No. 23-1812

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

MARY RODGERS-ROUZIER, *et al.*,

Plaintiffs-Appellants,

v.

AMERICAN QUEEN STEAMBOAT OPERATING CO., LLC,

and

HMS GLOBAL MARITIME LLC,

Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of Indiana, New Albany Division (Honorable Sarah Evans Barker)

BRIEF FOR THE ACTING SECRETARY OF LABOR AS *AMICUS CURIAE*

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The Acting Secretary of Labor ("Acting Secretary") files this brief in support of Plaintiffs-Appellants. This Court should reverse the district court's ruling that a provision in an arbitration agreement shortening the applicable statutes of limitations is enforceable as to claims under the Fair Labor Standards Act ("FLSA" or "Act"), and its dismissal (upon compelling the named plaintiff to

arbitration) of the claims of employees who had filed the required written consents to become "party plaintiffs" to the FLSA collective action.

INTRODUCTION

1. The FLSA requires covered employers to pay a minimum wage and overtime compensation (for hours worked over 40 in a workweek) to non-exempt employees. 29 U.S.C. 206(a), 207(a). The Supreme Court has held that the FLSA's wage protections are not waivable. Because an FLSA violation occurs each workweek when an employee is not paid the required wages, the Act's statute of limitations – three years for willful violations and two years for non-willful violations, 29 U.S.C. 255(a) – determines both the timeliness of a claim and the extent of an employee's recovery of back wages and damages. The district court here ruled that an arbitration agreement can limit the time period for bringing FLSA claims. But shortening the limitations period may cause an employee to waive recovery for FLSA violations which the Act expressly makes recoverable and the Supreme Court has held are not waivable, and would also contravene the Act's stated policies.

2. An employee may bring an FLSA enforcement action, either individually or collectively on behalf of the employee and "other employees similarly situated." 29 U.S.C. 216(b). When an action is brought collectively, other employees "shall be a party plaintiff to any such action" by giving their

"consent in writing to become such a party" and filing "such consent … in the court in which such action is brought." *Id*. Section 216(b) does not require employees who wish to become party plaintiffs to a collectively-filed action to file a motion, rely on any federal rule, or do anything other than file the required written consents. For purposes of the FLSA's statute of limitations, the claim of an employee who files a written consent to opt into a collective action commences on the date on which the consent is filed. 29 U.S.C. 256.

Contrary to this statutory language, the district court ruled that employees who had filed the required consents were not "actually party-plaintiffs to this litigation" and dismissed their claims after dismissing the named plaintiff's claim as compelled to arbitration. This ruling is also contrary to the Supreme Court's decision in *Genesis Healthcare Corp. v. Symczyk* and conflicts with numerous circuit decisions that have affirmed the party status of employees who file the required consents.

INTEREST AND AUTHORITY

The Acting Secretary and her representatives are responsible for the administration and enforcement of the FLSA. *See*, *e.g.*, 29 U.S.C. 211(a), 212(b), 216(c), 217. The Acting Secretary has a strong interest in ensuring that employees retain the full scope of recovery available under the FLSA if compelled to arbitrate and that the FLSA claims of employees who are not subject to arbitration and

comply with the Act's requirements to join collective actions proceed on their merits.

Federal Rule of Appellate Procedure 29(a) authorizes this brief.

STATEMENT OF THE ISSUES

1. Is a provision in an arbitration agreement that shortens the statutes of limitations for an employee to bring any claim enforceable as to FLSA claims?

2. Do employees who file the written consents required by 29 U.S.C. 216(b) in the court where an FLSA collective action was initiated become party plaintiffs to that action whose claims survive dismissal of the named plaintiff's claim because she is compelled to arbitration?

STATEMENT OF THE CASE

1. Background

Mary Rodgers-Rouzier ("Rodgers-Rouzier") filed an FLSA action "on behalf of herself and all others similarly situated" against American Queen Steamboat Operating Company and HMS Global Maritime ("Defendants"). A55.[1] She alleged that she and other service employees like herself on the river cruise ships operated by Defendants worked over 40 hours per week but were not paid the overtime required by the FLSA. *Id*. During the case, about 130 other service

[1] "A" refers to Appendix. Plaintiffs-Appellants filed a Short Appendix with their opening brief numbered A1-A37 and a Separate Appendix numbered A38-A79.

employees filed written and signed consent forms with the district court indicating their agreement to opt in and join the action.

Defendants moved to dismiss, arguing that Rodgers-Rouzier signed an arbitration agreement. The district court denied the motion, ruling that Rodgers-Rouzier satisfied the exemption in the Federal Arbitration Act ("FAA") for "seamen" and could not be compelled to arbitrate under the FAA. A4-A5.

Rodgers-Rouzier filed a motion for "step-one notice" ("conditional certification" of the collective action), arguing that she and hundreds of Defendants' other service employees are similarly situated and requesting court-authorized notice of the action to them. The district court denied the motion without prejudice. The court stated that, to avoid authorizing notice to employees subject to arbitration, it must undertake an analysis prescribed by this Court and ordered Defendants to submit additional information regarding the other employees' arbitration agreements. A70-A72 (citing *Bigger v. Facebook, Inc.*, 947 F.3d 1043 (7th Cir. 2020)). The district court added that Rodgers-Rouzier's exemption under the FAA did "not preclude a determination that state law may require" her to arbitrate her claims. A69. Thereafter, Defendants submitted information regarding other employees' arbitration agreements and filed a renewed

motion to dismiss, arguing that Rodgers-Rouzier's arbitration agreement was enforceable under Indiana law.[2]

2. District Court Decision

The district court granted Defendants' motion, compelled Rodgers-Rouzier to arbitration under Indiana law, and dismissed the case. The court rejected Rodgers-Rouzier's argument that the arbitration agreement's provision that it is governed by the FAA precluded consideration of its enforceability under Indiana law. A23-A25. The court ruled that arbitration agreements may be enforced as contracts under state law, even if they are outside of the FAA's scope. A23-A24.

Rodgers-Rouzier argued that her arbitration agreement was invalid, including because its six-month limitations period for bringing claims and waiver of contrary statutes of limitations were unenforceable. A25, A29-A30. Rodgers-Rouzier acknowledged that shortened limitations periods may be enforceable under Indiana law if reasonable, but argued that they are impermissible under the FLSA. A30. The district court stated that Rodgers-Rouzier "provided no persuasive authority for her contention that such time limitations are categorically prohibited"

[2] Defendants submitted numerous arbitration agreements, including for employees who had filed written consents, but conceded that several employees are not subject to arbitration and submitted only signature pages for some other employees. Moreover, a version of Defendants' arbitration agreement carves out claims by employees to participate in already-pending FLSA collective actions. Therefore, some employees are not subject to arbitration even if Rodgers-Rouzier is.

for FLSA claims. *Id.* The court noted that it had held in another case that a six-month limitations period in an employment agreement "was reasonable and served as a bar" to bringing Title VII claims. A30-A31. The court concluded that Rodgers-Rouzier "has not identified, nor has the Court been able to find, any authority under Indiana law for her assertion that arbitration agreements cannot limit the time period" for bringing FLSA claims. A32. Reiterating that every doubt is resolved in favor of arbitration under Indiana law, the court rejected the argument that the shortened limitations period was unenforceable as to FLSA claims. *Id*.

After concluding that her arbitration agreement was enforceable, the district court acknowledged that more than 100 other employees "have at this time already opted-in to this lawsuit." A33. The court ruled, however, that "because the Collective Action has never been certified, indeed, notice has never issued, these individuals are not actually party-plaintiffs to this litigation." *Id*. It concluded that Rodgers-Rouzier "thus remains the only plaintiff in this litigation" and added that "nothing, of course, prevents other, potential collective members from suing/arbitrating in their own right." A35. It dismissed the case without prejudice "[p]ursuant to Indiana law." *Id*.

ARGUMENT

1. The Arbitration Agreement's Shortened Limitations Period Is Unenforceable as to FLSA Claims.

a. The FLSA's Wage Protections Are Not Waivable.

Supreme Court precedent makes clear that employees may not waive the FLSA's wage protections through agreements with their employers. The FLSA recognized that "certain segments of the population required federal compulsory legislation to prevent private contracts on their part which endangered national health and efficiency and as a result the free movement of goods in interstate commerce." *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 706-07 (1945). The Court added that there was no suggestion "that the right to the basic statutory minimum wage could be waived by any employee subject to the Act" because "allow[ing] waiver of statutory wages by agreement would nullify the purposes of the Act." *Id.* at 707; *see also Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers of Am.*, 325 U.S. 161, 167 (1945) (Because Congress intended "to achieve a uniform national policy" of guaranteeing compensation for all employees covered by the Act, "[a]ny custom or contract falling short of that basic policy, like an agreement to pay less than the minimum wage requirements, cannot be utilized to deprive employees of their statutory rights.") (citation omitted).

In *Barrentine v. Arkansas-Best Freight System, Inc.*, the Supreme Court reiterated "the nonwaivable nature of an individual employee's right to a minimum

wage and to overtime pay under the Act" and that "FLSA rights cannot be abridged by contract or otherwise waived because this would 'nullify the purposes' of the statute and thwart the legislative policies it was designed to effectuate." 450 U.S. 728, 740 (1981) (quoting *Brooklyn Savings*, 324 U.S. at 707). The Court has also stated that, if employees could decline the FLSA's wage protections, "employers might be able to use superior bargaining power to coerce employees to make such assertions, or to waive their protections under the Act." *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 302 (1985). More recently, the Court explained that the FLSA "establishes federal minimum-wage, maximum-hour, and overtime guarantees that cannot be modified by contract." *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 69 (2013).

This Court has repeatedly applied this principle. *See*, *e.g.*, *Equal Emp't Opportunity Comm'n v. G-K-G, Inc.*, 39 F.3d 740, 745 (7th Cir. 1994) (noting that certain discrimination claims, "unlike claims under the Fair Labor Standards Act, can be waived") (emphasis added); *Calderon v. Witvoet*, 999 F.2d 1101, 1107 (7th Cir. 1993) (recognizing that "the provisions of the FLSA are not waivable"); *Wirtz v. Turner*, 330 F.2d 11, 14 (7th Cir. 1964) ("It is well settled that statutory wages [under the FLSA] cannot be waived by agreement.").[3]

[3] Employees may, of course, settle or compromise FLSA claims under the Acting Secretary's supervision pursuant to 29 U.S.C. 216(c) or with a court's approval. *Koch v. Jerry W. Bailey Trucking, Inc.*, 51 F.4th 748, 752 (7th Cir. 2022) (Because

b. Shortened Limitations Periods for FLSA Claims Are an Impermissible Waiver of the Act's Wage Protections.

The FLSA contained no statute of limitations when enacted, and courts applied a variety of state-law limitations periods to FLSA claims. In 1947, Congress determined that "the varying and extended" state-law limitations periods created "great difficulties in the sound and orderly conduct of business and industry." 29 U.S.C. 251(a). Congress amended the FLSA to add a uniform two-year statute of limitations. Portal-to-Portal Act of 1947, Pub. L. No. 80-49, 61 Stat. 84, 87-88. In 1966, Congress amended the FLSA to lengthen the statute of limitations for willful violations to three years. Fair Labor Standards Act Amendments of 1966, Pub. L. No. 89-601, 80 Stat. 830, 844. It remains two years for non-willful violations. 29 U.S.C. 255(a). "The fact that Congress did not simply extend the limitations period to three years, but instead adopted a two-tiered statute of limitations, makes it obvious that Congress intended to draw a significant distinction between ordinary violations and willful violations." *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 132 (1988).

The FLSA's statute of limitations determines the degree to which employees recover unpaid wages for violations of the Act. The FLSA requires payment of a minimum wage and overtime compensation on a "workweek" basis. 29 U.S.C.

"the FLSA restricts one's ability to contract for wages below the minimum wage," any settlement "requires a judicial imprimatur.") (citing *Walton v. United Consumers Club, Inc.*, 786 F.2d 303, 306 (7th Cir. 1986)).

206(a), 207(a). Accordingly, a claim for violating those requirements accrues following each workweek in which the requirements are not met. *See* 29 C.F.R. 790.21(b) (An FLSA claim "'accrues' when the employer fails to pay the required compensation for any workweek at the regular pay day for the period in which the workweek ends."); *Stone v. Troy Constr., LLC*, 935 F.3d 141, 154 (3d Cir. 2019); *Boaz v. FedEx Customer Info. Servs., Inc.*, 725 F.3d 603, 606 (6th Cir. 2013); *Figueroa v. Dist. of Columbia Metro. Police Dep't*, 633 F.3d 1129, 1134 (D.C. Cir. 2011); *Knight v. Columbus, Ga.*, 19 F.3d 579, 581 (11th Cir. 1994). The FLSA's statute of limitations thus determines whether an employee can bring suit and the scope of an employee's recovery of unpaid wages.

Consequently, shortening the limitations period would often prevent employees from recovering for each violation and the full amount of unpaid wages due under the Act. Applying a six-month limitations period, for example, to FLSA claims would prevent the employee from recovering any wages due if the violations occurred more than six months prior but within the applicable two- or three-year limitations period. Even if a claim is timely under a six-month limitations period, that shortened period would still prevent the employee from recovering wages due for violations occurring during the preceding 18- or 30-month period (depending on whether the violations were willful). A shortened limitations period would thus deprive an employee of wages guaranteed by the

FLSA. *Boaz*, 725 F.3d at 606 (explaining that shortened limitations period has "precisely the effect" of depriving employees of their FLSA rights). For these reasons, agreements to shorten limitations periods constitute a waiver of the FLSA's wage protections and are clearly impermissible under well-established Supreme Court precedent. *Id.* at 606-07 ("The limitations provision in Boaz's employment agreement operates as a waiver of her FLSA claim. As applied to that claim, therefore, the provision is invalid.").

c. Shortened Limitations Periods Are Also Contrary to the FLSA's Policies.

Not only would shortened limitations periods impermissibly waive FLSA rights, but they also contravene the Act's stated policies. First, permitting employers to contract for shortened limitations periods for FLSA claims (and thus variable limitations periods depending on the employer) would contravene the FLSA's rejection of variable limitations periods in favor of a uniform statute of limitations. 29 U.S.C. 251(a), 255(a). Second, the FLSA's longer limitations period for willful violations, 29 U.S.C. 255(a), is a deliberate congressional choice to ensure that employers that willfully violate the Act are exposed to greater liability. *Richland Shoe*, 486 U.S. at 132 ("Congress intended to draw a significant distinction between ordinary violations and willful violations."). Shortened limitations periods for FLSA claims would eliminate this distinction and contravene congressional intent to impose greater liability on willful violators.

Third, the FLSA provides that certain substandard labor conditions are "detrimental" because, among other reasons, they "constitute[] an unfair method of competition in commerce." 29 U.S.C. 202(a); *see also Citicorp Indus. Credit, Inc. v. Brock*, 483 U.S. 27, 36 (1987) (Section 202(a) "reflects Congress' desire to eliminate the competitive advantage enjoyed by goods produced under substandard conditions."). An employer that imposes a shorter limitations period could take advantage of substandard labor conditions and not face as much liability as other employers under the FLSA for doing so. *Brooklyn Savings*, 324 U.S. at 710 ("An employer is not to be allowed to gain a competitive advantage by reason of the fact that his employees are more willing to waive claims for liquidated damages than are those of his competitor."); *Boaz*, 725 F.3d at 606 ("[A]n employer that pays an employee less than minimum wage arguably gains a competitive advantage by doing so."). Shortened limitations periods would thus contravene the Act by failing to protect employees from substandard labor conditions and employers from unfair methods of competition.

d. There Is No Basis for Enforcing the Six-Month Limitations Period Because It Is in an Arbitration Agreement.

Although it was not the basis for the district court's decision, the fact that the shortened limitations period is in an arbitration agreement does not make it enforceable as to FLSA claims. As the Supreme Court explained, "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded

by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985); *see also Viking River Cruises, Inc. v. Moriana*, 142 S. Ct. 1906, 1919 (2022) ("An arbitration agreement thus does not alter or abridge substantive rights; it merely changes how those rights will be processed."). Moreover, the FAA "requires only" the enforcement of a provision to settle a controversy by arbitration, "and not any provision that happens to appear in a contract that features an arbitration clause." *Viking River*, 142 S. Ct. at 1919 n.5.

Accordingly, when considering provisions in arbitration agreements that shorten limitations periods, the overwhelming majority of federal district court decisions have ruled that such provisions are unenforceable as to FLSA claims. *See*, *e.g.*, *Crespo v. Kapnisis*, No. 21-cv-6963 (BMC), 2022 WL 2916033, at *5-6 (E.D.N.Y. Jul. 25, 2022); *Jefferis v. Hallrich Inc.*, No. 1:18-cv-687, 2019 WL 3462590, at *6 (S.D. Ohio Jul. 31, 2019); *Castellanos v. Raymours Furniture Co., Inc.*, 291 F. Supp.3d 294, 300-01 (E.D.N.Y. 2018); *Hackler v. R.T. Moore Co., Inc.*, No. 2:17-cv-262-FtM-29MRM, 2017 WL 6535856, at *4 (M.D. Fla. Dec. 21, 2017).

The district court here did not address *Boaz*, the Supreme Court authority that the FLSA's wage protections are not waivable, or the other decisions cited above (except for *Castellanos*). The district court asserted that *Castellanos* found a

shortened limitations period to be unenforceable based on "particular aspects of the FAA." A31-A32. The court in *Castellanos*, however, discussed the FLSA's text and history, relied on FLSA caselaw (including *Boaz*, a non-arbitration case), and ruled that the shortened limitations period was unenforceable as to FLSA claims because it "contravenes [the FLSA's] congressional commands," "undermines the FLSA's remedial scheme," and contravenes the FLSA's policies by "operat[ing] to waive plaintiffs' rights to full recovery under the FLSA." 291 F. Supp.3d at 299-301. *Castellanos* is firmly based in the FLSA.

e. Indiana Law Provides No Basis for Allowing a Shortened Statute of Limitations for FLSA Claims.

The district court's reliance on Indiana law to override the non-waivable nature of the FLSA's wage protections and the Act's stated policies was erroneous. The Supremacy Clause provides that federal law is "the supreme Law of the Land." U.S. Const., Art. VI, cl. 2; *see also Arizona v. United States*, 567 U.S. 387, 399-400 (2012). As explained above, the FLSA contains a precise statute of limitations, a policy that the limitations period is uniform across states and industries, and an intent for employees to recover more if the violation is willful. 29 U.S.C. 251(a), 255(a). And the Supreme Court has made clear that the FLSA's wage protections are not waivable. There was no basis for the district court to ignore the FLSA, its plain text, and Supreme Court precedent – the applicable federal law – when considering whether the FLSA's statute of limitations may be

shortened by contract. The district court provided no such basis and erred by applying Indiana law without considering federal law.

Even if Indiana law were applicable, a contractual limitations period is enforceable only if there is no contrary statute or public policy. *See*, *e.g.*, *Armour & Co. v. St. Paul Fire & Marine Ins. Co.*, 484 F.2d 1062, 1063 (7th Cir. 1973) (noting that "[n]o Indiana statute is violated by" the contractual limitations period at issue, and distinguishing cases where such provision was "in conflict with a state statute"); *Trzeciak v. State Farm Fire & Cas. Co.*, 809 F. Supp.2d 900, 909 (N.D. Ind. 2011) (Contractually shortening the time to commence suit in Indiana is valid if "a reasonable time is provided, and the provision does not contravene a statute or public policy.") (internal citations omitted); *New Welton Homes v. Eckman*, 830 N.E.2d 32, 35 (Ind. 2005) (explaining that contractual provision shortening limitations period is enforceable unless it "contravenes a statute or public policy"). Indeed, the decision from this Court relied upon by the district court made that exact point. In that case, this Court explained that, under Illinois law, contractual limitations periods are enforceable if they are "not inconsistent with public policy." *Taylor v. W. & S. Life Ins. Co.*, 966 F.2d 1188, 1203-04 (7th Cir. 1992). This Court also noted the Supreme Court's statement that contractual provisions shortening limitations periods are valid "'in the absence of a controlling statute to the contrary.'" *Id.* at 1204 (quoting *Order of United Commercial Travelers of Am.*

v. Wolfe, 331 U.S. 586, 608 (1947)). Accordingly, this Court considered 42 U.S.C. 1981 (the federal law at issue in that case) and determined that it had no policy contrary to a contractual limitations period primarily because it contained no statute of limitations at all. *Id.* at 1205-06 ("[B]y enacting section 1981 without a statute of limitations, Congress implied that it is willing to live with a wide range of state statutes and rules governing limitations of action under section 1981.").

Had the district court considered the FLSA's text and applicable precedent, it would have concluded that the FLSA and its policies are contrary to the six-month limitations period in this case. Unlike section 1981 and as explained above, the FLSA contains a limitations period, a directive against varying limitations periods, and a longer limitations period for willful violations. And the FLSA's statute of limitations determines the scope of back wages and damages that an employee recovers when the FLSA's wage protections are violated – protections that are not waivable. As the only circuit court and practically every district court to address the issue have ruled, the FLSA and its underlying policies are contrary to and render unenforceable a contractual provision that would shorten the limitations period for FLSA claims.

2. The District Court Wrongly Concluded that the Employees Who Had Filed Written Consents Opting Into the Collective Action Were Not Party Plaintiffs.

a. The FLSA Clearly Provides that an Employee Who Files the Required Written Consent Is a "Party Plaintiff" Regardless of Whether the Collective Action Has Been Conditionally Certified.

The FLSA provides that an action "may be maintained against any employer … by any one or more employees for and in behalf of himself or themselves and other employees similarly situated." 29 U.S.C. 216(b). Section 216(b) expresses Congress' "policy that [FLSA] plaintiffs should have the opportunity to proceed collectively." *Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, 170 (1989). The next sentence provides that an "employee shall be a party plaintiff to any such action" – referring to an action on behalf of "other employees similarly situated" – if "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). Section 216(b) does not require employees who wish to join a collective action to file a motion, rely on any federal rule, or do anything other than file a written consent with the court where the action is pending. *Id*. Nor does it require the district court to do anything upon filing of the written consent for the filing to be operative and confer party plaintiff status on the employee who filed the consent. *Id.*

Accordingly, "[a] collective action is instituted when workers join a collective action complaint by filing opt-in forms with the district court."

Campbell v. City of Los Angeles, 903 F.3d 1090, 1101 (9th Cir. 2018); *see also Cameron-Grant v. Maxim Healthcare Servs., Inc.*, 347 F.3d 1240, 1249 (11th Cir. 2003) ("Under § 216(b), the action does not become a 'collective' action unless other plaintiffs affirmatively opt into the class by giving written and filed consent.").

As numerous circuit courts have held, based on section 216(b)'s clear statutory directive, an employee who files the required written consent with the court where a collective action complaint was filed becomes a "party plaintiff" to that action. *Waters v. Day & Zimmerman NPS, Inc.*, 23 F.4th 84, 89 (1st Cir. 2022) (Section 216(b) "makes clear that in collective actions, opt-in plaintiffs become parties to the proceedings when they give 'consent in writing to become such a party and such consent is filed in the court.'") (quoting 29 U.S.C. 216(b)), *cert. denied*, 142 S. Ct. 2777 (2022); *Mickles v. Country Club Inc.*, 887 F.3d 1270, 1278 (11th Cir. 2018) ("The plain language of § 216(b) supports that those who opt in become party plaintiffs upon the filing of a consent and that nothing further, including conditional certification, is required."). Thus, "'similarly situated' employees may join a collective action by filing a 'consent in writing,'" and once they do, "opt-in plaintiffs enjoy party status as if they had initiated the action." *Canaday v. The Anthem Cos., Inc.*, 9 F.4th 392, 394 (6th Cir. 2021) (quoting 29 U.S.C. 216(b)), *cert. denied*, 142 S. Ct. 2777 (2022). "By defining them as party

plaintiffs, [section 216(b)] indicates 'opt-in plaintiffs should have the same status in relation to the claims of the lawsuit as do the named plaintiffs.'" *Fischer v. Fed. Express Corp.*, 42 F.4th 366, 377 (3d Cir. 2022) (quoting *Prickett v. DeKalb Cnty.*, 349 F.3d 1294, 1297 (11th Cir. 2003)). "The FLSA leaves no doubt that every plaintiff who opts in to a collective action has party status." *Campbell*, 903 F.3d at 1104 (internal quotation marks omitted); *see also Coan v. Nightingale Home Healthcare, Inc.*, No. 1:05-CV-0101-DFH-TAB, 2006 WL 1994772, at *2 (S.D. Ind. Jul. 14, 2006) ("Under the opt-in procedures of 29 U.S.C. § 216(b), all 66 of the plaintiffs have affirmatively opted in as plaintiffs in this case, and they are full parties for all purposes.") (Hamilton, J.).

Moreover, an opt-in employee's FLSA claim commences for statute-of-limitations purposes on the date on which the employee files the required written consent. 29 U.S.C. 256. Having their own statute-of-limitations start date upon filing the required consent is additional statutory support that each individual opt-in employee becomes a party plaintiff to the action then. *Campbell*, 903 F.3d at 1104 (From the date on which each opt-in employee's consent is filed with the court, "there is no statutory distinction between the roles or nomenclature assigned to the original and opt-in plaintiffs.").

Importantly, the "party plaintiff" status of an employee who opts into a collective action by filing the required written consent does not depend on whether

the collective action has been "certified." Although it has not approved a specific process for FLSA collective actions, this Court has recognized that a two-step certification process is "regularly used" by district courts. *In re: New Albertsons, Inc.*, No. 21-2577, 2021 WL 4028428, at *1 (7th Cir. Sept. 1, 2021); *see also Koch*, 51 F.4th at 751 n.1 (explaining that, "[t]o accommodate § 216(b)'s opt-in requirement," the district court applied "a two-step process"). At the first step, the district court may "conditionally certify" the collective action if the plaintiffs sufficiently show that they and other employees are similarly situated – resulting in court-facilitated notice to the other employees, who may join the action by filing consents. At the second step, the district court analyzes whether all of the plaintiffs are similarly situated and allows them to proceed to trial if so or decertifies the collective if not.

As the Supreme Court explained, "'conditional certification' does not produce a class with an independent legal status, or join additional parties to the action. The sole consequence of conditional certification is the sending of court-approved written notice to employees, … who in turn become parties to a collective action only by filing written consent with the court." *Genesis Healthcare*, 569 U.S. at 75 (citing *Hoffmann-La Roche*, 493 U.S. at 171-72; 29 U.S.C. 216(b)). Thus, whether a collective action has been conditionally certified has no legal impact on the party-plaintiff status of employees who file written

consents to join the action because conditional certification merely results in court-facilitated notice to employees who may potentially join the action (but must file consents to actually join). "Conditional certification cannot be the cornerstone of party status because it is not a statutory requirement[.]" *Waters*, 23 F.4th at 89. Compared to the affirmative decision that courts make under Federal Rule of Civil Procedure 23 to certify a class, "the district court in a collective action plays no such gatekeeping role" because "[p]reliminary certification in the FLSA context does not 'produce a class with an independent legal status'" and "may take place *after* the collective action has already begun." *Campbell*, 903 F.3d at 1101 (quoting *Genesis Healthcare*, 569 U.S. at 75) (emphasis in original). "Whether opt-in forms are filed after or before preliminary certification is thus entirely up to the workers joining the litigation; preliminary certification is '*neither necessary nor sufficient* for the existence of a [collective] action.'" *Id.* (quoting *Myers v. Hertz Corp.*, 624 F.3d 537, 555 n.10 (2d Cir. 2010)) (emphasis and alteration in original); *see also Mickles*, 887 F.3d at 1278 (explaining that it is "apparent" from *Genesis Healthcare* that "conditional certification does not serve the purpose of joining plaintiffs to the action," "is solely for notice purposes," and "does nothing to determine if a party becomes a plaintiff") (citing *Genesis Healthcare*, 569 U.S. at 75); *Myers*, 624 F.3d at 555 n.10 (Nothing in the FLSA's text "prevents

plaintiffs from opting in to the action by filing consents with the district court, even when the notice [resulting from conditional certification] has not been sent[.]").

b. This Court's Caselaw Does Not Preclude a Conclusion that the Opt-In Employees Are Party Plaintiffs to the Action.

This Court's caselaw is not to the contrary. In *Hollins v. Regency Corp.*, the district court granted summary judgment to the defendant on the grounds that its cosmetology students were not employees under the FLSA and denied as moot the motion for conditional certification and for certification of a Rule 23 class action of state-law claims. 867 F.3d 830, 832 (7th Cir. 2017). Numerous employees had filed written consents to join the lawsuit, and on appeal, the named plaintiff questioned whether there was jurisdiction over her own appeal of the summary judgment decision because she was uncertain if the claims of the employees who had filed the consents and the putative members of the class action were still before the district court and thus whether a final, appealable judgment had been entered. *Id*. Addressing the concern that the existence of "unnamed" Rule 23 class members might defeat finality of the district court's judgment for purposes of appeal, this Court observed that no one would advance "the novel and surely erroneous argument that a nonnamed class member is a party to the class-action litigation *before the class is certified*." *Id.* at 833 (internal quotation marks omitted, emphasis in original).

Turning to the FLSA collective action, this Court explained that "the same result should follow for the claims of potential members of an FLSA collective action[] if the collective action has never been conditionally certified and the court has not in any other way accepted efforts by the unnamed members to opt in or intervene." *Id.* This Court cited *Genesis Healthcare*'s statement that conditional certification under the FLSA "'does not produce a class with an independent legal status[] or join additional parties to the action'" but added that the Supreme Court "never said, however, that an unnamed and un-joined member of the FLSA collective action could become a party by filing a consent *before* the court even conditionally certified the group." *Id.* at 834 (quoting *Genesis Healthcare*, 569 U.S. at 74) (emphasis in original). This Court concluded that there was an appealable "final judgment" and that "the unaccepted opt-in notices that the district court received do not stand in the way of that conclusion. The collective action was never conditionally certified, and those notices did not, of their own force, make the filers 'parties' whose unresolved claims would defeat finality." *Id.*[4]

[4] The FLSA's opt-in requirement for collective actions is different than the requirements for Rule 23 class actions, where potential class members are "given only the opportunity to opt out of the class" and "will automatically be included in the class if they do not speak up." *Ervin v. OS Rest. Servs., Inc.*, 632 F.3d 971, 976 (7th Cir. 2011). Because section 216(b) expressly provides that an employee "shall be a party plaintiff" to an FLSA collective action by filing the required written consent, whereas Rule 23 establishes a process for certifying class actions from which employees must opt out, the analogy in *Hollins* to Rule 23 class actions may have been ill-suited for FLSA collective actions. Moreover, unlike in

Hollins does not support Defendants' position. The district court in *Hollins* did not address the party status of the opt-in employees and instead resolved the FLSA claim on the merits.[5] Accordingly, this Court on appeal addressed the party status of the opt-in employees only in the circumstance of whether they were an obstacle to a final, appealable judgment. 867 F.3d at 834. Here, on the other hand, the district court addressed only the enforceability of Rodgers-Rouzier's individual arbitration agreement and did not address the opt-in employees' arbitration agreements or wage claims or the underlying claim that they are all entitled to overtime pay. Consequently, the opt-in employees here have unresolved claims, and the district court erred in failing to acknowledge their party-plaintiff status in their circumstance – a very different circumstance than in *Hollins*.[6]

In addition, this Court in *Hollins* may have misapprehended *Genesis Healthcare* by relying on the fact that the collective action had not been conditionally certified (which this Court viewed as a way to "accept" the opt-in consents that had been filed). The import of the statement in *Genesis Healthcare*

Hollins, the case here does not involve a Rule 23 class action – only an FLSA collective action.

[5] Specifically, the district court ruled that the cosmetology students were not employees under the FLSA. 144 F. Supp.3d 990, 1007 (N.D. Ill. 2015) (concluding that "Regency's students were just that—students" and that Regency "is not an 'employer' within the meaning of the FLSA"). Thus, no opt-in employee had any claim remaining.

[6] As explained above in footnote 2, some of Defendants' employees are not subject to arbitration even if Rodgers-Rouzier and other employees are.

that conditional certification "does not produce a class with an independent legal status or join additional parties to the action," was that the "sole consequence of conditional certification is the sending of court-approved written notice to employees." 569 U.S. at 75. Nothing about that statement supports the notion that any certification is a necessary prerequisite for an employee who files a written consent to become a party plaintiff to the FLSA collective action or that conditional certification or some other affirmative step by the court is necessary to "accept" opt-in consents. As explained above, the fact that a collective action has not been certified does not prevent employees who file the required written consents from becoming party plaintiffs under the plain language of section 216(b). When a plaintiff files an action on behalf of herself and other employees similarly situated, section 216(b) requires only that other employees file consents to become party plaintiffs to that action.[7]

Moreover, this Court has recognized that the "twin goals of collective actions are enforcement and efficiency" and "[t]he FLSA invokes these goals by

[7] This Court explained in *Hollins* that "[t]he named plaintiff is free to allege whatever she wants for her group, but the court must assess that proposed [FLSA collective action] and assure itself that the employees identified are raising similar FLSA claims." 867 F.3d at 834. Opt-in plaintiffs must of course be similarly situated to the named plaintiff(s) for them to ultimately prevail on the collective claims, and a ruling that they are not similarly situated should result in dismissal of any opt-in plaintiffs (as explained below). However, this provides no basis, especially considering section 216(b), to view a similarly-situated determination via conditional certification as necessary for an employee who files a written consent to become a party plaintiff to the collective action.

explicitly permitting collective actions in which 'similarly situated' employees may join a lawsuit against their employer." *Bigger*, 947 F.3d at 1049 (quoting 29 U.S.C. 216(b)). This Court has also explained that section 216(b)'s "written consent forms assure the court that the signers 'want to have their rights adjudicated in [a collective] proceeding or be represented by counsel chosen by other plaintiffs.'" *Smith v. Professional Transp., Inc.*, 5 F.4th 700, 703 (7th Cir. 2021) (quoting *Harkins v. Riverboat Servs., Inc.*, 385 F.3d 1099, 1101 (7th Cir. 2004)) (alteration in original). This Court added that "[a] filed written consent is 'important' because it protects plaintiffs from binding judgments obtained by counsel whom they may not fully trust." *Id.* (quoting *Harkins*, 385 F.3d at 1101). In *Harkins*, this Court addressed whether employees who were named in the complaint initiating an FLSA collective action but who had not filed the required written consents were parties to the action, and it interpreted the FLSA "literally" to hold that the Act "is unambiguous: if you haven't given your written consent to join the suit, or if you have but it hasn't been filed with the court, you're not a party." 385 F.3d at 1101. This Court focused on whether written consents had been filed and not on whether they had been "accepted" or a collective action had been conditionally certified.

c. The District Court Erred in Ruling that Employees Who Had Filed the Required Written Consents Were Not Party Plaintiffs.

The district court cited *Genesis Healthcare* for its ruling that, "because the Collective Action has never been certified" and "notice has never issued," the employees who filed the required written consents "are not actually party-plaintiffs to this litigation." A33. As explained above, however, *Genesis Healthcar*e held that conditional certification "does not produce a class with an independent legal status[] or join additional parties to the action," but instead solely results in court-approved notice to employees "who in turn become parties to a collective action only by filing written consent with the court." 569 U.S. at 75. The Supreme Court plainly dismissed the legal impact of conditional certification and reiterated section 216(b)'s requirement that employees become parties to a collective action by filing written consents with the district court. *Id.*; *see also Waters*, 23 F.4th at 89; *Campbell*, 903 F.3d at 1100-01; *Mickles*, 887 F.3d at 1278. Nothing in *Genesis Healthcare* suggests that employees' written consents must be filed after conditional certification to confer party status. Thus, *Genesis Healthcar*e refutes – rather than supports – the district court's ruling.[8]

[8] The district court also cited two out-of-circuit district court decisions. A33 (citing *Beery v. Quest Diagnostics, Inc.*, No. 12-231, 2013 WL 3441792, at *3 (D.N.J. Jul. 8, 2013) and *Cooper v. Terminix Int'l Co.*, No. 17-3671, 2018 WL 1998973, at *6 (S.D. Tex. Apr. 11, 2018)). These cases, however, misread *Genesis Healthcare* in the same way that the district court here did.

The district court cited two decisions from this Court in which, following decertification of collective actions, the employees who filed written consents were dismissed and only the named plaintiffs remained. A33-A34 (citing *Espenscheid v. DirectSat USA, LLC*, 688 F.3d 872, 877 (7th Cir. 2012); *Alvarez v. City of Chicago*, 605 F.3d 445, 450 (7th Cir. 2010)). These decisions explained that, "'when a collective action is decertified, it reverts to one or more individual actions on behalf of the named plaintiffs.'" *Espenscheid*, 688 F.3d at 877 (quoting *Alvarez*, 605 F.3d at 450). Because decertification is predicated on finding that the employees are not similarly situated, the collective action of course ceases to exist, and dismissal of employees who filed written consents is proper. *See*, *e.g.*, *Campbell*, 903 F.3d at 1102 ("For a collective action to be 'decertified,' then, means that the plaintiffs cannot proceed collectively on the existing complaint because they are not similarly situated, so the opt-in plaintiffs must be dismissed."); *Mickles*, 887 F.3d at 1278 ("[T]he opt-in plaintiffs remain party plaintiffs until the district court determines they are not similarly situated and dismisses them."). Indeed, a finding at any stage that the employees are not similarly situated should result in dismissal of employees who filed written consents. *Campbell*, 903 F.3d at 1109 (explaining that denial of conditional certification premised on the failure to satisfy section 216(b)'s "similarly situated" requirement results in dismissal without prejudice of opt-in plaintiffs who have

already joined). Thus, *Espenscheid* and *Alvarez* have no relevance here because there has been no decertification or other finding that Rodgers-Rouzier and the other service employees are not similarly situated.[9]

For all of these reasons, the district court erred in dismissing the claims of the employees who filed the written consents required by 29 U.S.C. 216(b) to join the action. Neither the procedural propriety nor the substantive merits of their claims were addressed by the district court's decision that Rodgers-Rouzier must arbitrate her claim. Because they became party plaintiffs to the action when they filed their consents, their claims should have survived dismissal of her claim.

CONCLUSION

For the foregoing reasons, the Acting Secretary respectfully requests that this Court reverse the district court's rulings on the two issues briefed herein.

[9] The district court here did not cite *Hollins*. And although it did cite *Espenscheid*, it did not cite the statement from *Espenscheid* that FLSA collective actions "require certification." 688 F.3d at 877. In any event, this statement from *Espenscheid* was made prior to *Genesis Healthcare* and was not necessary to the holding in *Espenscheid* that this Court had jurisdiction over that appeal.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 29(a)(4)(G) and 32(g), I certify that the foregoing Brief for the Acting Secretary of Labor as *Amicus Curiae*:

(1) was prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font; and

(2) complies with the length limitation of Circuit Rule 29 because it contains 6,998 words excluding the items listed in Federal Rule of Appellate Procedure 32(f).

/s/ Dean A. Romhilt
DEAN A. ROMHILT

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Brief for the Acting Secretary of Labor as *Amicus Curiae* was served this 19th day of September, 2023, via the Court's ECF system on each attorney who has appeared in this case and is registered for electronic filing.

/s/ Dean A. Romhilt
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