No. 19-1944

IN THE

# United States Court of Appeals for the Seventh Circuit

SUSIE BIGGER, individually and on behalf of other similarly situated individuals,

*Plaintiff-Appellee,*

v.

FACEBOOK INC.,

*Defendant-Appellant*.

On Appeal from the United States District Court
For the Northern District of Illinois
Case No. 17-cv-7753

## BRIEF OF NATIONAL EMPLOYMENT LAW PROJECT AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLEE

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## DISCLOSURE STATEMENT

Undersigned counsel furnishes the following list in compliance with Circuit Rule 26.1:

1. The full name of every party that the attorney represents in the case:

National Employment Law Project

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

Lichten & Liss-Riordan, P.C

3. If the party or amicus is a corporation, i) Identify all its parents corporations, if any; and ii) List any publicly held company that owns 10% or more of the party's or amicus' stock:

National Employment Law Project is not a corporation

/s/ Shannon Liss-Riordan
Shannon Liss-Riordan

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## INTEREST OF AMICUS CURIAE

The National Employment Law Project (NELP) is a non-profit legal organization with 50 years of experience advocating for the employment and labor rights of low-wage and unemployed workers.[1] NELP seeks to ensure that all employees, and especially the most vulnerable ones, receive the full protection of labor laws, and that employers are not rewarded for skirting those basic rights. NELP has litigated directly and participated as amicus in numerous cases and has provided Congressional testimony addressing the Fair Labor Standards Act and the issue of forced arbitration agreements.

## PRELIMINARY STATEMENT

The U.S. Supreme Court has long recognized that the Fair Labor Standards Act ("FLSA") is "remedial and humanitarian in purpose" and that the statute does not "deal[] with mere chattels or articles of trade but with the rights of those who toil, of those who sacrifice a full measure of their freedom and talents to the use and profit of others. Those are the rights that Congress has specially legislated to protect. Such a statute must not be interpreted or applied in a narrow, grudging manner." Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123, 321 U.S. 590, 597 (1944). In light of its protective purpose, the Supreme Court has directed that, the FLSA must be "construed liberally to apply to the furthest reaches consistent with congressional direction." Mitchell v. Lublin, McGaughy & Assoc., 358 U.S. 207

[1] *Amicus curiae* files this brief with the consent of all parties. *Amicus curiae* thus files this brief without a motion for leave to file, pursuant to Fed. R. App. P. 29(a), which permits timely filing without leave of the Court if all parties consent to the filing of the brief.

(1959). And in Hoffman-La Roche Inc. v. Sperling, 493 U.S. 165, 169-170 (1989), the Supreme Court authorized district courts to facilitate notice in an FLSA case "from the named plaintiffs to the potential members of the class on whose behalf the collective action has been brought." Id. Such notice is intended to maximize enforcement of the FLSA by ensuring workers are aware of their rights.

In the ensuing decades, in light of the statute's broad remedial purpose, district courts nationwide have interpreted this authority as permitting notice to any workers who may have rights affected by the lawsuit, even if they may not ultimately be entitled to recover in the case. As discussed *infra*, for example, courts routinely order notice to potential plaintiffs who may ultimately be barred from recovery by the statute of limitations or who may choose to pursue their rights separate from the collective action.

Consistent with this interpretation of the goals of the FLSA and Hoffman-La Roche – namely, not keeping workers in the dark about their wage rights – the majority of courts have ordered that FLSA notice should be issued to all potential plaintiffs, even if some have signed arbitration agreements. Courts find that such notice is appropriate both in light of the minimal showing FLSA plaintiffs must make in order to obtain issuance of notice and the fact that, at the time of issuance of such notice, courts have not yet adjudicated the enforceability of the arbitration agreement and thus could ultimately invalidate it. It is consistent with the foundational remedial principles of the FLSA to issue notice even to employees who have signed an arbitration agreement. Doing otherwise flies in the face of the

statute's goals, as workers would be forever unaware of their rights against their employer. Even if the claims ultimately must proceed in arbitration, defendants such as Facebook should not be permitted to use arbitration clauses to keep workers in the dark about their rights.

The district court should be affirmed in this case, as there is nothing in recent Supreme Court jurisprudence that provides that notice cannot be issued to all workers, even those who signed an arbitration agreement. Denying district courts the ability to issue such notice deprives the district courts of their authority to issue notice to others who are similarly situated and may want to press the same claim, even if ultimately they must do so in another (arbitral) forum.

## ARGUMENT

### I. The Fair Labor Standards Act Requires Only a Modest Showing in Order for Notice to Issue, and Courts Routinely Order Notice That May Ultimately Be Overinclusive

#### A. All That Is Required for Notice to Be Issued is a Minimal Showing That Potential Plaintiffs Were Victims of a Common Illegal Policy

Courts in this Circuit (and others) typically follow a two-step conditional certification process in FLSA cases. See Smallwood v. Illinois Bell Tel. Co., 710 F. Supp. 2d 746, 750 (N.D. Ill. 2010) ("While the Seventh Circuit has yet to address how a district court should manage collective actions, the majority of courts ... have adopted a two-step process for determining whether an FLSA lawsuit should proceed as a collective action.") (internal citation omitted). "At the initial step of the certification process, the plaintiffs are required only to make a *minimal showing* that others in the potential class are similarly situated." Smith v. Family Video

Movie Club, Inc., 2012 WL 580775, at *2 (N.D. Ill. Feb. 22, 2012) (emphasis added). "If the plaintiff meets that minimal showing, the class is conditionally certified and notice is sent to potential class members, giving them an opportunity to opt in." Id. "In the second stage, after the parties have engaged in discovery and the opt-in process is complete, the court engages in a more stringent review of whether there is sufficient similarity between the named and opt-in plaintiffs to allow the matter to proceed to trial as a collective action." Hundt v. DirectSat USA, LLC, 294 F.R.D. 101, 104 (N.D. Ill. 2013).

"At the first step, 'a named plaintiff can show that the potential claimants are similarly situated by making a modest factual showing sufficient to demonstrate that they and potential plaintiffs together were victims of a common policy or plan that violated the law.'" Anyere v. Wells Fargo, Co., No. 09 C 2769, 2010 WL 1542180, at *1 (N.D. Ill. Apr. 12, 2010) (quoting Flores v. Lifeway Foods, Inc., 289 F. Supp. 2d 1042, 1045 (N.D. Ill. 2003)). This "modest factual showing" is not a high bar. Id. at *2 ("Courts have interpreted the 'similarly situated' requirement of this first step leniently."); see also Allen v. City of Chicago, 2013 WL 146389, at *3 (N.D. Ill. Jan. 14, 2013) ("In the first stage, courts employ a lenient interpretation of the term similarly situated, and require only a minimal showing of similarity.") (internal citation omitted). Thus, "Plaintiffs do not have to show that the potential class members have *identical* positions for conditional certification to be granted; plaintiffs can be similarly situated for purposes of the FLSA even though there are distinctions in their job titles, functions, or pay." Jirak v. Abbott Labs., Inc., 566 F.

Supp. 2d 845, 848-49 (N.D. Ill. 2008) (emphasis in original).

"[T]he court's role at this stage is not to assess any party's credibility," so that the evidence proffered by Plaintiff will be taken as true. Russell v. Illinois Bell Tel. Co., 575 F.Supp.2d 930, 935, n. 3 (N.D. Ill. 2008); see also Shiner v. Select Comfort Corp., 2009 WL 4884166, *3 (N.D. Ill. Dec.9, 2009) ("[A]t this stage of the collective action process, the Court must accept as true [plaintiff]'s description of his own day-to-day duties, which two other store managers corroborated, even if those duties were somewhat belied by the job descriptions that Defendants presented."). Thus, courts do not determine the merits of a case or evaluate the applicability of defenses at the conditional certification stage. Marshall v. Amsted Industries, Inc., 2010 WL 2404340, *3 (S.D. Ill. June 16, 2010) ("Conditional certification does not entail the district court adjudicating the *merits* of plaintiffs' claims. It is simply a finding that the claims are similarly situated enough to proceed as a collective action.").

In FLSA cases, it is vital that notice be issued promptly to preserve the rights of the proposed class of employees. Unlike with class claims brought under Fed. R. Civ. P. 23, the statute of limitations for claims brought under the FLSA is not tolled for each employee until she has opted in to the action. See 29 U.S.C. § 216(b); Ruffin v. Entm't of the E. Panhandle, 2012 WL 28192, at *2 (N.D. W.Va. Jan. 5, 2012) ("By statute, the limitations period for an opt-in plaintiff continues to run until the plaintiff files a written consent to join the action.") (citation omitted). Thus, because of this feature of an FLSA collective action, many courts have

identified a sense of urgency in ordering conditional certification. See, e.g., Nash v. CVS Caremark Corp., 683 F.Supp.2d 195, 200 (D.R.I. 2010) (noting that "[t]he longer it takes for an FLSA class to mature, the lower members' damages will be once they opt-in, given the two-year limitations period [of FLSA overtime claims]"); Lynch v. United Services Auto. Ass'n, 491 F. Supp. 2d 357, 371 (S.D.N.Y. 2007) ("Prompt court action is needed because potential opt-in plaintiffs' claims are in risk of being extinguished by the running of the statute of limitations.").

### B. The FLSA is Intended To Ensure Workers Are Aware of Their Rights

The Supreme Court has emphasized time and again the remedial nature of the FLSA. See, e.g., Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 687, 66 S. Ct. 1187, 1192, 90 L. Ed. 1515 (1946) (describing "the remedial nature of this statute and the great public policy which it embodies"); Hoffmann–La Roche, 493 U.S. at 173 ("The broad remedial goal of the statute should be enforced to the full extent of its terms"); Tyson Foods, Inc. v. Bouaphakeo, 136 S.Ct. 1036, 1047 (2016) (interpreting FLSA in light of its remedial nature). Consistent with this humanitarian purpose, district courts have recognized that one the statute's goals is "to ensure that all workers are aware of their rights." Williams v. Alimar Sec., Inc., 2017 WL 427727, at *1 (E.D. Mich. Feb. 1, 2017) (quoting Guareno v. Vincent Perito, Inc., 2014 WL 4953746, at *1 (S.D.N.Y. 2014).

In order to accomplish this statutory goal – of putting workers on notice of their rights against their employer – courts granting conditional certification routinely order broad notice, even to workers who ultimately may not be part of the

collective. District courts nationwide routinely err on the side of issuing notice to more employees, rather than fewer, to inform them of their rights under the statute. This is true even when courts are aware that certain employees who receive notice may not ultimately qualify for the lawsuit. For example, courts routinely approve of issuing notice to all employers who were employed at the employer up to three years prior, even though the statute of limitations for an FLSA violation is three years only if the plaintiff establishes that the violation was willful; the limitations period for a non-willful violation is two years. 29 U.S.C. § 255(a). Because notice is issued when the case is in its infancy, prior to any discovery, courts regularly order a three-year notice period, while recognizing that certain opt-ins may not be able to recover if the court finds the employer violated the FLSA but did not do so willfully. See, e.g., Gamble v. Minnesota State-Operated Services, 2019 WL 313034, at *2 (D. Minn. Jan. 24, 2019) ("Although it may be difficult for Plaintiffs to prove willfulness …. they should still have the opportunity to develop that theory of their case, and related potential class members should be notified."); Stitt v. American Disposal Svcs. of Georgia, 2018 WL 6716046 at *3 n.19 (N.D. Ga. Dec. 20, 2018) (ordering notice to employees who worked in three years prior to date of notice while reserving making a finding as to willfulness); Ivery v. RMH Franchise Corp., 280 F. Supp. 3d 1121, 1135 (N.D. Ill. 2017) ("[T]this Court and several others have held that conclusory allegations of willfulness suffice to justify providing notice to the putative collective on the basis of the potentially applicable three-year period."); Anglada v. Linens 'N Things, Inc., 2007 WL 1552511, at *8 (S.D.N.Y. May 29, 2007)

("[W]here there has been no substantive discovery as to the appropriate temporal scope of the prospective class of member plaintiffs, and where the Plaintiff has alleged a willful violation of the FLSA, it is prudent to certify a broader class of plaintiffs that can be limited subsequently, if appropriate, during the second phase of the collective action certification process."); Fasanelli v. Heartland Brewery, Inc., 516 F.Supp.2d 317, 323 (S.D.N.Y. 2007) (conditionally certifying class based on three-year period to "avoid any merit-based determinations at this time" but noting the possibility of "decertification at a later time"). Courts find "it is better to be overly inclusive at the notice stage" because a defendant will have the opportunity to move to decertify the class at the second certification stage or move for summary judgment against opt-in plaintiffs whose claims fall outside the two-year limitations period. Hart v. U.S. Bank NA, 2013 WL 5965637, at *6 (D. Ariz. Nov. 8, 2013).

Similarly, district courts ordering FLSA notice regularly require that the notice form make clear to workers that they have the right to retain their own counsel and pursue their rights separate from the FLSA collective. See, e.g., Curless v. Great Am. Real Food Fast, Inc., 280 F.R.D. 429, 436 (S.D. Ill. 2012) ("A notice should… include recipients' right to obtain separate counsel, bring their own action, or not to sue"); Martinez v. Cargill Meat Sols., 265 F.R.D. 490, 500 (D. Neb. 2009) (notice advised putative plaintiffs of their right to file a separate lawsuit and not be represented by the named plaintiffs' counsel); Reyes v. Quality Logging, Inc., 52 F. Supp. 3d 849, 852 (S.D. Tex. 2014) ("Plaintiff has agreed to include language in the notice that tells potential plaintiffs that they may hire their own

lawyer if they wish to file their own, separate individual action."); Volz v. Provider Plus, Inc., No. 4:15CV0256 TCM, 2015 WL 4255614, at *2 (E.D. Mo. July 14, 2015) ("A sentence must be added, however, advising the recipients that they are free to file their own lawsuit if they choose not to join this one."); Witteman v. Wisconsin Bell, Inc., 2010 WL 446033, at *3 (W.D. Wis. Feb. 2, 2010) (requiring notice to include the following sentence: "If you do not wish to join this action, you are free to retain your own counsel independently and file your own individual lawsuit."); Volz v. Provider Plus, Inc., No. 4:15CV0256 TCM, 2015 WL 5734916, at *1 (E.D. Mo. Sept. 29, 2015) ("the Court directed that a sentence be added to the proposed notice advising the recipient that he or she was free to file a separate lawsuit rather than consent to join this one.").

Underlying these courts' decisions to require that workers be informed that they can pursue their claims against their employers separate from the case for which they are receiving notice is a recognition that the purpose of FLSA notice *is to inform workers of their rights against their employer*. Ordering notice to all employees – even those who may have signed an arbitration agreement and may ultimately be required to pursue their claims in arbitration – is consistent with the FLSA's remedial statutory purpose of not keeping employees in the dark about their rights.

## II. Issuing FLSA Notice to Potential Opt-In Plaintiffs Who Have Signed Arbitration Agreements is Consistent With the FLSA's Purpose of Ensuring That Workers Who Have Suffered an Alleged Wage Violation Are Not Kept In the Dark About Their Statutory Rights

As the above examples make clear, district courts take a broad view of their authority under the FLSA and issue notice that is designed to effectuate the statute's purpose of notifying workers that their employer may be violating their federal wage rights. For these reasons, courts routinely grant conditional certification and issue FLSA notice even when defendants argue that the court should limit notice in light of an arbitration agreement.

Courts largely follow two rationales for ordering notice to all employees, even those who may ultimately be found to have signed a valid agreement for their claims to be heard in arbitration. First, many courts find that it is premature to consider the validity of arbitration agreements in ruling on a motion for issuance of notice under § 216(b), because "the [only] question on a motion to proceed as a collective action is whether the proposed plaintiffs are similarly situated with respect to their allegations that the law has been violated." Romero v. La Revise Assocs., L.L.C., 968 F. Supp. 2d 639, 647 (S.D.N.Y. 2013) (internal citation omitted). Whether opt-in plaintiffs are *in fact* similarly situated -- a question that does incorporate consideration of individual arbitration agreements -- is not addressed until a later stage, such as when the defendant may move to decertify the class (for instance, after there has been discovery on whether the arbitration clause is enforceable, or which workers may have their claims subject to arbitration). Camara v. Mastro's Rests. LLC, 340 F. Supp. 3d 46, 56 (D.D.C. Oct. 24, 2018),

appeal pending, D.C. Cir. No. 18-7167 ("After discovery, the Court may decide to exclude [workers] who have signed arbitration agreements from this action or separate them into a different collective…. That is what the second stage of certification proceedings is typically for.").

It is only at this later step that the Court is called on to make a "conclusive determination as to whether each plaintiff who has opted in to the collective action is in fact similarly situated to the plaintiff." Symczyk v. Genesis HealthCare Corp., 656 F.3d 189, 193 (3d Cir. 2011), rev'd on other grounds, 569 U.S. 66 (2013). This is why courts routinely defer the question of arbitration until a later stage. See Camara, 340 F. Supp. at 59 (agreeing with the "majority" of courts, in deciding to not "prematurely limit the dissemination of notice" when a question of fact remains about existence and validity of arbitration agreements); Weckesser v. Knight Enterprises S.E., LLC, 2018 WL 4087931, at *2–3 (D.S.C. Aug. 27, 2018) ("This Court will therefore follow the procedure previously applied in this District and allow conditional certification to proceed and address arbitration issues through a motion to compel arbitration once any opt-in plaintiffs allegedly subject to arbitration agreements have been identified."); Gordon v. TBC Retail Grp., Inc., 134 F. Supp. 3d 1027, 1039 (D.S.C. 2015) ("the court finds that the better approach is to address arbitration issues after conditional certification, when the scope and substance of those issues become clearer."); Saravia v. Dynamex, Inc., 310 F.R.D. 412, 424 (N.D. Cal. 2015) ("No district court in our circuit has denied conditional certification on the basis that some members of the proposed collective may be

subject to valid and enforceable arbitration clauses. The decisions that have addressed that issue have all found that the issue of the enforceability of arbitration clauses related to the merits of the case and therefore should be dealt with in phase two."); Woods v. Club Cabaret, Inc., 140 F.Supp.3d 775, 782-83 (C.D. Ill. 2015) (conditionally certifying class of exotic dancers and refusing to address, until the second step, whether entertainers had entered into arbitration agreements with the defendant); Deatrick v. Securitas Security Services USA, Inc., 2014 WL 5358723, *4 (N.D. Cal. Oct. 20, 2014) ("inquiries" into whether potential class members signed dispute resolution agreements "are reserved for the second stage of the certification process"); Hernandez v. Immortal Rise, Inc., 2012 WL 4369746, at *5 (E.D.N.Y. Sept. 24, 2012) ("While the Court may eventually have to determine enforceability of these agreements, the existence of arbitration agreements is irrelevant to class certification, because it raises a merits-based determination.…Therefore, the class shall not be restricted by any arbitration agreements at this time."); Sealy v. Keiser Sch., Inc., 2011 WL 7641238, *3 (S.D. Fla. Nov. 8, 2011) (by invoking arbitration agreements, "Defendant is asking the Court to apply the level of scrutiny that is only appropriate for the second phase of the two-tiered approach."); Green v. Plantation of Louisiana, LLC, 2010 WL 5256348, *1 (W.D. La. Dec. 15, 2010) (refusing to consider argument that some members of collective barred from joining by arbitration agreement "until discovery is complete"); D'Antuono v. C & G of Groton, Inc., 2011 WL 5878045, *3 (D. Conn. Nov. 23, 2011) (citing cases and finding "numerous federal cases where district courts elected to conditionally certify

a class [and authorize notice] before ruling on the enforceability of [arbitration] contracts"); Davis v. Novastar Mortg., Inc., 408 F .Supp. 2d 811 (W.D. Mo. 2005); Villatoro v. Kim Son Restaurant, L.P., 286 F. Supp. 2d 807, 811 (S.D. Tex. 2003) ("Defendant, further, raises issues about the effect of its recently implemented arbitration policies and newly signed arbitration/release agreements. Most, if not all of these objections, go to the merits of the action or the forum in which these claims ultimately should be resolved, not whether notice to potential claimants should be given.").[2]

Another line of cases reasons that it is proper to issue notice to all potential opt-ins, including those who have signed arbitration agreements, in recognition of the fact that the court could very well decide that the arbitration agreement is

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[2] Similarly, numerous courts have certified class actions under Rule 23 despite class members having signed arbitration agreements. Davis v. Four Seasons Hotel Ltd., 2011 WL 4590393, *4 (D. Haw. Sept. 30, 2011) ("[t]he possibility that Four Seasons may be able to compel unnamed members of the putative class to arbitrate in the future does not preclude class certification."); Bittinger v. Tecumseh Products Co., 123 F.3d 877, 884 (6th Cir. 1997) (ruling typicality requirement of Rule 23(a)(3) still met); In re Evanston NW Corp. Antitrust Litig., 2013 WL 6490152, at *3-5 (N.D. Ill. Dec. 10, 2013) (ruling predominance and superiority requirement still met despite arbitration agreements); Herrera v. LCS Fin. Servs. Corp., 274 F.R.D. 666, 681 (N.D. Cal. 2011); Coleman v. Gen. Motors Acceptance Corp., 220 F.R.D. 64, 88, 90-91 (M.D. Tenn. 2004); Collins v. Int'l Dairy Queen, Inc., 168 F.R.D. 668, 678 (M.D. Ga.1996) (certifying class despite the fact that the majority of class members entered into arbitration agreements). Courts reason that inquiries into whether individual class members have entered into valid and enforceable arbitration agreements constitute "subordinate" questions, Finnan v. L.F. Rothschild & Co., 726 F. Supp. 460, 465 (S.D.N.Y. 1989), that do not "preclude th[e] court from certifying a class." Bond v. Fleet Bank (RI), N.A., 2002 WL 31500393, *7 (D.R.I. Oct. 10, 2002). Courts typically delay consideration of arbitration agreements to a "later juncture" in litigation, when subclasses or individual exclusion may be considered. Midland Funding, LLC v. Brent, 2010 WL 4628593, at *4 (N.D. Ohio Nov. 4, 2010).

unenforceable, and thus that it would be improper not to notify all potential opt-ins of their rights in the case. See, e.g. Camp v. Bimbo Bakeries USA, Inc., 2019 WL 1472586, *3-4 (D.N.H. April 3, 2019); Mode v. S-L Distribution Co., LLC, 2019 WL 1232855, at *4 (W.D.N.C. Mar. 15, 2019) ("Because the Court could find at a later stage that the Distributor Agreements between Plaintiffs and S-L were null and void, it is premature—and would be prejudicial—to preclude potential plaintiffs from participating in this lawsuit solely based on arbitration provisions in their Distributor Agreements when those very provisions might ultimately be declared void. Therefore, the Court declines to preclude those distributors who have arbitration agreements in their Distributor Agreements from receiving notice under § 216(b)."); Conde v. Open Door Marketing LLC, 223 F. Supp. 3d 949, 969 (N.D. Cal. 2017) (expanding scope of collective to provide notice to individuals who signed arbitration agreements, finding "[t]he Court will not . . . at this point assume that the arbitration agreement [signed by some collective action members] is enforceable and can be used to prevent potential members of the collective from receiving notice, especially when the step one inquiry is so limited"); Amrhein v. Regency Mgmt. Servs., LLC, 2014 WL 1155356, at *10 (D. Md. Mar. 20, 2014) ("[T]his [c]ourt cannot determine at this stage of the proceeding what potential opt-in plaintiffs, if any, would be subject to valid and binding arbitration. Thus, the potential for arbitration will not forestall the [p]laintiffs' entitlement to conditional certification."); Sylvester v. Wintrust Fin. Corp., No. 12 C 01899, 2013 WL 5433593, at *9 (N.D. Ill. Sept. 30, 2013) ("[T]he enforceability of arbitration clauses are dealt with on a case-by-case

basis. Without being presented with the circumstances surrounding the manner of formation of an actual agreement, it will not prejudge the enforceability of other arbitration clauses. The defendants' proposal to limit the class in this way is accordingly denied.").

In ordering that FLSA notice should be limited to employees who did not sign an arbitration agreement, the U.S. Court of Appeals for the Fifth Circuit in In Re J.P. Morgan Chase & Co., 916 F.3d 494 (Feb. 21, 2019) ignored these fundamental aspects of the FLSA and its historical purpose. This Court should decline to adopt the Fifth Circuit's flawed rationale. Moreover, unlike in this case, the plaintiff in In Re J.P. Morgan did not challenge the validity of the arbitration agreements, rendering much of the decision's rationale inapplicable to the instant case. *Amicus* urges this Court, however, to adopt a rule that authorizes FLSA notice regardless of whether a plaintiff contests the arbitration clause. As explained in this brief, the remedial policy goal of the FLSA notice process – to inform workers about their rights against their employer – is served only by issuing notice to all workers.

In sum, district courts that, like the court in this case, conditionally certify and order issuance of notice to collectives that include workers who signed arbitration agreements are properly applying both the letter and spirit of the FLSA. To do otherwise would contravene the statutory intent by preventing workers from ever learning of their claims and foreclosing their opportunity to ever pursue their claims (whether that ultimately be in court or in arbitration).

## III. Facebook's Request to Limit Notice is Premature and Targeted to Suppress Valid Claims

Facebook, by arguing that notice should not be sent to potential class members, seeks to lower the number of class members and discourage litigation. The effects of mandatory arbitration agreements on whether potential plaintiffs will pursue litigation has been documented in two different articles as recently as 2018. Prof. Cynthia Estlund, in a landmark article The Black Hole of Mandatory Arbitration reviewed empirical data on mandatory employment arbitration and attempted to estimate the number of "missing claims," which she refers to as "potential claims that are subject to arbitration but never enter any adjudicatory process." The Black Hole of Mandatory Arbitration, 96 N.C. L. Rev. 679, 683 (2018). Estlund relies on data from the American Arbitration Association (AAA), the Judicial Arbitration and Mediation Service (JAMS), and a 2011 article by Alexander J.S. Colvin, An Empirical Study of Employment Arbitration: Case Outcomes and Processes, 8 J. Empirical Legal Stud. 1, 6 (2011). Estlund focuses on employment disputes because they are likely to involve individual disputes with significant financial stakes for individual claimants and also because private enforcement of civil rights statutes implicates the broader public interest. 96 N.C. L. Rev. at 682-83.1.

Estlund cites Colvin's 2017 study showing that 56 percent of non-union private sector employees, or approximately 60 million people, are covered by mandatory arbitration agreements. 96 N.C. L. Rev. at 688. Of those 60 million individuals, only 2,879 filed employment cases with the AAA in 2016. Id. at 690.

Based on Estlund's estimates, the AAA accounts for 50 percent of all arbitrations, meaning that 5,126 total number of arbitrations were filed in the same year. Id. Estlund then compares the 5,126 figure to the 31,000 federal employment court cases filed in 2016. Id. at 691. These numbers suggest that there are thus about 34,000 "missing arbitration cases" that were never filed, "based on the general rate of employment litigation and the number of employees covered by mandatory arbitration agreements." 96 N.C. L. Rev. at 691. Estlund then offers a possible adjustment, to exclude the percentage of government employees (approximately 15.2 percent), and on that basis, the number drops to 26,300 missing arbitrations per year, still showing that the presence of a mandatory arbitration agreement is a deterrent to potential plaintiffs before litigation proceedings begin.

Estlund's analysis also highlights some of the reasons for the disparities, pointing to the risk-return ratio and that the presence of the arbitration provisions "dramatically reduces an employee's chance of securing legal representation, as well as her chance of any kind of recovery, any kind of hearing, or any formal complaint being filed on her behalf." Id. at 703. Estlund also points to the likelihood that it will be difficult to win or if the case does win in arbitration, the amount of attorneys' fees will also fall below the threshold of economic viability for many attorneys. Id. at 702. It is clear that these issues are present in this matter, as reducing the number of potential plaintiffs will surely decrease the possibilities for recovery and also reduce the possibility of any return for the attorneys involved.

To be sure, Facebook is aware of the deterrent quality of mandatory arbitration, as Facebook has argued that the reason it sought declaratory judgment was "so that notice does not go out to these individuals [who cannot participate in the action.]" Facebook Petition for Permission to Appeal, p. 6. It also argued that notice to class members who signed arbitration agreements "merely "stirs up litigation" because they cannot ultimately participate in the collective action. Facebook Petition for Permission to Appeal, p. 9. Facebook also argued that sending notice would lead to "[a]n artificially inflated collective would greatly expand the scope of the proceedings, discovery and motion practice and would improperly amplify settlement pressure." Facebook Petition for Permission to Appeal, p. 13.

By referring to the distribution of notice as "artificially" inflating the collective, as opposed to informing potential plaintiffs who may have valid claims, Facebook has already decided the question of the validity of the mandatory arbitration agreements in its own favor, without having to submit them to the court for inspection or meet the preponderance of the evidence standard laid out by the Fifth Circuit. See In Re J.P. Morgan Chase & Co., 916 F.3d at 502-03. The Fifth Circuit further stated, "an employer that seeks to avoid a collective action, as to a particular employee, has the burden to show, by a preponderance of the evidence, the existence of a valid arbitration agreement for that employee." Id. By allowing Facebook to exclude potential class members by preemptively excluding them from the notice, Facebook is artificially reducing the collective and deflating the number

of potential plaintiffs who would be inclined to participate. As shown through Professor Estlund's research, the mere existence of an arbitration agreement has a deterrent effect on plaintiffs, and allowing Facebook to succeed in this premature proceeding will only amplify this deterrent effect and discourage meaningful participation. Facebook's effort should not be permitted.

## CONCLUSION

For the foregoing reasons, the Court should affirm the district court's order conditionally certifying the collective and should order that notice be issued to all potential opt-ins, regardless of whether they signed an arbitration agreement.

Dated: August 2, 2019

Respectfully submitted,

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This document complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) and Circuit Rule 32, because this document contains 5,212 words, including footnotes and excluding the parts of the brief exempted by Federal Rule of Appellate Procedure Rule 32(f).

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Dated: August 2, 2019

/s/ Shannon Liss-Riordan
Attorney for Amicus Curiae

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I hereby certify that on August 2, 2019, the Brief of Amicus Curiae was filed with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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