Training Ctr., LLC, 552 F. Supp. 3d 731, 737 (S.D. Ohio 2021) (setting forth the facts of the case subsequently taken up by the Sixth Circuit on appeal).

91 *Id.* at 744.

92 *Id.* at 745.

93 *Clark*, 68 F.4th at 1010.

Sixth Circuit held that plaintiffs must demonstrate a strong likelihood of similarity between named plaintiffs and potential notice recipients, characterizing the standard it was requiring as "greater than the one necessary to create a genuine issue of fact, but less than the one necessary to show a preponderance."[94] The court relied on language in *Hoffmann-La Roche*, where the Supreme Court sought to distinguish notice of a collective action from "solicitation of claims."[95] Though the Sixth Circuit rejected the two-step framework for making notice decisions, it also specified that it was not adopting the Fifth Circuit's approach, which it characterized as requiring the court to make a "final" determination of substantial similarity among plaintiffs prior to authorizing notice.[96]

The Third Circuit may soon offer an additional opinion on the subject. In one recent case, a district court agreed to stay the provision of notice so that the Third Circuit could consider whether to follow *JPMorgan* and *Bigger*[97]—an outcome fervently advocated for by the business lobby.[98] The Third Circuit heard oral arguments in the case on June 22, 2022.[99]

C. The Impact of JPMorgan *and Its Progeny*

Since the circuit decisions in *JPMorgan* and *Bigger*, district courts have struggled to apply them, and approaches to authorizing notice to potentially arbitration-bound plaintiffs remain fractured. District courts in the Fifth and Seventh Circuit now adhere to the process for authorizing notice established by *JPMorgan* and *Bigger*, respectively, prohibiting notice to employees that employers contend are bound by

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94 *Id.* at 1011.

95 *Id.* at 1010 (citing *Hoffmann-La Roche* and finding that "notice sent to employees who are not, in fact, eligible to join the suit amounts to solicitation of those employees to bring suits of their own").

96 *Id.* at 1009.

97 *See* Bruno v. Wells Fargo Bank N.A., No. 19-CV-00587, 2021 U.S. Dist. LEXIS 75262, at *6–9 (W.D. Pa. Apr. 20, 2021) (agreeing with the Fifth and Seventh Circuits' rationale for considering arbitration agreements at the conditional certification stage and staying notice to the portion of class members with signed agreements).

98 *See* Brief for The Chamber of Com. of the U.S., as Amicus Curiae Supporting Defendant-Appellant, Bruno v. Wells Fargo Bank, N.A., No. 21-02734 (3d Cir. Nov. 17, 2021). Business lobby groups are also pushing other circuits to follow the Fifth Circuit in eliminating the two-step approach to conditional certification and requiring a greater showing from the named plaintiffs before authorizing notice in a putative collective action under the FLSA. *See* Brief for The Chamber of Com. of the U.S. and Nat'l Fed'n of Indep. Bus. Small Bus. Legal Cntr., as Amici Curiae Supporting Defendants, Clark v. A&L Home Care & Training Ctr., LLC, Nos. 22-3101, 22-3102 (6th Cir. May 12, 2022).

99 Transcript of Oral Argument, Bruno v. Wells Fargo Bank, N.A., No. 21-02734 (3d Cir. June 22, 2022).

arbitration agreements,[100] and, crucially, permitting parties to present additional evidence concerning those agreements at the first stage of certification.[101]

The *JPMorgan*/*Bigger* approach has also gained traction outside the Fifth and Seventh Circuits.[102] In adopting those circuits' reasoning, district courts elsewhere have emphasized the claimed inefficiency inherent in providing notice to those who can't opt in.[103] While courts taking this approach have stressed that they will not take defendants at their word regarding the validity of purported arbitration agreements, defendants will have a chance to exclude individual class members by proving they have signed such agreements.[104] Nevertheless, the *JPMorgan*/*Bigger* approach has not received universal acceptance outside the Fifth and Seventh Circuits, with some courts either expressing "reservations about

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100 *See* Tuggle v. Rockwater Energy Sols., Inc., No. 18-CV-04746, 2019 U.S. Dist. LEXIS 219353, at *11–12 (S.D. Tex. Dec. 3, 2019) (recommending the exclusion from conditional certification of employees whom defendant can show are subject to arbitration).

101 *See* Rodgers-Rouzier v. Am. Queen Steamboat Operating Co., No. 20-CV-00004, 2022 U.S. Dist. LEXIS 48418, at *5–6 (S.D. Ind. Mar. 18, 2022) ("[B]efore FLSA notice can be approved and/or sent to the Putative Collective Members, *Bigger* requires a determination of the arbitration agreements' application and validity . . . ."); Campbell v. Marshall Int'l, LLC, No. 20-CV-5321, 2022 U.S. Dist. LEXIS 136048, at *5 (N.D. Ill. Aug. 1, 2022) (noting that *Bigger* requires defendant get the chance to show by a preponderance of the evidence the existence of valid arbitration agreements for each employee it sought to exclude from receiving notice).

102 *See* Kuchar v. Saber Healthcare Holdings, No. 20-CV-02542, 2021 U.S. Dist. LEXIS 179807, at *2–3 (N.D. Ohio Sept. 21, 2021) (opting to "follow the emerging trend" of considering arbitration agreements at the notice stage); Menucci v. Randstad Pros. US, LLC, No. 19-CV-4693, 2021 U.S. Dist. LEXIS 120414, at *10 (N.D. Ga. Mar. 2, 2021) (following the Fifth Circuit in refusing to conditionally certify and send notice to a putative class of plaintiffs); Graham v. Word Enters. Perry, LLC, No. 18-CV-10167, 2019 U.S. Dist. LEXIS 114655, at *14–15 (E.D. Mich. June 18, 2019) (refusing to provide notice of conditional certification to employees subject to arbitration agreements "[f]or the reasons stated by the *JP Morgan* court"); Comprere v. Nusret Miami, LLC, 391 F. Supp. 3d 1197, 1205 (S.D. Fla. 2019) (requiring the parties to "consider the list of individuals to be noticed in light of Defendants' contention that many employees have signed arbitration agreements and thus should not receive notice of this action").

103 *See* York v. Velox Express, 524 F. Supp. 3d 679, 688–89 (W.D. Ky. 2021) (adopting the approach of the Fifth and Seventh Circuits and finding that efficiency favors excluding workers with signed arbitration agreements from receiving notice where the validity of those agreements is unchallenged); *Menucci*, 2021 U.S. Dist. LEXIS 120414, at *10 (agreeing with the Fifth Circuit that "sending notice to individuals who have entered into arbitration agreements with the Defendant undermines the efficiency that collective actions are intended to achieve").

104 *See* Fox v. Ttec Servs. Corp., No. 19-CV-00037, 2021 U.S. Dist. LEXIS 52925, at *15 (E.D. Ark. Mar. 22, 2021) ("While the Court will not merely take [defendant] at its word that certain employees entered valid agreements, it will allow [defendant] an opportunity to prove that an employee entered into a valid arbitration agreement.").

[their] reasoning"[105] or outright rejecting the approach articulated in those rulings.[106] In seeking to limit the scope of the *JPMorgan*/*Bigger* approach, some courts focus on the strength of defendants' evidence, distinguishing cases where the agreements are contested from those where they are unchallenged.[107] Even where defendants present evidence that a portion of a conditionally certified class has signed arbitration agreements, some courts still authorize notice if they find the evidence insufficient.[108] Some courts, even within the Fifth and Seventh Circuits, emphasize that the burden of demonstrating valid arbitration agreements exist falls on the defendant.[109] In making these evaluations, courts have also held that evidence of arbitration agreements should be tailored to individual workers rather than blanket evidence suggesting some undifferentiated number of workers have signed agreements.[110]

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105 Lancaster v. FQSR, No. 19-2632, 2020 U.S. Dist. LEXIS 166285, at *24 (D. Md. Sept. 11, 2020) (observing that while the Seventh Circuit in *Bigger* focused on the twin aims of efficiency and enforcement, efficiency disfavors delaying certification until after resolution of disputes about binding arbitration agreements); *see also* Grove v. Meltech, Inc., No. 20-CV-193, 2020 U.S. Dist. LEXIS 228435, at *14 (D. Neb. Dec. 3, 2020) (finding post-*Bigger* that "[t]he arbitration issue is properly resolved at the second stage of the collective class certification process").

106 *See, e.g.*, Zambrano v. Strategic Delivery Sols., LLC, No. 15-CV-8410, 2021 U.S. Dist. LEXIS 186197, at *27–28 (S.D.N.Y. Sept. 28, 2021) (finding that, contrary to *JPMorgan* and *Bigger*, "the weight of law in this Circuit holds that a collective may be conditionally certified, and notice given, notwithstanding that some or all of the prospective members of the collective may have signed arbitration agreements").

107 *See, e.g.*, Bradford v. Team Pizza, Inc., No. 20-CV-60, 2020 U.S. Dist. LEXIS 113681, at *14–17 (S.D. Ohio June 29, 2020) (distinguishing *JPMorgan* and *Bigger* as applying to cases in which the validity of arbitration agreements is either uncontested or has been established following discovery); Camp v. Bimbo Bakeries USA, Inc., No. 18-CV-378, 2019 U.S. Dist. LEXIS 57114, at *8–9 (D.N.H. Apr. 3, 2019) (contrasting the "absence of any disagreement" about the arbitration agreements in *JPMorgan* with the disputed nature of the agreements at issue in the case before the court).

108 *See, e.g.*, Thomas v. Papa John's Int'l, Inc., No. 17-CV-411, 2019 U.S. Dist. LEXIS 171728, at *9–10 (S.D. Ohio Sept. 29, 2019) (distinguishing *JPMorgan* from the instant case in which, despite evidence presented by defendant as to the existence of arbitration agreements, "there are insufficient facts in the record regarding the validity of these agreements").

109 *See* Campbell v. Marshall Int'l, LLC, 623 F. Supp. 3d 927, 932 (N.D. Ill. 2022) (finding defendants had not carried their burden under *Bigger*, as "[i]t is not enough to offer agreements signed by eight [potential plaintiffs] and then to assure me, without additional evidence, that the same goes for over 150 other[s]"); Rodgers-Rouzier v. Am. Queen Steamboat Operating Co., LLC, No. 20-CV-00004, 2022 U.S. Dist. LEXIS 48418, at *6–7 (S.D. Ind. Mar. 18, 2022) (finding a single sworn declaration that most employees signed an arbitration agreement to be "insufficient under *Bigger*, which requires more than a generalized, blanket statement that alleged arbitration agreements exist for unidentified employees"); Holder v. A&L Home Care & Training Ctr., 552 F. Supp. 3d 731, 744–45 (S.D. Ohio 2021) (finding defendant had failed to carry its burden of showing valid arbitration agreements exist).

110 *See, e.g.*, *Bradford*, 2020 U.S. Dist. LEXIS 113681, at *16 (noting that "[w]hile defendants have provided evidence in the form of a sample arbitration agreement and a declaration stating that 324 [delivery drivers] executed such an agreement, there are insufficient facts . . . regarding the validity of these agreements as to *each* delivery driver defendants seek

While some district courts have adopted a mixed view of the *JPMorgan*/*Bigger* approach, courts in the Second,[111] Ninth,[112] and Tenth Circuits[113] have come closer to outright rejecting it. District courts in these circuits have, for instance, emphasized that because the FLSA is a "remedial statute," courts ought to err on the side of authorizing notice.[114] Some courts, in rejecting the *JPMorgan*/*Bigger* approach, have

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to exclude from receiving notice"); Hafley v. Amtel, No. 21-CV-203, 2022 U.S. Dist. LEXIS 48252, at *18 (S.D. Ohio Mar. 18, 2022) (finding that despite a declaration by an executive of the defendant company that some workers had signed arbitration agreements, "the more prudent approach is to defer the question of arbitrability until the allegedly arbitration-bound plaintiffs have opted in").

111 *See* Headley v. Liberty Homecare Options, LLC, No. 20-CV-00579, 2022 U.S. Dist. LEXIS 107353, at *19 (D. Conn. June 16, 2022) (finding that the "weight of jurisprudence within the Second Circuit . . . favors erring on the side of being overinclusive when sending notice to potential plaintiffs"); *see also Zambrano*, 2021 U.S. Dist. LEXIS 186197, at *27–28 (finding that, contrary to *Bigger* and *JPMorgan*, "the weight of law in this Circuit holds that a collective may be conditionally certified, and notice given, notwithstanding that some or all of the prospective members of the collective may have signed arbitration agreements"); Barone v. Laz Parking Ltd., No. 17-CV-01545, 2019 U.S. Dist. LEXIS 181126, at *15–16 (D. Conn. Oct. 20, 2019) (finding that "the weight of authority within the Second Circuit is inconsistent with the approach that was taken by the Fifth Circuit in *JPMorgan*"); *but see* Errickson v. Paychex, Inc., 447 F. Supp. 3d 14, 29 (W.D.N.Y. 2020) (considering the steps prescribed by the Fifth and Seventh Circuits for evaluating whether to send notice to employees who may have signed arbitration agreements).

112 *See* Cuevas v. Conam Mgmt. Corp., No. 18-CV-1189, 2019 U.S. Dist. LEXIS 181832, at *13–15 (S.D. Cal. Oct. 21, 2019) (finding defendant's reliance on *JPMorgan* unpersuasive, and "follow[ing] the district courts in this circuit and conclud[ing] that conditional certification is not defeated because certain California employees signed arbitration agreements"); Dominguez v. Better Mortg. Corp., No. 20-CV-01784, 2022 U.S. Dist. LEXIS 198305, at *12–14 (C.D. Cal. Oct. 24, 2022) (declining to follow the Fifth and Seventh Circuits where defendant has presented no evidence that a valid arbitration agreement applies to any member of the putative class); Gonzalez v. Diamond Resorts Int'l Mktg., No. 18-CV-00979, 2020 U.S. Dist. LEXIS 77623, at *17–20 (D. Nev. May 1, 2020) (declining to follow the Fifth and Seventh Circuits, but adding language to notices discussing the effect of arbitration agreements); *but see* Droesch v. Wells Fargo Bank, N.A., No. 20-CV-06751, 2021 U.S. Dist. LEXIS 125410, at *6–8 (N.D. Cal. July 6, 2021) (citing *Bigger* and *JPMorgan* approvingly in support of a "pragmatic approach" that "weighs in favor of reconsideration of the scope of notice").

113 *See* Pogue v. Chisholm Energy Operating, LLC, No. 20-CV-00580, 2021 U.S. Dist. LEXIS 237107, at *24 (D.N.M. Dec. 10, 2021) (citing Judd v. Keypoint Gov't Sols., Inc., No. 18-CV-00327, 2018 U.S. Dist. LEXIS 220807, at *11–12 (D. Colo. Dec. 4, 2018)) ("[T]he current weight of law in this Circuit holds that a collective may be conditionally certified, and notice given, notwithstanding that some of the prospective members of the collective may have signed arbitration agreements."); *see also* Stoddard v. Love's Travel Stops & Country Stores, Inc., No. 21-CV-308, 2022 U.S. Dist. LEXIS 132390, at *10 (W.D. Okla. July 26, 2022) (finding the weight of Tenth Circuit authority favors sending notice despite existence of arbitration agreements).

114 Barone v. Laz Parking Ltd., No. 17-CV-01545, 2019 U.S. Dist. LEXIS 181126, at *16 (D. Conn. Oct. 20, 2019) (quoting Aros v. United Rentals, Inc., 269 F.R.D. 176, 182 (D. Conn. 2010)) ("As the Second Circuit has made clear, the FLSA is a remedial statute, and the federal courts should give it a liberal construction."); *see also* Braunstein v. E. Photographic Lab'ys, Inc., 600 F.2d 335, 336 (2d Cir. 1978) (holding that it makes best sense to read the FLSA "as permitting, rather than prohibiting, notice in an appropriate case").

also observed that notice is not merely a procedural step in managing a collective action, but also a broader functional device that "start[s] a conversation among employees" to ensure they can vindicate their rights under the FLSA.[115] Courts have also reasoned that broader notice to potential class members is preferable in light of judicial economy considerations, which favor consolidation.[116]

In circuits that have had a more mixed response to the *JPMorgan*/*Bigger* approach, district courts also carefully scrutinize the evidence defendants put forward regarding the existence of valid arbitration agreements. Where defendants have not identified specific individuals allegedly subject to arbitration agreements, but instead made more generalized claims about the existence of such agreements, courts have in some instances refused to limit the scope of notice in an FLSA collective action.[117]

District courts in these circuits, too, appear to take a dim view of the newfound procedural framework for certification elaborated by the Fifth and Sixth Circuits in *Swales* and *Clark*.[118] There are also circuits, such as the Fourth Circuit, where the reception of these decisions has been more mixed, generating starkly divergent intracircuit opinions.[119]

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[115] Lijun Geng v. Shu Han Ju Rest. II Corp., No. 18-CV-12220, 2019 U.S. Dist. LEXIS 154246, at *60 (S.D.N.Y. Sept. 6, 2019) (quoting Trinidad v. Pret A Manger (USA) Ltd., 962 F. Supp. 545, 564 (S.D.N.Y. 2013)) (rejecting the *JPMorgan* approach as too narrow).

[116] *See* Headley v. Liberty Homecare Options, LLC, No. 20-CV-00579, 2022 U.S. Dist. LEXIS 107353, at *19 (D. Conn. June 16, 2022) ("[I]t is in the interest of judicial economy to consolidate actions where appropriate; it would be counterproductive for courts to see piecemeal litigation occurring but to ignore that fact when determining whether collective certification is appropriate.").

[117] *Compare* Agerkop v. Sisyphian LLC, No. 19-CV-10414, 2021 U.S. Dist. LEXIS 190333, at *8–9 (C.D. Cal. Aug. 4, 2021) (refusing to exclude putative class members from receiving notice on the basis of a claim by defendant that some have signed arbitration agreements), *with* Geiger v. Charter Commc'ns, Inc., No. 18-CV-158, 2019 U.S. Dist. LEXIS 228318, at *13–15 (C.D. Cal. Sept. 9, 2019) (prohibiting notice to potential plaintiffs subject to an arbitration agreement where defendant produced the particular agreements in issue). *See also Stoddard*, 2022 U.S. Dist. LEXIS 132390, at *10–11 (observing that defendant had not asserted that named plaintiff or other particular individuals were themselves subject to the arbitration agreement in question).

[118] *See* Lazaar v. Anthem Co., 678 F. Supp. 3d 434, 441 n.3 (S.D.N.Y. 2023) (noting that "[l]ike *Swales*, *Clark* provides no compelling reason for this Court to depart from the 'modest factual showing'" historically required by Second Circuit courts before authorizing notice); Davella v. Ellis Hosp., Inc., No. 20-CV-726, 2023 U.S. Dist. LEXIS 146610, at *11 (N.D.N.Y. Aug. 21, 2023) (declining to follow *Swales*); Gillespie v. Cracker Barrel Old Country Store Inc., No. 21-CV-00940, 2023 U.S. Dist. LEXIS 56888, at *19–20 (D. Ariz. Mar. 31, 2023) (declining to follow *Swales* and noting that no Ninth Circuit court has done so); Green v. Perry's Rests. Ltd., No. 21-CV-0023, 2022 U.S. Dist. LEXIS 202548, at *6 n.4 (D. Colo. Nov. 7, 2022) (describing the Fifth Circuit's reasoning in *Swales* as unpersuasive and declining to follow it).

[119] *Compare* Mathews v. U.S. Today Sports Media Grp., LLC, No. 22-CV-1407, 2023 U.S. Dist. LEXIS 95475, at *8–9 (E.D. Va. Apr. 14, 2023) (finding the Fifth Circuit in *Swales* outlined

Because of the current wide range of approaches, when a worker like Marion Graham alleges that an employer has violated the minimum wage and overtime laws, the number of coworkers who are notified of the suit and able to join it depends to a substantial degree on where the suit is filed.

III
Resolving Competing Approaches to the Notice Question

Courts have, evidently, arrived at widely divergent approaches in determining whether and when to provide notice of an FLSA collective action to arbitration-bound plaintiffs. As reviewed above, courts frequently emphasize different rationales for coming to their conclusion. Some stress the remedial goals of the FLSA itself[120] while others focus on judicial considerations[121]—and still others highlight procedural or constitutional concerns.[122] Their varied reasoning is emblematic of the fractured state of the case law.

Accordingly, reconciling the competing conclusions courts have drawn requires evaluation of all these factors in tandem. The Supreme Court's decision in *Hoffmann-La Roche*, which first confirmed the discretion of courts to authorize notice under the FLSA, suggested the "twin goals" of collective actions are "enforcement and efficiency."[123] A more searching look at the implications of notice decisions shows that these two aims, and the judicial system's overarching constitutional obligations, are best served by sending notice to potentially arbitration-bound plaintiffs, contrary to *JPMorgan* and its progeny.

A. The Efficiency Benefits of Broader Notice Authorization

The starkest reason to reject the reasoning in *JPMorgan* and its progeny is that this line of cases rests in large part on a fabrication of

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the "correct approach," and holding that courts must determine at the outset of a collective action whether other plaintiffs are similarly situated), *with* Hernandez v. KBR Servs., LLC, No. 22-CV-530, 2023 U.S. Dist. LEXIS 140795, at *16 (E.D. Va. Aug. 11, 2023) (declining to follow *Swales* or *Clark* and characterizing *Mathews* as "an extreme outlier").

120 *See* Barone v. Laz Parking Ltd., 17-CV-01545, 2019 U.S. Dist. LEXIS 181126, at *16 (D. Conn. Oct. 20, 2019) (reasoning that the remedial aims of the FLSA "would be undermined if employees who have signed arbitration agreements are excluded from receiving notice").

121 *See* York v. Velox Express, 524 F. Supp. 3d 679, 688–89 (W.D. Ky. 2021) (finding that preventing workers with signed arbitration agreements from receiving notice is preferable on grounds of efficiency).

122 *See* Gonzalez v. Diamond Resorts Int'l Mktg., No. 18-CV-00979, 2020 U.S. Dist. LEXIS 77623, at *18–19 (D. Nev. May 1, 2020) (declining to follow the Fifth and Seventh Circuit on account of potential standing and due process concerns, as well as practical difficulties).

123 *See* Bigger v. Facebook, Inc., 947 F.3d 1043, 1049 (7th Cir. 2020) (reading *Hoffmann-La Roche* to suggest the underlying purpose of FLSA collective actions).

the *Hoffmann-La Roche* precedent confirming the basis for judicial authorization of notice. The Fifth Circuit, and the courts that followed it, have repeatedly cited a misquoted and egregiously mischaracterized piece of text purportedly conveying the Supreme Court's concern that overly broad notice authorization could undermine efficiency—one of the "twin goals" notice is intended to achieve. In refusing to send notice to potentially arbitration-bound plaintiffs, these courts have expressed concern that notifying a plaintiff who turns out to be precluded from joining a collective action could be inefficient and a waste of resources.[124] In *JPMorgan*, the Fifth Circuit—quoting *Hoffmann-La Roche* in support of this point—explained its concern that providing notice to a wider pool of plaintiffs would undermine efficiency by "merely stir[ring] up litigation."[125] Courts have echoed this concern and quoted such language in subsequent decisions, repeatedly voicing anxiety that notifying arbitration-bound plaintiffs of a collective action could result in increased FLSA litigation against employers.[126]

However, neither the concern articulated nor the precise language quoted by the Fifth Circuit is expressed anywhere in *Hoffmann-La Roche*. In *JPMorgan*, the Fifth Circuit, purporting to quote the decision, writes in full that "alerting those who cannot ultimately participate in the collective 'merely stirs up litigation,' which is what *Hoffmann-La Roche* flatly proscribes."[127] Not only does such phrasing not appear in *Hoffmann-La Roche*; it has no precedent either. Rather, this quotation originates with the Fifth Circuit itself.[128] Indeed, far from "flatly proscrib[ing]" the use of notice in a manner that could risk stirring up additional litigation, the Supreme Court instead took care in *Hoffmann-La Roche* to explain that judicial intervention to authorize

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124 *See In re* JPMorgan Chase & Co., 916 F.3d 494, 502 (5th Cir. 2019) (positing potential inefficiencies of sending notice to arbitration-bound plaintiffs); *Bigger*, 947 F.3d at 1050 (same).

125 *JPMorgan*, 916 F.3d at 502 (purportedly quoting Hoffmann-La Roche v. Sperling, 493 U.S. 165, 174 (1989)).

126 *See, e.g.*, *In re* A&D Ints., Inc., 33 F.4th 254, 259 (5th Cir. 2021) (citing the court's earlier concern, derived from *JPMorgan*, that broader notice "merely stirs up litigation" (internal quotation marks omitted)); Trottier v. Fieldcore Servs. Sols., LLC, No. 2:20-CV-186, 2022 U.S. Dist. LEXIS 38779, at *23 (N.D. Tex. Mar. 4, 2022) (quoting the Fifth Circuit's language in *JPMorgan*); Fox v. Ttec Servs. Corp., No. 4:19-CV-00037, 2021 U.S. Dist. LEXIS 52925, at *13 (E.D. Ark. Mar. 22, 2021) (same); Errickson v. Paychex, Inc., 447 F. Supp. 3d 14, 28 (W.D.N.Y. 2020) (same).

127 *JPMorgan*, 916 F.3d at 502 (purportedly quoting *Hoffmann-La Roche*, 493 U.S. at 174).

128 In a legal database search for the quoted phrase "merely stirs up litigation," the earliest result is the Fifth Circuit's *JPMorgan* decision. See results for "merely stirs up litigation," LexisNexis, https://plus.lexis.com/zhome [https://perma.cc/8WUY-QJE7] (search in search bar for "merely stirs up litigation").

notice is "distinguishable in form and function from the solicitation of claims."[129]

The Fifth Circuit has subsequently cited other portions of *Hoffmann-La Roche* to support its contention that broader notice "merely stirs up litigation," but these attempts, too, fail to support the proposition.[130] While the dissent in *Hoffmann-La Roche* may have sought to characterize the majority's opinion as permitting courts to encourage litigation,[131] the majority was clear in its view that court authorization of notice improves judicial efficiency by "serv[ing] the legitimate goal of avoiding a multiplicity of duplicative suits."[132]

The Fifth Circuit in *JPMorgan* also expressed trepidation that notifying arbitration-bound employees further undermines efficiency by "reach[ing] into disputes beyond the 'one proceeding.'"[133] In articulating this concern, the Fifth Circuit gave voice to a recurring worry expressed by employers: that the expansive provision of notice will force parties to expend more resources defending themselves against additional alleged violations.[134]

Though there is merit to the contention that authorizing notice to potentially arbitration-bound plaintiffs could cause employers to spend more money on resolving claims of FLSA violations, such a reality does not suffice to prevent such notice. As the Supreme Court explained in *Hoffmann-La Roche*, the notice process is not intended "to relieve

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129 *Hoffmann-La Roche*, 493 U.S. at 174.

130 For instance, in *In re A&D Ints., Inc.*, the Fifth Circuit contended that "[i]ssuing notice to those who will not *ultimately* be able to participate '"merely stirs up litigation," which is what *Hoffmann-La Roche* flatly proscribes.'" 33 F.4th 254, 259 (5th Cir. 2021) (first quoting Swales v. KLLM Transp. Servs., LLC, 985 F.3d 430, 441 (5th Cir. 2021); and then purportedly quoting *Hoffmann-La Roche*, 493 U.S. at 170). The cited portion of *Hoffmann-La Roche*, which differs from that cited in *JPMorgan*, voices no such concern about stirring up litigation. Rather, that portion of the majority opinion states that "[t]he judicial system benefits by efficient resolution in one proceeding of common issues of law and fact arising from the same alleged discriminatory activity," and that timely notice is essential to securing those benefits. *Hoffmann-La Roche*, 493 U.S. at 170.

131 *See Hoffmann-La Roche*, 493 U.S. at 181 (Scalia, J., dissenting) ("'Stirring up litigation' was once exclusively the occupation of disreputable lawyers, roundly condemned by this and all American courts.").

132 *Id.* at 172 (majority opinion).

133 *In re* JPMorgan Chase & Co., 916 F.3d 494, 502 (5th Cir. 2019) (quoting *Hoffmann-La Roche*, 493 U.S. at 170).

134 *See, e.g.*, Garcia v. Chipotle Mexican Grill, Inc., No. 16-CV-601, 2019 U.S. Dist. LEXIS 14140, at *14 (S.D.N.Y. Jan. 29, 2019) (describing the employer's objection to the alleged "injustice" of facing multiple arbitrations following the provision of notice to arbitration-bound employees); Brief for The Chamber of Commerce of the U.S. as Amicus Curiae Supporting Defendant-Appellant at 13–14, Bruno v. Wells Fargo Bank, N.A., No. 21-02734 (3d Cir. Nov. 22, 2021) (arguing against provision of notice to arbitration-bound employees on grounds that it could force employers to expend resources compelling arbitration).

employers from the burden of multiparty actions."[135] Achieving efficient resolution is not equivalent to minimizing employer litigation costs. If reducing the resources spent on numerous independent actions is employers' worry, there is a solution readily at hand: They can decline to compel arbitration and permit arbitration-bound employees to join the collective action. As one court observed, there is deep irony in an employer complaining of the supposed injustice of responding to multiple arbitration filings when the employer could easily reduce costs by permitting those employees to join an FLSA collective action in the first place.[136]

Linked to these sorts of efficiency concerns that courts have used to justify narrower provision of notice are fairness-inflected anxieties about the "settlement pressure" created by collective actions.[137] In the context of Rule 23 class actions, some courts have characterized the settlement pressure generated by class certification as posing a "blackmail" threat to defendants.[138] Because the potential liability for a class action may be exceptionally large, the thinking goes, defendants may feel pressure to settle weak or unmeritorious claims.[139]

However, the claim that class certifications under Rule 23 function as "blackmail" is contested. Some legal scholars argue that the risk is overstated,[140] or that supposedly compelled settlements are not

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135 *Hoffmann-La Roche*, 493 U.S. at 173.

136 *See Garcia*, 2019 U.S. Dist. LEXIS 14140, at *14 ("Chipotle could have permitted its employees to raise disputes through collective actions such as those under the FLSA and realize the efficiencies inherent in collective or class procedures.").

137 *See* Bigger v. Facebook, Inc., 947 F.3d 1043, 1049 (7th Cir. 2020) (finding notice to arbitration-bound plaintiffs "would unfairly amplify settlement pressure"); Swales v. KLLM Transp. Servs., LLC, 985 F.3d 430, 435 (5th Cir. 2021) (observing that "collective actions" present "the opportunity for abuse (by intensifying settlement pressure no matter how meritorious the action)").

138 *See In re* Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1298 (7th Cir. 1995) (decertifying a class action and legitimating judicial concern about "blackmail settlements" (quoting Henry J. Friendly, Federal Jurisdiction: A General View 120 (1973)); *see also* Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 164 (3d Cir. 2001) (describing the "hydraulic pressure on defendants to settle, avoiding the risk, however small, of potentially ruinous liability"); *In re* Bridgestone/Firestone Tires Prods. Liab. Litig., 288 F.3d 1012, 1015–16 (7th Cir. 2002) (noting the potential for the aggregation of small claims to result in "stakes so large, that settlement becomes almost inevitable"); Parker v. Time Warner Ent. Co., 331 F.3d 13, 29 (2d Cir. 2003) (noting the potential for an "*in terrorem* threat of a massive award" to "unfairly induce a large settlement").

139 *See, e.g.*, Castano v. Am. Tobacco Co., 84 F.3d 734, 746 (5th Cir. 1996) (noting that "[c]lass certification magnifies and strengthens the number of unmeritorious claims" resulting in settlements that are "judicial blackmail").

140 *See* Bruce Hay & David Rosenberg, *"Sweetheart" and "Blackmail" Settlements in Class Actions: Reality and Remedy*, 75 Notre Dame L. Rev. 1377, 1379 (2000) ("Our central conclusion is that the risks of sweetheart and blackmail settlements have been overstated,

necessarily unfair.[141] More importantly, many of the concerns about settlement pressure that have been raised in the Rule 23 context are inapposite to FLSA collective actions. The potential for unfair settlement threats generated by class certification in an opt-out action is substantially reduced by the opt-in structure of FLSA collective actions, which limits participation.[142] Because the percentage of potential plaintiffs in any given FLSA collective action is far lower on average than in an opt-out class action,[143] the liability and settlement pressure faced by defendants is correspondingly reduced.

The common two-step approach to certification of FLSA collective actions also mitigates potential settlement pressure because at the first stage, when notice is typically authorized, the court provides only a *conditional* certification of the class.[144] In contrast to the certification of an opt-out class, defendants retain an opportunity to challenge the court's conditional certification of an FLSA collective action and may seek to decertify it at the second stage, at which point the court will more closely scrutinize whether the class members are similarly situated.[145] This provides an additional safety valve, alleviating whatever settlement pressure might exist as a consequence of the conditional certification.

Not only are the efficiency-driven concerns articulated by some courts about the potential for notice to stir up litigation or exert undue settlement pressure overstated, other considerations suggest that more expansive notice authorization may actually improve efficiency. The Seventh Circuit itself recognized this in *Bigger*, ultimately

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in that these problems can effectively be handled by courts through appropriate class action safeguards . . . .").

141 *See* Charles Silver, "*We're Scared to Death": Class Certification and Blackmail*, 78 N.Y.U. L. Rev. 1357, 1387–88 (2003) (observing that although settlements are ordinarily praised and "[n]either law nor conventional morality treats settlement demands in conventional lawsuits as blackmail attempts," judges have wrongly impugned settlement demands in the context of Rule 23 class actions).

142 *See* Nantiya Ruan, *What's Left to Remedy Wage Theft: How Arbitration Mandates That Bar Class Actions Impact Low-Wage Workers*, 2012 Mich. St. L. Rev. 1103, 1124 (observing that concerns about settlement pressure "are lessened, but perhaps not wholly alleviated by, the 216(b) procedural mechanism").

143 *See, e.g.*, Ellis v. Edward D. Jones & Co., 527 F. Supp. 2d 439, 445 (W.D. Pa. 2007) (quoting De Asencio v. Tyson Foods, Inc., 342 F.3d 301, 310 (3d Cir. 2003)) (observing that, "for similar causes of action, Rule 23 classes are much larger than the corresponding § 216(b) collective action groups; they may even be 'exponentially greater'").

144 *See* Genesis HealthCare Corp. v. Symczyk, 569 U.S. 66, 75 (2013) (noting that in contrast to certification of a class under Rule 23, "[t]he sole consequence of conditional certification [under the FLSA] is the sending of court-approved written notice to employees").

145 *See, e.g.*, Morgan v. Fam. Dollar Stores, 551 F.3d 1233, 1261 (11th Cir. 2008) (citing Anderson v. Cagle's Inc., 488 F.3d 945, 953 (11th Cir. 2007)) (noting that the second stage is triggered by the employer's motion for decertification, at which point the court "is less lenient, and the plaintiff bears a heavier burden").

disallowing the authorization notice despite the possibility that providing it to arbitration-bound plaintiffs would be more efficient.[146]

Sending notice to a wider pool of plaintiffs up front is more efficient because it does not require the parties or court to spend resources carefully culling the entire list of potential plaintiffs on the basis of arbitration agreements, as that list is naturally winnowed at the second stage to those who opted in.[147] The average FLSA collective action involves several thousand class members,[148] so making individualized determinations of the validity of arbitration agreements before sending notice could be immensely time-consuming. It is far easier to send notice to all potential plaintiffs, and then permit evidence concerning arbitration agreements only after other plaintiffs have opted in. Since opt-in rates to FLSA collective actions are so low,[149] this approach substantially reduces the workload of both parties and the court in evaluating arbitration evidence. In this vein, some courts have refused to follow the *JPMorgan*/*Bigger* approach, instead erring on the side of over-inclusivity, reasoning that it is more efficient to consolidate disputes to the extent possible and that "it would be counterproductive for courts to see piecemeal litigation occurring but to ignore that fact when determining whether collective certification is appropriate."[150]

On balance, the efficiency goal of FLSA notice is best achieved when courts cast a wide net and authorize notice to arbitration-bound plaintiffs.

B. Notice as a Remedial and Enforcement Tool

In addition to providing more efficient resolution of FLSA allegations, broader authorization of notice promotes stronger enforcement of the law, and thereby better achieves both efficiency in case management—one of the twin goals of notice articulated in

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146 *See* Bigger v. Facebook, Inc., 947 F.3d 1043, 1050 (7th Cir. 2020) ("Even if efficiency favors sending notice to individuals who entered arbitration agreements, efficiency cannot override the court's obligations to maintain neutrality and to shield against abuse of the collective-action device.").

147 *Id.* ("As a general matter, it may be efficient to first send notice to a group of people and then weed out those who opt in but are in fact ineligible to join.").

148 *See* Samuel Estreicher & Kristina Yost, *Measuring the Value of Class and Collective Action Employment Settlements: A Preliminary Assessment*, 6 J. Empirical Legal Stud. 768, 777 (2009) (finding FLSA collective actions to have a mean class size of 9,832).

149 *See, e.g.*, Alexander, *supra* note 18, at 466–67 (calculating a median opt-in rate of only fifteen percent).

150 *See* Headley v. Liberty Homecare Options, LLC, No. 20-CV-00579, 2022 U.S. Dist. LEXIS 107353, at *19–20 (D. Conn. June 16, 2022) ("The weight of jurisprudence within the Second Circuit, however, and more particularly in this district, favors erring on the side of being overinclusive when sending notice to potential plaintiffs.").

Hoffmann-La Roche—and Congress's intent in passing the FLSA. Courts have always understood the FLSA to be a "remedial and humanitarian" statute,[151] intended to combat the "evils and dangers resulting from wages too low to buy the bare necessities of life and from long hours of work injurious to health . . . ."[152] The statute itself declares its purpose to be "to correct and as rapidly as practicable to eliminate" poor labor conditions detrimental to workers' well-being.[153] The enforcement aim of FLSA collective actions, as amended by the Portal-to-Portal Act, reflects these aims by disincentivizing violations and helping workers secure relief.[154]

Given the broad remedial and enforcement goals of the FLSA, courts have given the statute a correspondingly broad reading.[155] In the context of authorizing notice to potential opt-in plaintiffs, this approach to statutory interpretation has historically led courts to favor permitting, rather than prohibiting, notice.[156] Courts have repeatedly taken this more expansive view in interpreting other FLSA provisions. For instance, numerous circuits have held that informal complaints to supervisors entitle employees to protection under the FLSA's antiretaliation provision, rejecting a narrow interpretation that would limit protection to employees who have filed formal proceedings.[157] Similarly, circuit courts have insisted on generous readings of the type

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151 Tenn. Coal, Iron & R.R. Co. v. Muscoda Local No. 123, 321 U.S. 590, 597 (1944). To the present day, courts continue to interpret the FLSA in light of its "humanitarian and remedial" aims. *See, e.g.*, Uronis v. Cabot Oil & Gas Corp., 49 F.4th 263, 270 (3d Cir. 2022) (quoting Brock v. Richardson, 812 F.2d 121, 123 (3d Cir. 1987)) (emphasizing that the FLSA is a "humanitarian and remedial" statute).

152 S. Rep. No. 75-884, at 4 (1937) (explaining the understanding of the Senate Committee on Education and Labor of the purpose of the FLSA, and recommending its adoption).

153 29 U.S.C. § 202(b).

154 *See* Swales v. KLLM Transp. Servs., LLC, 985 F.3d 430, 435 (5th Cir. 2021) (citing Bigger v. Facebook, Inc., 947 F.3d 1043, 1049 (7th Cir. 2020)) (describing the enforcement aim of collective actions under the Portal-to-Portal Act as aiming to "prevent[] violations and let[] employees pool resources when seeking relief").

155 *See, e.g.*, Donovan v. Janitorial Servs., Inc., 672 F.2d 528, 530 n.3 (5th Cir. 1982) (citing Mitchell v. C.S. Vollmer & Co., 349 U.S. 427 (1955)) (noting that its review was "guided by the firmly established principle of liberal construction of the FLSA").

156 *See* Braunstein v. E. Photographic Lab'ys, Inc., 600 F.2d 335, 336 (2d Cir. 1978) (authorizing notice and explaining that its holding "comports with the broad remedial purpose of the Act, which should be given a liberal construction").

157 *See, e.g.*, Lambert v. Ackerley, 180 F.3d 997, 1004 (9th Cir. 1999) ("We agree with the other circuits that have given a broad construction to the statutory [antiretaliation] provision . . . ."); Valerio v. Putnam Assocs., Inc., 173 F.3d 35, 43 (1st Cir. 1999) (rejecting a "narrow construction" of the antiretaliation provision and observing that such a reading could undermine the purpose of the FLSA); Love v. RE/MAX of Am., Inc., 738 F.2d 383, 387 (10th Cir. 1984) (finding the antiretaliation provision applies to unofficial complaints).

of employee activity covered by the FLSA's overtime provisions.[158] In early cases interpreting the statute, the Supreme Court, too, observed that the FLSA was to be given a "liberal construction."[159] In *Hoffmann-La Roche*, the Court emphasized that the very reason courts have discretion to provide notice is because the benefits conferred by the FLSA "depend on employees receiving accurate and timely notice concerning the pendency of the collective action, so that they can make informed decisions about whether to participate."[160]

The bias towards interpreting the statute broadly in other contexts should extend to the provision of notice to arbitration-bound employees. Though courts have historically provided expansive readings of other FLSA provisions, the statute's wage-and-hour protections continue to be "chronically underenforced,"[161] suggesting the rationale for such interpretations persists. One explanation for this underenforcement is the opt-in requirement.[162] Empirical data demonstrate the comparative ineffectiveness of opt-in actions in remedying violations for the maximal number of workers, with as few as fifteen percent opting in to the average FLSA collective action,[163] as compared to roughly ninety-nine percent average participation in opt-out actions.[164] Because receiving notice is a prerequisite to participation, courts can advance the goals of the statute with a broad reading of its enforcement aims that entails notifying potentially arbitration-bound employees.

In *JPMorgan* and its progeny, courts have gone the other direction, disregarding this precedent, reading the statute narrowly, and interpreting

158 *See, e.g.*, Mitchell v. Kroger Co., 248 F.2d 935, 938–39 (8th Cir. 1957) (giving the FLSA a "liberal construction" in finding travelling auditors were engaged in "commerce" covered by the Act).

159 *See* Mitchell v. C.W. Vollmer & Co., 349 U.S. 427, 429 (1955) (noting the FLSA "has been given a liberal construction").

160 Hoffmann-La Roche v. Sperling, 493 U.S. 165, 170 (1989).

161 *See* James W. Crooks, *Fair Labor Fraud: The Peculiar Interplay of Civil RICO and the Federal Minimum Wage Act*, 112 COLUM. L. REV. 2153, 2154 (2012) ("Despite the ubiquity of [FLSA collective actions], however, the FLSA's substantive guarantees are chronically underenforced."); *see also* Craig Becker & Paul Strauss, *Representing Low-Wage Workers in the Absence of a Class: The Peculiar Case of Section 16 of the Fair Labor Standards Act and the Underenforcement of Minimum Labor Standards*, 92 MINN. L. REV. 1317, 1318 (2008) (noting the "shocking rates of noncompliance" with the FLSA, especially in low-wage industries).

162 *See* Crooks, *supra* note 161, at 2154–55 (describing how the opt-in requirement suppresses enforcements of the FLSA).

163 *See* Brunsden, *supra* note 16, at 292–94 (finding an average opt-in rate of 15.71 percent); Alexander, *supra* note 18, at 466–67 (calculating a median opt-in rate of fifteen percent); Lampe & Rossman, *supra* note 16, at 313 (estimating opt-in rates to be between fifteen percent and thirty percent).

164 *See* WILLGING, HOOPER & NIEMIC, *supra* note 17, at 52 (finding a median opt-out rate of either 0.1 percent or 0.2 percent); Eisenberg & Miller, *supra* note 17, at 1532 ("[O]n average, less than 1 percent of class members opt-out").

the purpose of FLSA notice solely in terms of informing eligible plaintiffs of their ability to join a collective action.[165] A more generous reading of the statute would recognize that the notice requirement serves the dual enforcement purpose of *both* alerting potential plaintiffs *and* opening a dialogue among employees to ensure they are better informed of their rights.[166] Fidelity to the underlying enforcement aims of the FLSA and courts' typical "liberal construction" of its provisions favor this broader reading, which recognizes a secondary enforcement function of notice.

Plainly, a worker's awareness of the existence of a right is necessary to the vindication of that right. However, there is widespread confusion among workers about the extent of their rights—confusion that is particularly acute when it comes to employment issues.[167] Relationships between employers and employees are characterized by "severe information asymmetries," with workers often ignorant of relevant law.[168] In some areas, such as protections against unjust discharges in an at-will workplace, workers tend to systematically overestimate their rights.[169] In others, such as protections for engaging in concerted activity, workers underestimate their rights.[170]

Courts have acknowledged that one of the FLSA's "primary goals" is "to ensure 'that all workers are aware of their rights.'"[171] As

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165 *See* Recent Cases, *Collective Actions — Fair Labor Standards Act — Seventh Circuit Holds That Arbitration-Bound Employees Cannot Be Given Notice of Collective Action Proceeding Under the Fair Labor Standards Act*, 133 HARV. L. REV. 2601, 2607 (2020) (describing the possibility of both narrow and broad readings of the enforcement aims of the FLSA through commentary on Bigger v. Facebook, Inc., 947 F.3d 1043 (7th Cir. 2020)).

166 *See, e.g.*, Lijun Geng v. Shu Han Ju Rest. II Corp., No. 18-CV-12220, 2019 WL 4493429, at *20–21 (S.D.N.Y. Sept. 6, 2019) (noting that one purpose of the FLSA notice requirement is to facilitate conversation among employees about their rights under the statute).

167 *See* Ian H. Eliasoph, *Know Your (Lack of) Rights: Reexamining the Causes and Effects of Phantom Employment Rights*, 12 EMP. RTS. & EMP. POL'Y J. 197, 218 (2008) (observing that although individuals are capable in many contexts of distinguishing that which is fair from that which is legally mandated, employees persistently fail to make this distinction when it comes to employment rights).

168 Gali Racabi, *Abolish the Employer Prerogative, Unleash Work Law*, 43 BERKELEY J. EMP. & LAB. L. 79, 99 (2022).

169 *See* Pauline T. Kim, *Bargaining with Imperfect Information: A Study of Worker Perception of Legal Protection in an At-Will World*, 83 CORNELL L. REV. 105, 106, 133–35 (1997) (finding "overwhelming majorities" of workers had erroneous understandings of the grounds under which they could be discharged under an at-will contract).

170 *See generally* Amanda L. Ireland, *Notification of Employee Rights Under the National Labor Relations Act: A Turning Point for the National Labor Relations Board*, 13 NEV. L.J. 937, 948 (2013) (observing that given low rates of unionization "workers most likely underestimate their rights to any concerted activity or are completely ignorant that the law promotes and protects labor rights").

171 Lopez v. Nights of Cabiria, LLC, 96 F. Supp. 3d 170, 180 (S.D.N.Y. 2015) (quoting Guareno v. Vincent Perito, Inc., No. 14-CV-1635, 2014 U.S. Dist. LEXIS 144038, at *3 (S.D.N.Y. Sept. 26, 2014)).

some courts have recognized, notice serves not only to facilitate opt-in plaintiffs' ability to join a collective action, but also to raise awareness of potential violations.[172] By "start[ing] a conversation among employees" about a pending collective action, court-authorized notice better ensures employees are "meaningfully able to vindicate their statutory rights"[173] both with respect to the violation that is the subject of the notice and with respect to future violations. For instance, notice of an FLSA collective action typically provides information about the statute's antiretaliation provisions[174]—information that can help employees protect themselves against future violations. So, even if a given employee is precluded by an arbitration agreement from joining a collective action for which they receive notice, they will walk away better informed, advancing the aims of the statute.

Thus, the remedial and enforcement purposes of the FLSA are best served by sending notice to a wider pool of workers. This approach is most in keeping with courts' traditional broad construction of the statute and helps compensate for the structural ways in which both the opt-in mechanism and employer insistence on arbitration agreements serve to suppress enforcement.

C. Justiciability Concerns Raised by Notice Denials

Not only are the twin efficiency and enforcement aims of providing notice undermined by refusing to send notice to arbitration-bound plaintiffs, such refusal also raises constitutional concerns and risks violations of justiciability doctrine. Collective actions under the FLSA present justiciability issues that are distinct from those in class actions under Rule 23 due to the unique opt-in structure of FLSA collective actions. In a Rule 23 class action, the class of opt-out plaintiffs acquires an "independent legal status" once it is certified, whereas a conditional

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172 *See* Dickensheets v. Arc Marine, LLC, 440 F. Supp. 3d 670, 672–73 (S.D. Tex. 2020) (quoting Wade v. Furmanite Am., Inc., No. 3:17-CV-00169, 2018 U.S. Dist. LEXIS 75624, at *20 (S.D. Tex. May 4, 2018)) (reasoning that the purpose of notice is *both* to "inform" potential class members of the lawsuit, and to give them the chance to join the case).

173 See Lijun Geng v. Shu Han Ju Rest. II Corp., No. 18-CV-12220, 2019 WL 4493429, at *20 (S.D.N.Y. Sept. 6, 2019) (quoting Trinidad v. Pret A Manger (USA) Ltd., 962 F. Supp. 545, 564 (S.D.N.Y. 2013)) (noting that "a purpose of notice is to start a conversation among employees, so as to ensure that they are notified about potential violations of the FLSA and meaningfully able to vindicate their statutory rights").

174 For representative recent examples of anti-retaliation information included in an FLSA collective action notice, see Murphy v. Lab. Source, LLC, No. 19-CV-1929, 2022 U.S. Dist. LEXIS 22481, at *99 (D. Minn. Feb. 8, 2022); Shane Villarino v. Pacesetter Pers. Serv., No. 20-CV-60192, 2021 U.S. Dist. LEXIS 259396, at *16–17 (S.D. Fla. Apr. 20, 2021); Spack v. Trans World Ent. Corp., No. 17-CV-1334, 2019 U.S. Dist. LEXIS 6932, at *51 (N.D.N.Y. Jan. 15, 2019).

certification in an FLSA action doesn't create such a class or join additional parties.[175]

In analyzing potential justiciability issues, one must distinguish between those cases in which the named plaintiff is themselves subject to an arbitration agreement of the sort the employer alleges binds other employees and those cases in which the named plaintiff is not subject to such an agreement. Constitutional concerns are more likely to arise in the latter cases, emerging from the asymmetry between the circumstances of the named plaintiff and those of other opt-in plaintiffs.[176] Such was the case for most of the named plaintiffs in *JPMorgan*,[177] and the sole named plaintiff in *Bigger*.[178]

For a court to determine whether to exclude a potential plaintiff from receiving notice requires a preliminary decision as to whether an enforceable arbitration agreement exists. The *JPMorgan*/*Bigger* approach would have the parties at this first stage of certification submit evidence regarding purported arbitration agreements.[179] In circumstances like those in *JPMorgan* and *Bigger*, in which the named plaintiff is not arbitration-bound, this approach thrusts them into the inappropriate position of litigating on behalf of third parties the validity of agreements to which they themselves have no connection. Different courts have characterized the ways in which this arrangement may trouble justiciability doctrine in different ways, with some, for instance, describing the issue as one of standing, and others suggesting it could violate the bar on advisory opinions.[180]

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175 *See* Genesis HealthCare Corp. v. Symczyk, 569 U.S. 66, 75 (2013) (finding plaintiff's FLSA claim not justiciable); *see also* Sergio J. Campos, *Class Actions and Justiciability*, 66 Fla. L. Rev. 553, 561–62 (2014) (discussing the *Genesis* decision and the different applicability of justiciability doctrine to collective and class actions).

176 *See, e.g.*, Adami v. Cardo Windows, Inc., 299 F.R.D. 68, 79 n.6 (D.N.J. 2014) (basing the decision to send notice on the asymmetry of circumstances between named plaintiffs, who had not signed a waiver, and other potential opt-in plaintiffs, who had).

177 *See* Rivenbark v. JPMorgan Chase & Co., 340 F. Supp. 3d 619, 621 (S.D. Tex. 2018) (describing JPMorgan's contentions regarding the arbitration obligations of named plaintiffs).

178 *See* Bigger v. Facebook, Inc., 375 F. Supp. 3d 1007, 1012 (N.D. Ill. 2019) (noting that Bigger had not herself signed an arbitration agreement).

179 *See* Bigger v. Facebook, Inc., 947 F.3d 1043, 1050 (7th Cir. 2020) (holding that when there is an initial dispute regarding arbitration agreements "the court must permit the parties to submit additional evidence on the agreements' existence and validity"); *In re* JPMorgan Chase & Co., 916 F.3d 494, 503 (5th Cir. 2019) ("The court should permit submission of additional evidence, carefully limited to the disputed facts, at the conditional-certification stage.").

180 *Compare* Gonzalez v. Diamond Resorts Int'l Mktg., No. 18-cv-00979, 2020 WL 2114353, at *6–7 (D. Nev. May 1, 2020) (characterizing the *JPMorgan*/*Bigger* approach as creating problems of standing), *with* Brown v. Consol. Rest. Operations, Inc., No. 12-cv-00788, 2013 WL 12101000, at *3 (M.D. Tenn. Mar. 18, 2013) (refusing to rule on the enforceability of

The justiciability doctrine of standing centers on whether the litigants are the proper parties to a dispute.[181] Under the *JPMorgan*/*Bigger* approach, courts must permit limited evidence regarding the existence and validity of arbitration agreements with putative class members.[182] When the named plaintiff has no such agreement, this approach nevertheless obliges them to argue the validity of the alleged arbitration agreements on behalf of others who are not yet parties to the action. This raises the obvious concern that the named plaintiff, who has signed no arbitration agreement, is not the proper party to contest the arbitration agreements to which other potential plaintiffs may be subject.

Standing requires that parties assert their own rights, not those of third parties.[183] Consequently, federal courts have "historically been reluctant to recognize third-party standing,"[184] which is typically limited to cases in which the present party has a "'close' relationship" with the third party and where there is a hindrance to the third party's ability to protect their own interests,[185] though courts may apply these principles differentially depending on the type of litigant.[186]

Employers may have a case that named plaintiffs bear a sufficiently close relationship to their coworkers to justify the third-party standing

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an arbitration policy with respect to hypothetical plaintiffs on grounds that doing so would amount to an impermissible advisory opinion).

181 *See* Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 799 (2015) (citing Raines v. Byrd, 521 U.S. 811, 818 (1997)) (characterizing standing as "trained" on whether the plaintiff is the proper party to bring a particular suit). To qualify as a party in standing, a party must show an injury. *See e.g.*, Arizonans for Off. English v. Arizona, 520 U.S. 43, 64 (1997) (quoting Lujan v. Def. of Wildlife, 504 U.S. 555, 560 (1992)) ("To qualify as a party with standing to litigate, a person must show, first and foremost, 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent.'"). Additionally, the party must show that injury is both "fairly traceable" to the challenged action and "redressable by a favorable ruling." Clapper v. Amnesty Int'l USA, 568 U.S. 398, 409 (2013) (internal quotation marks omitted).

182 *See JPMorgan*, 916 F.3d at 503 (describing the obligation to take evidence and corresponding limits).

183 *See* NAACP v. Ala. *ex rel.* Patterson, 357 U.S. 449, 459 (1958) ("To limit the breadth of issues which must be dealt with in particular litigation, this Court has generally insisted that parties rely only on constitutional rights which are personal to themselves."); Hong Kong Supermarket v. Kizer, 830 F.2d 1078, 1081 (9th Cir. 1987) ("Prudential limitations require that parties assert their own rights rather than rely on the rights or interests of third parties.").

184 Darring v. Kincheloe, 783 F.2d 874, 877 (9th Cir. 1986) (citing Poe v. Ullman, 367 U.S. 497 (1961)).

185 *See, e.g.*, Rover Pipeline LLC v. Zwick, No. 22-3370, 2022 WL 17336502, at *4 (6th Cir. Nov. 30, 2022) (citing Kowalski v. Tesmer, 543 U.S. 125, 130 (2004)) (describing the hindrance prong).

186 *See* Curtis A. Bradley & Ernest A. Young, *Unpacking Third-Party Standing*, 131 YALE L.J. 1, 6 (2021) (distinguishing three classes of litigants for third-party standing purposes).

necessary for the *JPMorgan*/*Bigger* approach to function.[187] However, there is generally no obstacle to opt-in plaintiffs' ability to protect their interests. Rather, defendants insist on these third-party plaintiffs' capacity to advance their own interests in the separate, arbitral forum. The assumption that other potential opt-in plaintiffs are perfectly capable of doing so is baked into defendants' insistence on the validity of these arbitration agreements. Consequently, some courts have already recognized the potential for standing problems when named plaintiffs are obliged to litigate the enforceability of arbitration agreements to which they are not a party, as the *JPMorgan*/*Bigger* approach requires.[188]

In the context of Rule 23 class actions, courts have used similar reasoning to deny the named plaintiff an opportunity to contest arbitration agreements and class action waivers that defendants contend bind other class members, on grounds that the named plaintiff lacks standing to do so.[189] Courts may especially hesitate to determine the arbitration rights of potential class members prior to certification, because, at that point, those other class members aren't yet parties.[190] As one appellate court stated in evaluating a pre-certification motion

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187 *Compare* Kowalski v. Tesmer, 543 U.S. 125, 139 (2004) (Ginsburg, J., dissenting) (citing Carey v. Population Servs. Int'l, 431 U.S. 678, 683 (1977)) ("[T]he Court has found an adequate 'relation' between litigants alleging third-party standing and those whose rights they seek to assert when nothing more than a buyer-seller connection was at stake."), *with* Region 8 Forest Serv. Timber Purchasers Council v. Alcock, 993 F.2d 800, 810 (11th Cir. 1993) (finding there is typically no close relationship of the sort required for third-party standing in an employer/employee relationship).

188 *See* Romero v. Clean Harbors Surface Rentals USA, Inc., 404 F. Supp. 3d 529, 534 (D. Mass. 2019) (noting it is unclear if named plaintiff has standing to contest the validity of arbitration agreements with respect to other plaintiffs); Gonzalez v. Diamond Resorts Int'l Mktg., No. 18-cv-00979, 2020 WL 2114353, at *7 (D. Nev. May 1, 2020) ("The Fifth and Seventh Circuits' approach raises potential standing and due process concerns and creates practical difficulties.").

189 *See, e.g.*, Tan v. GrubHub, Inc., No. 15-cv-05128, 2016 WL 4721439, at *6 (N.D. Cal. July 19, 2016) (denying class certification and holding plaintiff "has no standing to challenge the applicability or enforceability of the arbitration and class action waiver provisions"); Conde v. Open Door Mktg., LLC, 223 F. Supp. 3d 949, 960 (N.D. Cal. 2017) (holding that because plaintiffs had not signed similar arbitration agreements to putative class members, they "therefore have no interest in the enforceability of the arbitration agreement itself, and lack the ability to challenge the agreements on behalf of individuals who did sign such agreements"); *see also* Jensen v. Cablevision Sys. Corp., 372 F. Supp. 3d 95, 123 (E.D.N.Y. 2019) ("The 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.").

190 *See* Emily Villano, *Arbitration Asymmetries in Class Actions*, 131 Yale L.J.F. 742, 750–51 (2021) (discussing courts' hesitance to adjudicate arbitration rights of putative class members prior to certification); *see also* Smith v. Bayer Corp., 564 U.S. 299, 313 (2011) (quoting Davlin v. Scardelletti, 536 U.S. 1, 16 n.1 (2002)) (describing as "surely erroneous" the contention that a nonnamed class member is a party to class-action litigation prior to certification).

to compel arbitration: "[T]he named plaintiffs lack standing to assert any rights the unnamed putative class members might have to preclude [the defendant] from moving to compel arbitration because the named plaintiffs have no cognizable stake in the outcome of that question."[191]

By the same token, the named plaintiffs in FLSA collective actions lack standing to contest arbitration agreements affecting other putative class members, because at the first stage of conditional certification, when this issue is adjudicated, those putative class members are likewise not parties.[192] Rather, potential opt-in plaintiffs "become parties to a collective action only by filing written consent with the court,"[193] which by definition can only happen after the court's authorization of notice.[194]

While some courts have reasonably characterized the enforcement of an arbitration agreement with respect to absent plaintiffs as a problem of standing,[195] others have invoked the constitutional prohibition on advisory opinions as a reason to refuse a defendant's request to deny notice to absent plaintiffs.[196] Because federal courts are barred from issuing advisory opinions that don't concern present, adverse litigants,[197] some courts have found it improper to rule on the enforceability of

191 Larsen v. Citibank FSB (*In re* Checking Account Overdraft Litig.), 780 F.3d 1031, 1039 (11th Cir. 2015).

192 *See* Genesis HealthCare Corp. v. Symczyk, 569 U.S. 66, 75 (2013) (describing how and when opt-in plaintiffs become parties).

193 *Id*.

194 *See, e.g.*, Baugh v. A. H. D. Houston, Inc., No. 20-cv-0291, 2020 WL 2771251, at *8 (S.D. Tex. May 28, 2020) (citing Beery v. Quest Diagnostics, Inc., No. 12-CV-00231, 2013 U.S. Dist. LEXIS 95096 (D.N.J. July 8, 2013)) (noting that opt-in plaintiffs do not become plaintiffs until after a court's conditional certification).

195 *See* Romero v. Clean Harbors Surface Rentals USA, Inc., 404 F. Supp. 3d 529, 533–34 (D. Mass. 2019) (describing potential standing issues with refusing to authorize notice to arbitration-bound plaintiffs); Gonzalez v. Diamond Resorts Int'l Mktg., No. 18-CV-00979, 2020 WL 2114353, at *7 (D. Nev. May 1, 2020) (same).

196 *See, e.g.*, Weckesser v. Knight Enters. S.E., LLC, No. 16-CV-02053, 2018 WL 4087931, at *3 (D.S.C. Aug. 27, 2018) (internal citation omitted) ("The potential opt-in plaintiffs allegedly subject to arbitration agreements have not yet joined this action, and the Court therefore has no ability to determine whether any potential arbitration agreement are enforceable against them."); Brown v. Consol. Rest. Operations, Inc., No. 12-CV-00788, 2013 WL 12101000, at *3 (M.D. Tenn. Mar. 18, 2013) ("Simply put, ruling on the enforceability of the arbitration policy as it relates to hypothetical plaintiffs would impermissibly require the Court to adjudicate the rights of parties not before it.").

197 Article III of the U.S. Constitution permits federal courts to hear "cases" and "controversies," a category which does not include advisory opinions regarding issues for which there is no actual dispute between adverse litigations before the court. *See* Muskrat v. United States, 219 U.S. 346, 356 (1911) ("[B]y the express terms of the Constitution, the exercise of the judicial power is limited to 'cases' and 'controversies.' Beyond this it does not extend, and unless it is asserted in a case or controversy within the meaning of the Constitution, the power to exercise it is nowhere conferred.").

agreements affecting hypothetical, nonparty plaintiffs at the first stage of conditional certification of an FLSA action.[198]

The potential for running afoul of the bar on advisory opinions is well understood by courts with respect to other aspects of FLSA collective actions, where courts have diligently avoided issuing improper advisory opinions. For instance, in analyzing the tolling of the statute of limitations for FLSA claims, district courts have repeatedly recognized their inability to rule on the tolling of claims of nonparties.[199]

Like the decision to equitably toll the statute of limitations, whether two parties have agreed to arbitrate a dispute is typically an issue for judicial determination.[200] The same concerns that have prompted courts to refuse to decide equitable tolling questions affecting absent potential plaintiffs should likewise restrain courts from deciding questions regarding the enforceability of arbitration agreements affecting absent potential plaintiffs.[201] Although courts typically have the authority to determine whether a valid arbitration agreement exists, that power may be limited to resolving the validity of agreements between those parties

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198 *See, e.g.*, Whittington v. Taco Bell of Am., Inc., No. 10-CV-01884, 2011 WL 1772401, at *6 (D. Colo. May 10, 2011) ("[T]he putative class members are not currently before the court . . . . As such, a declaration regarding the enforceability of the proffered arbitration agreement would constitute an advisory opinion.").

199 *See* United States v. Cook, 795 F.2d 987, 994 (Fed. Cir. 1986) (vacating a district court's order tolling the statute of limitations for parties not yet party to the litigation on grounds that "a federal court is without power to give advisory opinions" under principles derived from Article III); Tidd v. Adecco USA, Inc., No. 07-CV-11214, 2010 WL 996769, at *3 (D. Mass. Mar. 16, 2010) (internal citation omitted) (refusing plaintiffs' request for equitable tolling of the statute of limitations for potential class members as premature, holding that "[b]ecause these persons have not yet opted-in to the case, the plaintiffs are, in effect, asking for an advisory opinion, which the Court cannot issue"); Hawkins v. Alorica, Inc., No. 11-cv-00283, 2012 WL 5364434, at *4 (S.D. Ind. Oct. 30, 2012) (internal citation omitted) ("To decide the tolling issue for non-parties would be to issue an advisory opinion, which the Court is prohibited from doing."); Piekarski v. Amedisys Ill., LLC, No. 12-CV-7346, 2013 WL 2357536, at *3 (N.D. Ill. May 28, 2013) (internal citation omitted) (finding it would be premature and run afoul of Article III to equitably toll the statute of limitations for prospective opt-in plaintiffs).

200 *See* Howsam v. Dean Witter Reynolds, 537 U.S. 79, 83 (2002) (quoting AT&T Techs., Inc. v. Commc'ns Workers of Am., 475 U.S. 643, 649 (1986)) ("The question whether the parties have submitted a particular dispute to arbitration, i.e., the 'question of arbitrability,' is 'an issue for judicial determination [u]nless the parties clearly and unmistakably provide otherwise.'"(alteration in original)) .

201 The district court in *Bigger* observed that Facebook's request to exclude the potentially arbitration-bound plaintiffs could require the court to improperly issue an advisory opinion concerning those agreements, *see* Bigger v. Facebook, Inc., 375 F. Supp. 3d 1007, 1023 (N.D. Ill. 2019) (internal citation omitted) (finding Facebook's argument "premature" and noting federal courts may not issue advisory opinions), an observation that was not directly addressed by the Seventh Circuit.

represented before the court.[202] To extend that power to nonparties may seriously trouble the prohibition on advisory opinions to the extent it entails a court rendering a decision on the enforceability of an agreement entered into by a party not before the court.

If courts take the approach of the Fifth and Seventh Circuits, they will inevitably continue to encounter these sorts of justiciability problems. Refusing to notify a potential plaintiff of an FLSA collective action on the basis of a purported arbitration agreement necessarily obliges the court to evaluate the existence and enforceability of that agreement in their absence. To avoid creating these types of constitutional problems, courts should reject the *JPMorgan*/*Bigger* approach and defer consideration of arbitration agreements to the second stage of conditional certification, after opt-in plaintiffs receive notice and become parties properly able to dispute employers' assertions.

Conclusion

The approach advocated for in *JPMorgan* and its progeny has an intuitive appeal. After all, what is accomplished by informing a person of a lawsuit in which they may have no chance of participating? A great deal, as it turns out.

Ensuring notice goes to the widest conceivable pool of plaintiffs comports with traditional methods of interpreting FLSA and can help buoy participation rates in actions under the statute, advancing its remedial and enforcement goals. Such widespread notice also serves the secondary goal of better informing workers of the statute and its provisions, making remediation of future violations more likely. Sending notice to more, rather than fewer, potential plaintiffs also serves the efficiency goals of the statute by increasing the consolidation of claims in a single proceeding. The opt-in structure of FLSA collective actions amplifies this efficiency effect, since delaying consideration of arbitration agreements until the second stage of certification means courts will have a much smaller pool of plaintiffs to evaluate. The opt-in structure also reduces potential unfairness due to settlement pressure. Lastly, authorizing notice to potentially arbitration-bound plaintiffs avoids a host of thorny constitutional problems that arise under the *JPMorgan*/*Bigger* approach. By sending notice to more plaintiffs, courts

[202] The Supreme Court has stated that "we presume that parties have not authorized arbitrators to resolve certain 'gateway' questions, such as 'whether the *parties* have a valid arbitration agreement at all or whether a concededly binding arbitration clause applies to a certain type of controversy.'" Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1416–17 (2019) (emphasis added) (quoting Green Tree Fin. Corp. v. Bazzle, 539 U. S. 444, 452 (2003) (plurality opinion)).

can cleanly avoid the justiciability issue associated with determining the enforceability of arbitration agreements in the absence of the affected party.

A careful evaluation of these factors demonstrates that courts can best vindicate the aims of the FLSA, and its important goal of ensuring a basic standard of decency in working conditions, by rejecting the approach in the *JPMorgan* line of cases and ensuring a wider pool of workers are notified of an opportunity to remediate potential violations.