Case No. 21-2734

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

SANDRA BRUNO,
Individually and on behalf of all others similarly situated,

Plaintiff-Appellee,

v.

WELLS FARGO BANK, N.A,

Defendant-Appellant.

Appeal from the United States District Court for the
Western District of Pennsylvania, No. 2:19-cv-00587 (Hon. Robert J. Colville)

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

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The Chamber of Commerce of the United States of America

CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America ("Chamber") states that it is a non-profit, tax-exempt organization incorporated in the District of Columbia. The Chamber has no parent corporation, and no publicly held company has 10% or greater ownership in the Chamber.

This 22nd day of November, 2021.

Respectfully submitted,

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INTEREST OF THE *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. The Chamber represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. One of the Chamber's responsibilities is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. The Chamber regularly files *amicus* briefs in cases that raise issues of concern to the nation's business community, including cases involving the enforceability of arbitration agreements.

Because the simplicity, informality, and expedition of arbitration depend on the courts' consistent recognition and application of the principles underlying the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16, the Chamber and its members have a strong interest in this case. Indeed, the Chamber filed an *amicus* brief in a prior appeal presenting the same issue that is before this Court: whether a district court may order that notice be sent to potential members of a collective action who

[1] No counsel for a party authored this brief in whole or in part, and no person other than the Chamber, its members, or its counsel made any monetary contribution intended to fund the preparation or submission of this brief. *See* Fed. R. App. P. 29(a)(4)(E). All parties have consented to the filing of this brief.

have agreed to resolve their disputes by arbitration on an individual basis. *See Bigger v. Facebook, Inc.*, 947 F.3d 1043 (7th Cir. 2020).

INTRODUCTION AND SUMMARY OF ARGUMENT

Since 1925, there has been a clear and "emphatic federal policy" in favor of enforcing arbitration agreements. *KPMG LLP v. Cocchi*, 565 U.S. 18, 25 (2011) (quotation marks omitted). Congress passed the FAA to stop judicial hostility to arbitration from interfering with the ability of parties to contract for swift and informal resolution of disputes—in lieu of costly and prolonged litigation. Thousands of companies—including Wells Fargo and many Chamber members—have since entered into millions of arbitration agreements with their employees in expectation of realizing those benefits.

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

The district court here recognized that there was "absolutely no evidence that the [arbitration] agreements are unenforceable." JA21-22. But by including Wells Fargo employees who are parties to those agreements among the individuals to receive notice of the conditionally certified collective, the district court's order treats the arbitration agreements between Wells Fargo and its employees as presumptively unenforceable, in direct contravention of the FAA. The fact that Wells Fargo may *later* have an opportunity to exclude these employees from the collective does not cure this problem, because, in the meantime, Wells Fargo will suffer the delays, costs, and increased settlement pressure that arise from certifying an artificially large group of employees. Those are some of the precise harms that the arbitration agreements were designed to avoid.

There is no legal basis for the district court's disregard for the arbitration agreements between Wells Fargo and its employees—and its disregard for the FAA's mandate that those agreements be enforced. Nothing in the FLSA overrides the FAA and authorizes such an approach. Indeed, the two courts of appeals to have addressed this issue have held that "a court *may not* authorize notice to individuals" when "the court has been shown [that those individuals] entered . . . arbitration agreements waiving their right to join the action" and that "the court must give the defendant the opportunity to make that showing." *Bigger*, 947 F.3d at 1050

(emphasis added); *see also In re JPMorgan Chase & Co.*, 916 F.3d 494, 502-04 (5th Cir. 2019).

To affirm the district court's order would both create a circuit split on the issue and turn back the clock to a time when judicial skepticism of arbitration deprived parties of the benefits of arbitration agreements. This Court should reject that course, in accordance with Congress's command to "enforce, not override, the terms of the arbitration agreements." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1623 (2018).

ARGUMENT

I. Under The Federal Arbitration Act, Agreements To Arbitrate On An Individual Basis Are Fully Enforceable.

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

The FAA thus establishes a "liberal federal policy favoring arbitration agreements," *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983), and ensures that the "arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts," *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967). It does so primarily through Section 2, which provides emphatically and unambiguously that "a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

In accordance with Congress's legislative judgment, the Supreme Court has directed courts to "rigorously enforce arbitration agreements according to their terms." *American Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 233 (2013) (cleaned up). It has recognized that the FAA protects against "new devices and formulas that would achieve the same result today" as pre-FAA "devices and formulas declaring arbitration against public policy." *Epic*, 138 S. Ct. at 1623 (cleaned up). Accordingly, the Court has repeatedly rejected rules that would "frustrate[]" arbitration's objective of achieving "streamlined proceedings and expeditious results." *Preston v. Ferrer*, 552 U.S. 346, 357-58 (2008).

Perhaps most pertinent here, the Supreme Court has expressly held that collective and class-wide proceedings are inherently at odds with a "fundamental attribute of arbitration"—its "individualized and informal nature." *Epic*, 138 S. Ct. at 1622-23. Such proceedings are by definition not individualized, and are "slower, more costly, and more likely to generate procedural morass than final judgment." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 348 (2011). Accordingly, the Court has repeatedly rejected efforts of "part[ies] in arbitration to demand classwide proceedings," *Epic*, 138 S. Ct. at 1623, or to "invalidate arbitration agreements on the ground that they do not permit class arbitration" or class proceedings in court, *Italian Colors*, 570 U.S. at 232.

The Court has applied the same principles in the collective action context, holding that the National Labor Relations Act does not displace the FAA and justify a refusal to enforce employment arbitration agreements. *Epic*, 138 S. Ct. at 1632. As the Court put it, the FAA "seems to protect pretty absolutely" arbitration agreements that require "individualized rather than class or collective action procedures." *Id.* at 1621.

II. The District Court's Decision Violates The Federal Arbitration Act.

The district court's order flouts decades of Supreme Court precedent interpreting and applying the FAA. Instead of giving effect to the arbitration agreements entered into by Wells Fargo and thousands of its employees, the district

court ordered that notice—and an opportunity to opt-in to the collective action—be given to employees who agreed to individualized arbitration. In so doing, the district court contravened the FAA's mandate to enforce valid arbitration agreements and deprived Wells Fargo of the benefits of its arbitration agreements.

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

The district court addressed whether to conditionally certify a collective and authorize notice to employees "similarly situated" to the plaintiff for purposes of a putative FLSA collective action—where Wells Fargo presented evidence that half of the putative collective had agreed to arbitrate any employment disputes on an individual basis. The FLSA is silent as to how a collective action under its terms should be certified and as to whether and how notice of the action should be given. In *Hoffman-La Roche v. Sperling*, 493 U.S. 165 (1989), the Supreme Court held that district courts have discretion to facilitate notice to "potential plaintiffs," but did not elaborate on who "potential plaintiffs" might be and what procedure to use.

The court below followed a judicially-created, two-step certification process for a putative FLSA collective action. JA3-5.[2] Under the first step of that process,

[2] Although many courts, including courts in the Third Circuit, follow the two-step process, the FLSA does not require them to do so. *See Halle v. W. Penn Allegheny Health Sys. Inc.*, 842 F.3d 215, 224 (3d Cir. 2016) (explaining that "there are no formal procedures that mandate how to accomplish" the task of determining "whether those who purport to join the collective action are 'similarly situated' as intended by the statute'"); *Hipp v. Liberty Nat'l Life Ins. Co.*, 252 F.3d 1208, 1219

the court conditionally certifies the collective if the plaintiff makes a "'modest factual showing'" that permits a court to determine "whether similarly situated plaintiffs exist." JA4 (quoting *Halle*, 842 F.3d at 224). Courts making this determination "'typically rely on the pleadings and affidavits of the parties to determine the suitability of conditional certification.'" *Id.* (quoting *Rood v. R&R Express, Inc.*, 2019 WL 5422945, at *2 (W.D. Pa. Oct. 23, 2019)). Notice is sent to the members of the conditionally certified collective, who then "become parties to [the] collective action" simply by filing written consent with the court. *Genesis Healthcare Corp.*, 569 U.S. at 75; *see also* 29 U.S.C. § 216(b).

After notice is sent, the parties engage in group-wide discovery before the court conducts the second step of the certification process, in which it "make[s] a determination on a case-by-case basis as to whether the named plaintiffs have satisfied [their] burden" to show that the opt-in plaintiffs are similarly situated "by a preponderance of the evidence." *Halle*, 842 F.3d at 226. If this "final certification" is granted, the action proceeds to trial on a representative basis. *Id.*

(11th Cir. 2001) (similar). The Fifth Circuit recently rejected use of a loose step-one "conditional certification" test that fails to consider, "at the outset of the case, what facts and legal considerations will be material to determining whether a group of 'employees' is 'similarly situated.'" *Swales v. KLLM Transp. Servs., LLC*, 985 F.3d 430, 434, 441 (5th Cir. 2021) (holding that "a district court must rigorously scrutinize the realm of 'similarly situated' workers, and must do so from the outset of the case, not after a lenient, step-one 'conditional certification'").

The district court here conditionally certified a putative collective group and ordered that notice be sent to the defined collective—despite recognizing that the putative collective includes thousands of employees who have agreed to arbitrate their claims individually. The court's order permits those employees—who have *waived* the ability to be part of a collective action—to nonetheless opt-in to the collective action simply by filing a consent with the court. Filings of such consents, effectively encouraged by the district court's order, would breach those employees' arbitration agreements.

The district court took this approach despite the fact that "Wells Fargo submitted to the Court the arbitration agreement applicable to team members, as well as the employee handbook, noting that it had been upheld as enforceable in several other courts." JA21. It did so despite the additional fact that "Plaintiffs [did] not seriously contest the validity of [those] arbitration agreements." JA21.[3] As the district court admitted in certifying its order for appeal, it also did so despite the fact that "there is absolutely no evidence that the agreements are unenforceable." JA22.

Although it had no reason to question the enforceability of the arbitration agreements, the district court reasoned that it was "premature" to address the issue

[3] To the contrary, plaintiffs' counsel filed two arbitration demands on behalf of plaintiffs who had previously joined the case as opt-in plaintiffs but later withdrew after Wells Fargo pointed out that they had agreed to arbitrate. *See* JA21.

and stated that it had "no ability to determine whether certain arbitration agreements are enforceable against potential opt-in plaintiffs" prior to ordering notice. JA13. The district court's refusal to engage with the enforceability of employees' arbitration agreements at the conditional certification stage in effect treats those agreements as presumptively *unenforceable*, allowing employees who have agreed to individual arbitration to nonetheless receive notice and, at least temporarily, join the collective action in court.

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

Courts should not be permitted to abrogate that protection through inaction, as the district court did here. As we next explain, doing so has significant negative consequences for employers and employees.

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

Requiring that notice, and an opportunity to opt-in to the collective action, be given to employees who have agreed to individually arbitrate their claims subjects employers to the very costs and procedures they bargained to avoid, thereby vitiating the benefits of arbitration Congress intended to protect. Even though the order leaves open the possibility that Wells Fargo could subsequently move to decertify or exclude from the collective action those employees who are parties to arbitration agreements, that opportunity will not arise until later in the proceedings. In the meantime, employees will be led to believe, incorrectly, that the collective action, rather than arbitration, is the available route for vindicating their rights—channeling their claims into a procedural mechanism that "interfere[s] with fundamental attributes of arbitration" and imposes "new risks and costs for both sides." *Epic*, 138 S. Ct. at 1623; *see also Bigger*, 947 F.3d at 1049-50 (agreeing with the defendant that sending notice to employees subject to arbitration agreements would "misinform [those] recipients—by indicating that they may join the action when, in truth, they may not").

1. The District Court's Approach Would Make It Slower And More Costly To Move Parties Into Arbitration.

The district court's notice-first, analyze-arbitration-later approach "hinder[s] the speedy resolution of the controversy." *Concepcion*, 563 U.S. at 346. The FAA

seeks "to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible." *Moses H. Cone*, 460 U.S. at 22. The district court's order, however, does the opposite—it essentially invites parties to an arbitrable dispute *into* court. Wells Fargo will be required to give notice to employees who agreed to individual arbitration. It will then have to afford the employees time and an opportunity to opt-in to the collective action despite the employees' express contractual agreement to the contrary. Only after that expense and delay will Wells Fargo be permitted to litigate the enforceability of the arbitration agreements, at the cost of further delay and expense to the parties. As the Seventh Circuit put it, sending notice to individuals who agreed to arbitrate can be "*in*efficient," because "the notice may serve only to prompt futile attempts at joinder or the assertion of claims outside the collective proceeding." *Bigger*, 947 F.3d at 1050.

What's more, the costs and delays associated with litigating the enforcement of arbitration agreements will be far greater than what the employer would have faced if the notice had not been sent to employees who are bound by arbitration agreements. That is because the district court's order does not just permit employees who have agreed to arbitrate to breach their contracts and attempt to become parties to the collective action, it effectively *encourages* them to do so.

"[A]lerting those who cannot ultimately participate in the collective 'merely stirs up litigation,' which is what *Hoffman-La Roche* flatly proscribes." *In re JPMorgan Chase,* 916 F.3d at 502. Courts have repeatedly recognized, in both the collective and class action context, that sending notice to an overbroad group wastes resources and places unnecessary burden on the defendant. *See, e.g.*, *Hudgins v. Total Quality Logistics, LLC*, 2017 WL 514191, at *4 (N.D. Ill. Feb. 8, 2017) (sending notice to an overbroad group "would constitute a waste of resources and would risk misleading those individuals into thinking they will be able to join the lawsuit"); *DeHoyos v. Allstate Crop.*, 240 F.R.D. 269, 297 (W.D. Tex. 2007) (noting that "sending individual direct notice to millions of policyholders who are not class members would likely result in unneeded confusion on the part of the non-class member recipients"); *Smith v. Sovereign Bancorp, Inc.*, 2003 WL 22701017, at *2 (E.D. Pa. Nov. 13, 2003) (sending overbroad notice "places a substantial and expensive burden on the defendant" to notify persons "who would clearly be established as outside the class if plaintiff were to conduct even minimal class-related discovery"); *Marcarz v. Transworld Sys., Inc.*, 201 F.R.D. 54, 64 (D. Conn. 2001) ("[S]ending notice to the admittedly over-inclusive group here would 'most likely confuse the recipients and encourage [responses] by non-class members'"); *In re Domestic Air Transp. Antitrust Litig.*, 141 F.R.D. 534, 539-46 (N.D. Ga. 1992)

(sending notice to group that includes non-class members is inappropriate because it likely "confuse[s] the recipients and encourage[s] claims by non-class members").

Here, employees who otherwise would have honored their arbitration agreements may be confused by a court-authorized notice into believing that they can, and should, join the collective action. The employer will then be required to expend additional resources and time to compel arbitration of every one of those employees' claims (or to wait and decertify the action after expensive discovery, *see* pages 15-16 *infra*). And the employees will waste their time on a lawsuit in which they cannot participate. Their ability to pursue their own claims in arbitration will also have been delayed.

The increased costs and delays occasioned by an overbroad notice are significant. Wells Fargo demonstrated here that *half* of the employees who are covered by the conditionally certified collective, or nearly 4,000 individuals, agreed to individual arbitration. It is likely that Wells Fargo will be forced to wait many months, and expend significant resources, before it is able to complete litigation of the enforceability of arbitration agreements with potentially thousands of opt-in plaintiffs. That is true even if the court ultimately excludes from the collective action the employees who are bound by arbitration agreements for the very same reason that they should never have been invited to join in the first place. At that point, both

the employer and employee will have lost one of the key benefits of arbitration: quick resolution of the employee's claims.

2. The District Court's Approach Would Subject Employers To Costs And Procedures That Arbitration Is Intended To Avoid.

Requiring employers to give notice to employees who agreed to individual arbitration subjects the employer to another set of costs that arbitration is intended to avoid. Employers will have to engage in group discovery that is more costly because it encompasses employees with arbitration agreements.

Judicially-supervised discovery under court rules—rules that would not apply under the more informal procedures that govern arbitration—could delay arbitration for these employees more than a year. *See, e.g.*, *Devries v. Morgan Stanley & Co. LLC*, 2015 WL 11237668, at *2 (S.D. Fla. July 8, 2015) (two-and-a-half years of discovery); *Prescott v. Prudential Ins. Co.*, 729 F. Supp. 2d 357, 366 (D. Me. 2010) (five-and-a-half months of discovery); *Sarviss v. Gen. Dynamics Info. Tech., Inc.*, 663 F. Supp. 2d 883, 904 (C.D. Cal. 2009) (over a year of discovery).

In addition, both the employer and its employees will be subject to more formal (and therefore slower) dispute resolution procedures in judicially-supervised discovery. For example, parties in arbitration may often resolve discovery disputes through telephonic hearings or discussions and letter briefs, as opposed to formally noticed motions with accompanying legal briefs as is typically required in court.

See, e.g., JAMS, Arbitration Discovery Protocols (2010), https://www.jamsadr.com/arbitration-discovery-protocols/. The formal procedures in litigation are generally more costly than those in arbitration. Moreover, one of the long-recognized benefits of arbitration is that it allows for more efficient discovery than the comparatively free-ranging discovery available under the Federal Rules of Civil Procedure. Indeed, recent empirical studies in the consumer and employment arbitration context confirm that claims in arbitration are resolved more quickly than claims in court.[4] Employers lose the benefit of these streamlined, quicker procedures when courts permit employees who are bound by arbitration agreements to opt-in to collective actions.

3. The District Court's Approach Would Put Undue Pressure On Employers To Settle.

The notice ordered by the district court also increases the pressure on employers to settle questionable claims. As noted above, including among the

[4] *See* Nam D. Pham & Mary Donovan, *Fairer, Faster, Better II: An Empirical Assessment of Consumer Arbitration* 11, NDP Analytics (Nov. 2020), https://instituteforlegalreform.com/wp-content/uploads/2020/11/Final-Consumer-Arbitration-Paper.pdf (arbitrations in which the consumer-plaintiff prevailed averaged 299 days, while cases in court required an average of 429 days); Nam D. Pham & Mary Donovan, *Fairer, Faster, Better: An Empirical Assessment of Employment Arbitration* 11-12, NDP Analytics (May 2019), https://instituteforlegalreform.com/wp-content/uploads/media/Empirical-Assessment-Employment-Arbitration.pdf (reporting an average of 569 days for arbitrations in which the employee-plaintiff prevailed, compared to 665 days for cases in court).

recipients of the notice employees who are not entitled to join the collective action in this case approximately doubles the size of the group of recipients; in other cases, the effect can be much greater. The notice requirement thus can substantially ratchet up the stakes for companies like Wells Fargo, for two reasons.

First, the cost of proceeding to litigate the claims is multiplied. "Too much leniency at the notice stage can lead to a frivolous fishing expedition conducted by the plaintiff at the employer's expense and can create great settlement pressure early in the case." *Lang v. DirecTV, Inc.*, 2011 WL 6934607, at *6 (E.D. La. Dec. 30, 2011) (quotation marks omitted); *see also* Rachel K. Alexander, *Federal Tails and State Puppy Dogs: Preempting Parallel State Wage Claims to Preserve the Integrity of Federal Group Wage Actions*, 58 Am. U. L. Rev. 515, 541 (2009) (observing that authorizing notice of collective action "can create settlement pressure early in the action . . . because it signals the potential expansion of the case and the need for significant and expensive class-wide discovery").

Second, the employer's potential exposure is unjustifiably multiplied. "Generally speaking, expanding the litigation with additional plaintiffs increases pressure to settle." *Bigger*, 947 F.3d at 1050. Because the damages potentially owed might be aggregated and decided at once in a collective action, even the "small probability" of an adverse judgment puts "intense pressure to settle" on companies. *In re Rhone-Poulenc Rorer*, 51 F.3d 1293, 1298 (7th Cir. 1995); *see also Epic*, 138

S. Ct. at 1632 ("It's also well known that [class and collective actions] can unfairly place pressure on the defendant to settle even unmeritorious claims.") (cleaned up). Thus, as the Seventh Circuit has explained in this context, requiring a defendant to send notice to employees who have agreed to arbitrate unfairly inflates settlement pressure, facilitates abuse of the collective action device, and inappropriately "place[s] a judicial thumb on the plaintiff's side of the case." *Bigger*, 947 F.3d at 1050.

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

The district court's order relied on its interpretation of the judicially-created, two-step certification process for FLSA collective actions. But because the district court's order requiring notice to persons subject to individual arbitration violates the FAA, it must be reversed. The FLSA does not contain a "clear congressional demand" overriding the FAA, or otherwise require a different result. Further, application of the two-step certification process does not require courts to disregard the existence of arbitration agreements at step one.

A. The FLSA Contains No Congressional Command Overriding The FAA.

The Supreme Court has made clear that only a federal statute containing a "contrary congressional command" can override the FAA's mandate that arbitration agreements be enforced according to their terms. *CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 98, 103 (2012) (quotation marks omitted). Congress's

intent to do so must be "clear and manifest." *Epic*, 138 S. Ct. at 1624. Indeed, "[i]n every case the Supreme Court has considered involving a statutory right that does not explicitly preclude arbitration, it has upheld the application of the FAA." *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 357 n.8 (5th Cir. 2013) (quotation marks omitted).

Because there is no contrary Congressional command in the FLSA, the FAA's pro-arbitration policy must prevail. The FLSA does not explicitly preclude arbitration; it does not say anything about arbitration. The statute merely provides that an employee may maintain an action against an employer on behalf of himself "and other employees similarly situated." 29 U.S.C. § 216(b). For that reason, courts have held time and again that there is no conflict between the FLSA and the FAA because the FLSA does not reflect a command by Congress to disregard arbitration. *See, e.g.*, *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1052-55 (8th Cir. 2013) (collecting cases); *see also Vilches v. The Travelers Cos., Inc.*, 413 Fed. App'x 487 (3rd Cir. 2011) (affirming order compelling arbitration of FLSA claims). As the Supreme Court observed in *Epic*, the employees did "not suggest that the FLSA displaces the [FAA], presumably because the Court has held that an identical collective action scheme [in the ADEA] does not prohibit individualized arbitration proceedings." 138 S. Ct. at 1617 (citing *Gilmer*, 500 U.S. at 32).

The district court's concern that addressing the enforceability of arbitration agreements at the conditional certification stage would "cause further delays in the FLSA notice process," JA13, or otherwise impede the two-step certification process, does not justify its refusal to consider the issue. *Congress* has not mandated that courts use the two-step certification process, and *Congress* has not mandated that courts disregard the existence of arbitration agreements at the first step of that process. Rather, the FLSA is silent as to when and how a court should determine whether employees are "similarly situated." *Halle*, 842 F.3d at 224. In the face of such silence, any inconsistency between the judicially-created two-step certification procedure and the FAA must be resolved in favor of honoring the FAA's dictates. Here, that means not inviting individuals who have waived their right to participate in collective actions to opt-in to such actions.[5]

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

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

Even if the two-step procedure followed by the district court were mandated by the FLSA, there is no inherent conflict between that procedure and the FAA. After all, multiple courts following the two-step procedure *have* taken account of the existence of arbitration agreements between a defendant employer and putative collective members at the conditional certification stage—and held that notice of a putative collective action cannot be sent to employees who have entered into arbitration agreements. *See, e.g.*, *Bigger*, 947 F.3d at 150; *In re JPMorgan*, 916 F.3d at 500-03; *York v. Velox Exp., Inc.*, 524 F. Supp. 3d 679, 688-89 (W.D. Ky. 2021); *Fox v. TTEC Servs. Corp.*, 2021 WL 1096332, at *5 (E.D. Ark. Mar. 22, 2021); *Hudgins*, 2017 WL 514191, at *4; *see also Kuchar v. Saber Healthcare Holdings, LLC*, 2021 WL 4290861, at *1 (N.D. Ohio Sept. 21, 2021) (following the "emerging trend" and holding that plaintiff "should not send notice to employees with binding arbitration agreements").

The district court here effectively presumed that the arbitration agreements were unenforceable because it believed it was "premature" to address their enforceability at the conditional certification stage. JA13. But it is not premature to consider whether proposed members of the collective are bound to arbitrate, as that determination does not require assessing the merits of any of the claims in the dispute. *See Hoffman-LaRoche*, 493 U.S. at 174 (counseling that, when facilitating

notice to potential plaintiffs, courts must "avoid even the appearance of judicial endorsement of the *merits of the action*") (emphasis added). The question whether proposed members are bound to arbitrate does not go to the merits of the action; a court thus expresses no "judicial endorsement of the merits of the action" by addressing the collateral issue of the existence of arbitration agreements governing the claims of proposed members of the collective.

Moreover, a court need not even make a determination about the validity of each arbitration agreement at this stage. The court can resolve the dispute by recognizing that individuals who have signed arbitration agreements are not "similarly situated" to those who have not for purposes of proposed membership in a collective action.

Many courts have found in the Rule 23 class action context that a plaintiff who is not subject to an arbitration agreement "stands in a different position legally than many class members" who *are* parties to such agreements based on the mere existence of those agreements. *Renton v. Kaiser Found. Health Plan, Inc.*, 2001 WL 1218773, at *7 (W.D. Wash. Sept. 24, 2001); *see, e.g.*, *Avilez v. Pinkerton Gov't Servs., Inc.*, 596 F. App'x 579, 579-80 (9th Cir. 2015) (vacating certification of class that included employees who signed class action waivers); *Farr v. Acima Credit LLC*, 2021 WL 2826709, at *7 (N.D. Cal. July 7, 2021) (explaining that courts appropriately deny class certification "based upon the existence of an arbitration

agreement and class action waiver applicable to unnamed class members but not the proposed class representative"); *Jensen v. Cablevision Sys. Corp.*, 372 F. Supp. 3d 95, 123-24 (E.D.N.Y. 2019) ("At class certification, the question for this Court to decide is not the validity of the agreement but whether the presence of class members that are potentially subject to the provision satisfies the requirements of Rule 23," and holding that it does not); *Tan v. Grubhub, Inc.*, 2016 WL 4721439, at *3 (N.D. Cal. July 19, 2016) (holding that plaintiff, who opted out of class action waiver provision, could not satisfy typicality or adequacy requirement because he "is in a position unique from all but one other [putative class members] . . . who are potentially bound by the arbitration and class action waiver provisions"); *Quinlan v. Macy's Corporate Servs., Inc.*, 2013 WL 11091572, at *3 (C.D. Cal. Aug. 22, 2013) (because plaintiff was not subject to arbitration but most of the employees who he sought to represent were, plaintiff could not satisfy Rule 23 typicality requirement even though "the enforceability and effect of the arbitration clause are not presently before the court").

The fact that unnamed putative class members are parties to arbitration agreements raises separate defenses and issues that defeat typicality and adequacy under Rule 23. *Tan*, 2016 WL 4721439, at *3. Accordingly, courts have found that "[t]he mere potential that the relevant arbitration provision is valid is sufficient to preclude a named plaintiff who opted out of the provision from representing a class

largely made up of individuals that may be subject to the agreement." *Jensen*, 372 F. Supp. 3d at 123.

There is no reason that the conditional certification of an FLSA collective should be treated differently from the certification of a Rule 23 class on this point. In either context, individuals who have agreed to resolve their disputes by individual arbitration are not similarly situated to those who have not.

If anything, the refusal to enforce arbitration agreements in the FLSA context is even worse, because FLSA collective actions were intended to be *narrower* than Rule 23 class actions. Congress specifically made FLSA collective actions opt-in, as opposed to opt-out like most Rule 23 class actions, "to prevent large group actions, with their vast allegations of liability, from being brought on behalf of employees who had no real involvement in, or knowledge of, the lawsuit." *Cameron-Grant v. Maxim Healthcare Servs., Inc.*, 347 F.3d 1240, 1248 (11th Cir. 2003) (cleaned up); *see also Hoffman-LaRoche*, 493 U.S. at 173 (opt-in requirement of FLSA "was for the purpose of limiting private FLSA plaintiffs to employees who asserted claims in their own right and freeing employers of the burden of representative actions"). Thus, permitting an unjustifiably broad collective action to move forward is inconsistent with the design of the FLSA.

CONCLUSION

This Court should reverse the portion of the district court's Conditional Certification Order authorizing notice to individuals subject to arbitration agreements.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and Fed. R. App. P. 32(a)(7)(B) because it contains 5,714 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in size 14 Times New Roman.

I further certify that the brief complies with Third Circuit Rule 31.1(c) because the text of the electronic copy of this brief filed with the Court is identical in all respects to the text in the paper documents, and a virus check was performed on the electronic version using Symantec End Point Protection and the document is free of viruses.

Dated: November 22, 2021

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CERTIFICATE OF BAR MEMBERSHIP

I hereby certify pursuant to Third Circuit Rule 28.3 that I was admitted to the Bar of the United States Court of Appeals for the Third Circuit on August 11, 2003, and remain a member in good standing of the Bar of this Court.

Dated: November 22, 2021

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CERTIFICATE OF SERVICE

I certify that on November 22, 2021, I filed the foregoing via the CM/ECF system and the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

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