APPENDIX A

16-3396-cv
Rodriguez-Depena v. Parts Authority, Inc.

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT
August Term 2017

Argued: September 18, 2017
Decided: December 12, 2017
Docket No. 16-3396

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JUAN RODRIGUEZ-DEPENA,

Plaintiff-Appellant,

v.

PARTS AUTHORITY, INC., MICHIGAN LOGISTICS INC., NORTHEAST
LOGISTICS INC., AKA Diligent Delivery Systems,

Defendants-Appellees.

- -

Before: NEWMAN, CALABRESI, and POOLER, Circuit Judges.

Appeal from the Sept. 30, 2016, judgment of the District Court for the Eastern District of New York (Eric N. Vitaliano, District Judge), ordering

arbitration of a claim under the Fair Labor Standards Act and dismissing a complaint for violations of that Act.

Affirmed.

Abdul K. Hassan, Abdul Hassan Law Group, PLLC, Queens Village, NY, for Plaintiff- Appellant.

Andrew P. Marks, Dorf & Nelson, LLP, Rye, NY, for Defendants-Appellees Parts Authority, Inc., Michigan Logistics Inc., and Northeast Logistics Inc.

JON O. NEWMAN, Circuit Judge:

The issue on this appeal is whether claims under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq*., are subject to arbitration. The issue arises on an appeal by Juan Rodriguez-Depena from the September 30, 2016, judgment of the District Court for the Eastern District of New York (Eric N. Vitaliano, District Judge). The judgment granted the motion of Parts Authority, Inc., Michigan Logistics, Inc., and Northeast Logistics, Inc., aka Diligent Delivery Systems ("Diligent") to compel arbitration, and dismissed the complaint alleging FLSA violations.

We conclude that FLSA claims are arbitrable and therefore affirm.

Background

Rodriguez-Depena was employed by the three defendants in 2015, all of which controlled his employment. His employment contract with Diligent contained a clause requiring arbitration of any dispute arising out the contract.

He sued the defendants in the District Court, alleging that he was denied overtime pay in violation of the FLSA.

The District Court ordered arbitration and dismissed the complaint. The Court relied on Judge Weinstein's thorough opinion in *Bynum v. Maplebear Inc.*, 160 F. Supp. 3d 527 (E.D.N.Y. 2016), *appeal dismissed for lack of jurisdiction*, No. 16- 3348 (July 13, 2016) (mem).

Discussion

Statutory claims are arbitrable unless Congress "has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991). In the absence of any such indication of congressional intent, Rodriguez-Depena urges us to preclude arbitration on the authority of *Barrentine v. Arkansas-Best Freight Systems, Inc.*, 450 U.S. 728 (1981). The issue in *Barrentine* was whether

an employee may sue in a district court for an alleged FLSA violation "after having unsuccessfully submitted a wage claim based on the same underlying facts to a joint grievance committee pursuant to the provisions of his union's collective-bargaining agreement." *Id.* at 729-30. Upholding the right to sue in a district court despite the grievance proceeding, the Supreme Court contrasted collective rights arising out of a collective-bargaining agreement with individual rights conferred by a federal statute, in that case, the FLSA. *See id.* at 737.

Ten years later, the Supreme Court in *Gilmer* upheld the enforcement of contractually required arbitration for an individual's claims under the Age Discrimination in Employment Act of 1967 ("ADEA"). In doing so, the Court emphasized that in *Barrentine* the Plaintiff was granted access to a district court to assert his statutory claim after arbitration because the basis for the rights that had been previously asserted was a collective bargaining agreement. *See Gilmer*, 500 U.S. at 35. In light of *Gilmer*'s explanation of the limited rationale of *Barrentine,* the earlier decision cannot fairly be read to preclude arbitration of an individual FLSA claim.[1] Judge Weinstein's

[1] A parenthetical description of *Barrentine in Genesco, Inc. v. T. Kakiuchi & Co.*, 815 F.2d 840, 844 (2d Cir. 1987), describing Barrentine as "finding congressional intent that Fair Labor Standards Act of 1938 claims be nonarbitrable," was written before the Supreme Court authoritatively explained the limited rationale of that case in Gilmer. The parenthetical, not even rising to the level of dictum, had no bearing on the outcome of Genesco and must be regarded as abrogated by Gilmer.

opinion in *Bynum* convincingly ruled in favor of enforcing arbitration of such claims. To the same effect are *Bailey v. Ameriquest Mortgage Co.*, 346 F.3d 821, 824 (8th Cir. 2003), and *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 506 (4th Cir. 2002).

Rodriguez-Depena makes several other arguments all of which lack merit. He contends that the FLSA precludes arbitration because it authorizes suit "in any Federal or State court of competent jurisdiction." 29 U.S.C. § 216(b). *Gilmer* rejected the argument that similar statutory language in the ADEA was a bar to arbitration of claims under that statute. He next contends that arbitration is precluded because it can be expensive. In *Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 299 n.11 (2d Cir. 2013), we considered it unnecessary to consider cost-sharing provisions in rejecting a similar claim, relying on *American Express Co v. Italian Colors Restaurant*, 133 S. Ct. 2304, 2311 n.4 (2013). To whatever extent a claim of barriers to entry into arbitration might preclude the "effective vindication" of statutory rights, id. at 2311, Rodriguez-Depena has not made a sufficient showing to support such a claim. The Appellant also contends that FLSA claims cannot be arbitrable because stipulated dismissals settling such claim brought in a district court require court approval, see *Cheeks v. Freeport Pancake House, Inc.*, 796 F.3d 199 (2d Cir. 2015). The rationale of *Cheeks*, however, is assurance of the fairness of a settlement of a claim filed in court, not a guarantee of a judicial forum.

Even if FLSA claims are subject to arbitration, the Appellant contends that the claims in this case are not arbitrable because the agreement was not signed by Parts Authority and Michigan Logistics and his ability to read English is limited. As the District Court ruled, however, the Appellant's dispute with the non-signatories was factually intertwined with his dispute with Diligent, see *Ragone v. Atlantic Video at Manhattan Center*, 595 F.3d 115, 126-27 (2d Cir. 2010), and a language barrier does not prevent enforcement of contract obligations, see *Myskina v. Conde Nast Publications, Inc.*, 386 F. Supp. 2d 409, 415 (S.D.N.Y. 2005).[2]

Conclusion

The judgment ordering arbitration and dismissing the complaint is affirmed.

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[2] The Appellant's claim that he was a transportation worker, within the exemption of the Federal Arbitration Act for such workers, *see Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 109 (2001), was not presented to the District Court, and need not be considered. *See Singleton v. Wulff*, 428 U.S. 106, 120 (1976) (general rule not to consider on appeal issues not ruled on in trial court); *Bogle-Assegai v. Connecticut*, 470 F.3d 498, 504 (2d Cir. 2006) (same).

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Juan Rodriguez-Depena
Plaintiff,

-against- Memorandum and Order 15-CV-6463 (ENV)(VMS)

PARTS AUTHORITY, INC., MICHIGAN LOGISTICS INC., and NORTHEAST LOGISTICS, INC. a/k/a DILIGENT DELIVERY SYSTEMS,
Defendants

VITALIANO, DJ.

On November 11, 2015, plaintiff Juan Rodriguez-Depena filed this action against defendants Parts Authority, Inc. ("Parts Authority"), Michigan Logistics, Inc. ("Michigan"), and Northeast Logistics, Inc., a/k/a Diligent Delivery Systems ("Northeast"), alleging wage and hour violations under the Fair Labor Standards Act ("FLSA") and New York Labor Law. Compl., Dkt. No. 1. Defendants have filed a motion to compel arbitration and dismiss this action. For the reasons stated below, that motion is granted in its entirety.

Background

The facts, for purposes of this motion, are not in dispute. Northeast provides middleman services for its clients in the automotive parts industry by hiring for them independent owner/operator truck drivers. *See* Def. Br., Dkt. No. 11, at 1, 6. Depena is one such driver. Compl. ,26. Under agreements among the various parties, Michigan is responsible for remitting payments to the owner/operators Northeast hires on behalf of its clients. *Id* ,11. Parts Authority is one of Northeast's clients. *Id* 12.

Depena was hired by Northeast in May 2015 to drive for its clients. Id. ,25. On or around August 30, 2015, he began to drive for Parts Authority, at which time he signed an owner/operator agreement that provided, in relevant part:

> Arbitration of Claims: In the event of a dispute between the parties, the parties agree to resolve the dispute as described in this Paragraph (hereafter "the Arbitration Provision"). This Arbitration Provision is governed by the Federal Arbitration Act, 9 U.S.C. § 1, et seq., and applies to any dispute brought by either [plaintiff] or [Northeast] arising out of or related to this Agreement or [plaintiff]'s relationship with [Northeast], including termination of the relationship. The provisions of this

> Arbitration Provision shall remain in force after the parties' contractual relationship ends . . . Except as it otherwise provides, this Arbitration Provision is intended to apply to the resolution of disputes that otherwise would be resolved in a court of law, and therefore this Arbitration Provision requires all such disputes to be resolved only by an arbitrator through final and binding arbitration and not by way of court or jury trial,

See Def. Br. at 2-3; *see also* Owner Operator Agreement, Dkt. No. 13-1, at 8[1]. This agreement also notified Depena that he had up to 30 days to 'opt out' of the mandatory arbitration provision and of his right to consult an outside attorney. See Def. Br. at 3-4; see also Owner Operator Agreement at 11.

Depena took no steps to opt out of the arbitration provision. His employment with Northeast and Parts Authority ended on or about November 6, 2015. Compl. ,25. Notwithstanding the agreement to arbitrate, a few days later, Depena brought this action.

Standard of Review

"In the context of motions to compel arbitration

[1] All citations to pages of the owner/operator agreement refer to the Electronic Case Filing System ("ECF") pagination.

brought under the Federal Arbitration Act ("FAA"), 9 U.S.C. § 4 (2000), the court applies a standard similar to that applicable for summary judgment." *Bensadoun v.Jobe-Rial,* 316 F.3d 171, 175 (2d Cir. 2003); *see also Par-Knit Mills, Inc. v. Stockbridge Fabrics Co.,* 636 F.2d 51, 54 n.9 (3d Cir. 1980) (holding that "[a]pplication of [the summary judgment standard] to [a motion to compel arbitration] is appropriate inasmuch as the district court's order to arbitrate is in effect a summary disposition of the issue of whether or not there had been a meeting of the minds on the agreement to arbitrate"); *Doctor's Assocs. v. Distajo,* 944 F. Supp. 1010, 1014 (D. Conn. 1996), *aff'd,* 107 F.3d 126 (2d Cir. 1997). Thus, "[a] motion to compel arbitration may be granted when the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." *LaVoice v. UBS Fin. Servs., Inc.,* 2012 WL 124590, at *2 (S.D.N.Y. Jan. 13, 2012) (citation and internal quotations omitted). "A party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration." *Id.* (quoting *Green Tree Fin. Corp.-Alabama v. Randolph,* 531 U.S. 79, 91, 121 S. Ct. 513, 148 L.Ed.2d 373 (2000)). "Once a court is satisfied that an arbitration agreement is valid and the claim before it is arbitrable, it must stay or dismiss further judicial proceedings and order the parties to arbitrate." *Nunez v. Citibank, N.A.,* 2009 WL 256107, at *2 (S.D.N.Y. Feb. 3, 2009); *see also Genesco, Inc. v. T. Kakiuchi Co., Ltd.,* 815 F.2d 840, 844 (2d Cir. 1987) (noting that "[b]y its terms, the [FAA] leaves

no place for the exercise of discretion by a district court, but instead mandates that district courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed") (alteration in original) (citation omitted). In evaluating the present motion, extrinsic evidence submitted by the parties as well as the allegations in the complaint may properly be considered. *See Sutherland v. Ernst & Young LLP,* 768 F. Supp. 2d 547, 548 n.l (S.D.N.Y. 2011), *rev'd on other grounds and remanded,* 726 F.3d 290 (2d Cir. 2013).

Discussion

Plaintiff contends that his claims cannot be sent to arbitration because FLSA claims are not arbitrable as a matter of law. Although the Second Circuit has not explicitly ruled on this issue, it is well-settled among courts in this district that the opposite is true: FLSA claims brought by parties subject to valid arbitration agreements can -and must -be arbitrated. *See Bynum v. Maplebear Inc.,* 160 F. Supp. 3d 527, 540-41 (E.D.N.Y. 2016) (Weinstein, J.) (granting motion to compel arbitration of FLSA claims because "[t]here is no merit to plaintiff's claim that FLSA claims are *per se* non-arbitrable[;]" noting that, "[t]he decisions of the Supreme Court, as well as of courts both within and outside this circuit, indicate that valid arbitration agreements subjecting individual FLSA claims to arbitration must be enforced in accordance with the FAA"), *appeal dismissed* (July 13, 2016), *motion to certify appeal denied,* No. 15-CV-6263, 2016 WL 4995093 (E.D.N.Y.

Sept. 19, 2016); see also *Torres v. United Healthcare Serts.*, 920 F. Supp. 2d 368, 379 (E.D.N.Y. 2013).

Instructively, this rule was recently held to apply in a nearly identical case against the exact same defendants. See *Diaz v. Michigan Logistics Inc.*, 167 F. Supp. 3d 375 (E.D.N.Y., 2016) (granting motion to compel arbitration of FLSA claims brought by owner/operators against Michigan, Northeast and Parts Authority)[2] Rather than an argument vaulting these procedural barriers, Depena offers no good reason to depart from them[3]. Indeed, the absence of

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[2] Depena argues, like his fellow owner/operator in *Diaz,* that Parts Authority and Michigan, as non-signatories to the owner operator agreement, cannot compel arbitration of their claims. *See* Pl. Br., Dkt. No. 14, at 10-12. However, as held in *Diaz,* because "the subject matter of the dispute between [plaintiff] and [Northeast] is factually intertwined with the dispute between [plaintiff] and [non-signatories] Parts Authority [and Michigan] . . . [plaintiff] can be compelled to arbitrate against" those defendants as well. *Diaz,* 167 F. Supp. 3d 375 (citing *Ragone v. At/. Video at Manhattan Ctr., 595* F.3d 115, 128 (2d Cir. 2010)).

[3] In an attempt to escape the clear standard requiring enforcement of his agreement to arbitrate, Depena relies on cases that are plainly inapposite. *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 101 S. CT. 1437, 67 L. Ed. 2d 641 (1981), was not decided under the FAA and "involved arbitration in the context of a collective bargaining agreement … [where] the relevant concern was the tension between collective representation and individual statutory rights." *Bynum*, 160 F. Supp. 3d 539. It has no bearing, therefore, on the arbitrability of FLSA claims by force of its connection to alleged employment relations, which is the subject of FLSA. In the other case plaintiff seeks to rely on, *Cheek v. Freeport Pancake House, Inc.* 796 F. 3d 199 (2d Cir. 2015), *cert denied*, 136 S. Ct. 824, 193 L. Ed. 2d 718

such valid countervailing argument, it is clear that he is subject to a legally enforceable arbitration agreement. An order compelling arbitration of this dispute, including Plaintiff's FLSA claims must be ordered[4].

Conclusion

For the foregoing reasons, the motion of defendants to compel arbitration is granted, arbitration of plaintiff's claims is ordered, and the complaint is dismissed.

The clerk is directed to enter judgment accordingly and to close this case.

So Ordered.

(2016), "[n]o question regarding the arbitrability of FLSA claims was raised." *Bynum*, 160 F. Supp. 3d at 541.

[4] In his opposition, Depena, for the first time, challenges the validity of the arbitration agreement, claiming that, as a non-English speaker, he did not understand the agreement and, therefore, cannot be bound by it. See Pl. Br. At 9. Assuming this late-starter is properly before the Court, the argument is without merit. See *Myskina v. Conde Nast Publ'ns, Inc.*, 386 F. Supp. 2d 409, 415 (S.D.N.Y. 2005)(finding that claims of a "language barrier" are insufficient to free a party from contractual obligations); *Holcomb v. TWR Express, Inc.*, 11 A.D. 3d 513, 514, 782 N.Y.S. 2d 840, 841 (2d Dept. 2004)("An inability to understand the English language, without more, is insufficient to avoid th[e] general rule …[that] "[a] party who executes a contract is presumed to know its contents and to assent to them.")(citation and internal quotations omitted).

Dated: Brooklyn, New York
September 26, 2016

/s/USDJ ERIC N. VITALIANO
Eric N. Vitaliano
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 30th day of January, two thousand eighteen.

Juan Rodriguez-Depena,

Plaintiff - Appellant,

v.

ORDER
Docket Nos:
16-3396

Parts Authority, Inc., Michigan Logistics Inc., Northeast Logistics Inc., AKA Diligent Delivery Systems,

Defendants - Appellees.

Appellant, Juan Rodriguez-Depena, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk

APPENDIX D

U.S. Department of Labor

Office of the Solicitor
Washington, D.C. 20210

March 27, 2015

Catherine O'Hagan Wolfe
Clerk of Court
United States Court of Appeals for the Second
Circuit 40 Foley Square
New York, NY 10007

Re: Cheeks v. Freeport Pancake House,
Docket No. 14-299

Dear Ms. Wolfe:

This Court asked the Secretary of Labor for the U.S. Department of Labor's views on issues presented in above-referenced case, which is currently pending before a panel of this Court. In response, the Secretary files this letter brief addressing the question raised in this case: whether in a lawsuit between private parties brought pursuant to the Fair Labor Standards Act ("FLSA" or "the Act"), the parties may stipulate to the dismissal of FLSA claims with prejudice, without court approval, pursuant to Federal Rule of Civil Procedure 41(a)(1) ("Rule 41"), or whether the FLSA falls within the "applicable federal statute" exception

to Rule 41.[1] As discussed below, it is the Secretary's position that the FLSA falls within the "applicable federal statute" exception in this context, based on Supreme Court precedent, Congress's subsequent acceptance of that precedent, and the long-standing views of the U.S. Department of Labor ("the Department" or "DOL") that FLSA rights cannot be waived or compromised without supervision by the Department or approval by a court.

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[1] Rule 41 states in relevant part:

Dismissal of Actions

(a) Voluntary Dismissal.

(1) By the Plaintiff.

(A) Without a Court Order. Subject to Rules 23(e), 23.1(c), 23.2, and 66 and any applicable federal statute, the plaintiff may dismiss an action without a court order by filing:

(i) a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment; or

(ii) a stipulation of dismissal signed by all parties who have appeared.

(B) Effect. Unless the notice or stipulation states otherwise, the dismissal is without prejudice. But if the plaintiff previously dismissed any federal- or state-court action based on or including the same claim, a notice of dismissal operates as an adjudication on the merits.

Fed. R. Civ. P. 41 (emphases added).

This brief does not address a Rule 41(a)(1) stipulation of dismissal without prejudice, an issue that is not present in this case and that would raise separate legal questions.

Background

1. In August 2012, Dorian Cheeks ("Cheeks"), who worked at Freeport Pancake House ("Freeport Pancake"), filed a complaint in district court alleging that he was entitled to unpaid overtime wages, liquidated damages, and attorney's fees under the FLSA and New York Labor Law ("NYLL"). *See* Joint Appendix ("J.A.") A5 ¶¶ 1-3, 22. Cheeks further alleged that he was demoted and terminated in retaliation for complaining about Freeport's failure to pay him and others the wages that were owed to them. *See id.* ¶¶ 4-5. He sought back pay, front pay in lieu of reinstatement, and damages for pain and suffering for the unlawful retaliation. *See id.* ¶¶ 66-67. Freeport Pancake filed an answer, denying Cheeks' allegations and asserting affirmative defenses. *See id.* at A16-25.

2. After an initial court conference and discovery, the parties reached a private settlement of the claims in the case. *See* Brief for Plaintiff-Appellant at 3. The parties filed a stipulation of dismissal on December 27, 2013, pursuant to Rule 41(a)(1)(ii), asserting that Cheeks' claims were being dismissed "with prejudice" and that he would be "barred from bringing another claim under the [FLSA] . . . for the period set forth in [his] Complaint." *Cheeks v. Freeport Pancake House & W.P.S. Indus.*, No. 2:12-CV-04199, ECF No. 15 (Dec. 27, 2013).

The district court issued an order to show cause, stating that "Plaintiff 'may not waive or otherwise settle [his] FLSA claim[s] for unpaid wages for less

than the full statutory damages unless the settlement is supervised by the Secretary of Labor or made pursuant to a judicially supervised stipulated settlement.'" J.A. A34-35 (quoting *Wolinsky v. Scholastic Inc.*, 900 F. Supp. 2d 332, 335 (S.D.N.Y. 2012), and collecting additional cases). The court ordered the parties to file a copy of the settlement agreement on the public docket and to show why the proposed settlement reflected a "'reasonable compromise of disputed issues rather than a mere waiver of statutory rights brought about by an employer's overreaching.'" *Id.* at A35 (quoting *Martinez v. Ragtime Foods of N.Y., Inc.*, No. 11-CV-1483, 2011 WL 5508972, at *3 (E.D.N.Y. Nov. 10, 2011)). The district court further ordered the parties to provide additional information "in the form of affidavits or other documentary evidence explaining why the proposed settlement is fair and reasonable." *Id*. If the parties did not respond to the order to show cause, the district court stated, the case would be referred to the magistrate judge for discovery. *See id.* at A36.

The parties did not wish to disclose the terms of their settlement, and argued that court approval is not required to voluntarily dismiss a claim under Rule 41. *See* J.A. A26-32. The district court stayed the case and certified the question for interlocutory appeal. *See id.* at A32. This Court granted the motion for interlocutory appeal and oral argument was held on November 14, 2014.

Discussion

1. The FLSA is a remedial and humanitarian statute. *See Farley v. Metro-North Commuter R.R.*, 865 F.2d 33, 35 (2d Cir. 1989). An express policy of the Act is "to correct and as rapidly as practicable to eliminate" certain "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." 29 U.S.C. 202. The Act thus establishes a minimum wage, 29 U.S.C. 206(a), "to secure for the lowest paid segment of the nation's workers a subsistence wage," *D.A. Schulte, Inc. v. Gangi*, 328 U.S. 108, 116 (1946). The FLSA also requires the payment of overtime compensation, 29 U.S.C. 207, "to remedy the 'evil of overwork' by ensuring workers were adequately compensated for long hours, as well as by applying financial pressure on employers to reduce overtime," *Chao v. Gotham Registry, Inc.*, 514 F.3d 280, 285 (2d Cir. 2008) (quoting *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 576-78 (1942) (specifying the spread of employment as a consequence of reducing overtime)).

The Supreme Court has reasoned that in enacting the FLSA, Congress intended to establish a "uniform national policy of guaranteeing compensation for all work" performed by covered employees. *Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers*, 325 U.S. 161, 167 (1945) (internal quotation marks omitted). Consequently, the Court has held that "[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." *Id.* (internal quotation marks omitted). In addition, the Act applies even "to those who would decline its protections" because "employers might be able to use superior bargaining power to coerce employees . . . to waive their protections under the Act." *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 302 (1985). Moreover, FLSA rights are not subject to waiver because these standards protect employers against unfair methods of competition in the national economy, another explicit purpose of the Act. *See* 29 U.S.C. 202(a); *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 710 (1945) ("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 . . . than are those of his competitor.").

2. The rule requiring judicial scrutiny of litigants' FLSA settlements derives from the Supreme Court's decisions in *Brooklyn Savings* and *Gangi*, both of which interpreted the FLSA to preclude employees from waiving in a private settlement their right to recover the full amount of unpaid wages and damages required under the FLSA. In *Brooklyn Savings*, the Supreme Court granted certiorari in three cases to resolve questions under FLSA section 16(b) (the private right of action under the Act). *See* 324 U.S. at 699.[2] In the primary case, a former night watchman

[2] Section 16(b) provided at that time, and still provides, that "[a]ny employer who violates the provisions of section 6 or section 7 of this [Act] shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid

had accepted the Bank's offer to pay him the overtime compensation it determined he was owed, even though he had not brought a claim seeking those wages, in exchange for the watchman's release of all claims under the FLSA. *See id.* at 700, 703. The watchman subsequently brought suit to recover liquidated damages under section 16(b), which had not been paid under the agreement. *See id.* at 700. After determining that the release had not been given in settlement of a bona fide dispute, the Court held that the release was "invalid" and did not bar the watchman's subsequent action seeking liquidated damages. *Id.* at 704, 713.

The Court's rationale was based on the policies underlying the FLSA, as it noted that a statutory right "conferred on a private party, but affecting the public interest, may not be waived or released if such waiver or release contravenes the statutory policy." *Brooklyn Sav.*, 324 U.S. at 704. With respect to the legislative policy embodied in the FLSA, the Court stated as follows:

> The statute was a recognition of the fact that due to the unequal bargaining power as between employer and employee, certain segments of the population required federal compulsory legislation to prevent private contracts on their part which endangered

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overtime compensation, as the case may be, and in an additional equal amount as liquidated damages." 29 U.S.C. 216(b).

> national health and efficiency and as a result the free movement of goods in interstate commerce. To accomplish this purpose standards of minimum wages and maximum hours were provided. Neither petitioner nor respondent suggests that the right to the basic statutory minimum wage could be waived by any employee subject to the Act. No one can doubt but that to allow waiver of statutory wages by agreement would nullify the purposes of the Act. We are of the opinion that the same policy considerations which forbid waiver of basic minimum and overtime wages under the Act also prohibit waiver of the employee's right to liquidated damages.

Id. at 706-07 (internal footnote omitted).

The Supreme Court rejected Brooklyn Savings' argument that statutory language regarding compromise and waiver similar to the provisions that existed in other federal employment statutes (either specifically prohibiting waiver of rights or providing the method under which compromises and settlements can be approved) was necessary to impose restrictions on private settlements. *See Brooklyn Sav.*, 324 U.S. at 712-13. The Court explained that "[t]he decision in the instant case is based on the legislative policy behind this enactment and issues arising under

other acts having different legislative backgrounds are not conclusive in determining the legislative intent with respect to the Fair Labor Standards Act." *Id.* at 713.

The Court's decision did not address the validity of agreements to resolve claims where there *is* a bona fide dispute between the employer and the employee leading to compromise and settlement. *See Brooklyn Sav.*, 325 U.S. at 714. The following year, however, in *Gangi*, 328 U.S. at 111-12, the Court expanded its holding in *Brooklyn Savings* to include a bona fide dispute over coverage under the Act. The employer in *Gangi* paid all the overtime compensation it allegedly owed and "obtained a [written] release under seal signed by the [plaintiffs]," but the plaintiffs nevertheless filed suit to collect liquidated damages under the FLSA. *Id.* at 111-12. The Court held:

> [T]he remedy of liquidated damages cannot be bargained away by bona fide settlements of disputes over coverage. Nor do we need to consider here the possibility of compromises in other situations which may arise, such as a dispute over the number of hours worked or the regular rate of employment. The reasons which lead us to conclude that compromises of real disputes over coverage which do not require the payment in full of unpaid wages and liquidated damages do not differ greatly from those which led us to

> condemn the waivers of liquidated damages in the *O'Neil* case.

Id. at 114-15 (footnote omitted). In dictum, the Court indicated that stipulated judgments were on surer footing than private settlements, stating that "by the simple device of filing suits and entering agreed judgments, we think the requirement of pleading the issues and *submitting the judgment to judicial scrutiny* may differentiate stipulated judgments from compromises by the parties." *Id.* at 113 n.8 (emphasis added). Subsequently, in *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728 (1981), which involved the question whether an employee could bring an FLSA claim in federal court after unsuccessfully pursuing it as a grievance under a collective bargaining agreement, the Court reaffirmed that its "decisions interpreting the FLSA have frequently emphasized the nonwaivable nature of an individual employee's right to a minimum wage and to overtime pay under the Act. Thus, we have held 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. at 740 (quoting *Brooklyn Sav.*, 324 U.S. at 707).

3. Within a few years after *Brooklyn Savings* and *Gangi*, Congress enacted legislation specifically addressing the compromise and waiver of FLSA claims, which accepted and built upon the holdings of *Brooklyn Savings* and *Gangi*.

First, Congress amended the FLSA in the Portal-to-Portal Act of 1947 ("the Portal Act"), Pub. L. No. 80-49, 61 Stat. 84. The Portal Act was motivated by concerns about the volume of litigation that had resulted from earlier Supreme Court decisions interpreting the FLSA expansively, such that preliminary and postliminary work activities were deemed compensable. *See Integrity Staffing Solutions, Inc. v. Busk*, 135 S. Ct. 513, 516-17 (2014). At that time, employers were exposed to significant liability for back pay and liquidated damages arising from such suits. *See id.* at 516; *see also* 29 U.S.C. 251(a) ("Congress finds that the [FLSA] has been interpreted judicially . . . [to] creat[e] wholly unexpected liabilities, immense in amount . . . upon employers[.]").

Congress thus expressly authorized the compromise and waiver of claims that had accrued *prior to* the enactment of the Portal Act but left undisturbed for prospective claims the rule announced in *Brooklyn Savings* and *Gangi*. Section 3 of the Portal Act allows an employee to "compromise[] in whole or in part" "[a]ny cause of action under the [FLSA] . . . which accrued prior to May 14, 1947," and "any action (whether instituted prior to or on or after May 14, 1947) to enforce *such* a cause of action" so long as a "bona fide dispute [exists] as to the amount payable by the employer" and the compromise does not provide less than the minimum wage or overtime owed. 29 U.S.C. 253(a) (emphasis added). Congress's use of the term "*such* a cause of action" in section 3(a) refers directly back to the provision's earlier reference to causes of action under the FLSA which "accrued prior

to May 14, 1947," thus making clear that section 3 (like several other provisions of the Portal Act) simply addressed FLSA liability arising before enactment of the Portal Act. 29 U.S.C. 253(a); *see* H.R. Conf. Rep. No. 80-326, at 12 (1947) (explaining that this provision "lays down no rule as to compromises or waiver with respect to causes of action hereafter accruing" and that "[t]he validity or invalidity of such [later-in-time] compromises or waivers is to be determined under law other than [section 3]"). With respect to that liability, section 3 provides that "[a]ny employee may hereafter waive his right under the [FLSA] to liquidated damages, in whole or in part, with respect to activities engaged in prior to May 14, 1947," 29 U.S.C. 253(b), and that (with qualifications not relevant here) "[a]ny such compromise or waiver . . . shall . . . be a complete satisfaction of [the employee's] cause of action and a complete bar to any action based on such cause of action," 29 U.S.C. 253(c). As Senator Donnell explained, "we have recognized in our bill, by not making the provision for compromise and settlement applicable to the future, that there is a grave danger of placing a provision of that kind in the bill as to future activities, because such a provision might well result, as in the case of the Brooklyn National Savings Bank, in the utter demolition of the Fair Labor Practices Act." 93 Cong. Rec. 2121 (1947). By explicitly limiting the category of FLSA claims that could be compromised by employees only to those that had accrued prior to May 14, 1947, Congress accepted the application of the *Brooklyn Savings/Gangi* non-

waiver rule to future FLSA claims.[3] Second, in 1949, Congress enacted section 16(c) of the FLSA, which vests the Secretary of Labor with authority to "supervise the payment of unpaid minimum wages or the unpaid overtime compensation" due under the Act. *See* Fair Labor Standards Amendments of 1949, Pub. L. No. 81-393, § 14, 63 Stat. 910, 919 (codified at 29 U.S.C. 216(c)). Section 16(c) then specifies that "the

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[3] The majority view with which the Department concurs, primarily based on the plain text, is that section 3 of the Portal Act, 29 U.S.C. 253, applies only to claims that accrued prior to the Portal Act. *See* 12 Fed. Reg. 7655, 7668 (Nov. 18, 1947) (former DOL regulation at 29 C.F.R. 790.27 interpreting Portal Act section 3 to "authorize compromise only of those causes of action accruing prior to May 14, 1947" because "the statute does not change existing law with respect to any cause of action accruing after the date of the enactment of the act") (internal footnotes omitted); *The Fair Labor Standards Act*, § 1.IV.A.2 at 21 (Ellen C. Kearns et al. eds., 1999) (the Portal Act amendment codified at 29 U.S.C. 253 is "retroactive" only); Marc Linder, *Class Struggle at the Door: The Origins of the Portal-to-Portal Act of 1947*, 39 Buff. L. Rev. 53, 137, 148 (1991) (explaining that the initial House bill would have allowed all claims to be "waived, compromised, adjusted, settled, or released[,]" but the Senate version of the bill that was ultimately adopted by the conference committee did not extend compromise and settlement to future actions) (internal quotation marks omitted). Some courts, however, have construed this provision differently notwithstanding the text of section 3. *See Archer v. TNT USA, Inc.*, 12 F. Supp. 3d 373, 382 (E.D.N.Y. 2014) ("Some courts [including the Eleventh Circuit] have interpreted 29 U.S.C. § 253 as applying only to actions which accrued prior to May 14, 1947, the date the Portal-to-Portal Act became effective. . . . Other courts [including the Fifth Circuit] have assumed that § 253 was intended to abrogate *O'Neil* and *Gangi* and have applied the statute without restriction.") (internal quotation marks and citation omitted).

agreement of any employee to accept such [a Department-of-Labor supervised] payment" shall, upon payment in full, "constitute a waiver by such employee" of the employee's right under section 16(b) to bring suit for unpaid wages and liquidated damages. 29 U.S.C. 216(c); *see* S. Rep. 81-640 (1949), *reprinted in* 1949 U.S.C.C.A.N. 2241, 2247. This legislative provision for the Department's supervision of FLSA settlements that will operate to waive the employee's FLSA claims confirms the teachings of *Brooklyn Savings* and *Gangi* that employees cannot waive their FLSA rights on their own. If employees could do so, Congress's provision for the Department's supervision of settlements that validly waive FLSA claims when paid would have little, if any, practical import. Thus, Congress's legislative Acts in the years immediately following *Brooklyn Savings* and *Gangi* confirmed and built upon the limitations that those decisions place on an employee's ability to waive FLSA claims in a private settlement.

4. These seminal Supreme Court cases, which laid the foundation for Congress's subsequent revisions to the legislative scheme, form the basis of the majority view in the courts of appeals that FLSA rights can only be waived or compromised where employees make claims and there is a bona fide dispute culminating in either DOL supervision or court approval of the agreed-upon settlement. The leading decision articulating that rule is *Lynn's Food Stores, Inc. v. United States*, 679 F.2d 1350, 1352-53 (11th Cir. 1982). In *Lynn's Food*, the Department found after investigation that Lynn's Food had violated the FLSA's minimum wage and

overtime provisions and that it was therefore liable to its employees for back wages totaling more than $10,000, as well as liquidated damages. *See* 679 F.2d at 1352. After Lynn's Food's attempts to negotiate a settlement with DOL failed, Lynn's Food approached its employees directly, offering them $1,000 collectively in exchange for their release of all claims arising under the FLSA. *See id.*

Fourteen Lynn's Food employees signed the agreement, and Lynn's Food subsequently sought judicial approval of the settlement in district court. *See id.* The Eleventh Circuit affirmed the district court's dismissal of Lynn's Food's action on the ground that the settlements violated the FLSA. *See id.* The court held that employees can only compromise their FLSA back wage claims in two specific ways. *See id.* First, under section 16(c) of the statute, employees may waive their right to FLSA compensation by accepting payment of unpaid wages if that payment is made under the supervision of the Secretary of Labor and the back wages are paid in full. *See id.* at 1353. Second, when employees bring a private action against their employer under section 16(b), the court may enter a stipulated judgment "after scrutinizing the settlement for fairness." *Id.* Because Lynn's Food's agreements did not fall within either category, as they were not supervised by the Department and were not entered as a stipulated judgment in an action brought by the employees, the court held that they could not be approved. *See id.*

In reaching its conclusion, the Eleventh Circuit relied on the policy considerations underlying the Supreme Court's decisions in *Brooklyn Savings* and *Gangi*: "Recognizing that there are often great inequalities in bargaining power between employers and employees, Congress made the FLSA's provisions mandatory; thus, the provisions are not subject to negotiation or bargaining between employers and employees." *Lynn's Food*, 679 F.2d at 1352. The facts in *Lynn's Food* presented a stark example to the Eleventh Circuit of the result of such unequal bargaining power. *See id.* at 1354. The employees, some of whom did not speak English, were apparently unaware of the Department's determination that Lynn's Food owed them over $10,000, and a transcript of the settlement proceedings revealed "a virtual catalog of the sort of practices which the FLSA was intended to prohibit," such as the Lynn's Food's representative repeatedly suggesting that the employees were not entitled to unpaid wages and that only "malcontents" would accept the back pay. *Id.*

In contrast with the procedural posture in *Lynn's Food* where the employer privately bargained with its employees over wages owed under the FLSA and then unilaterally sought judicial imprimatur, the Eleventh Circuit explained the reasoning behind allowing courts to approve settlements where the employees themselves bring suit under the FLSA. *See* 679 F.2d at 1354. In such cases, the court opined, there is some assurance of an adversarial context because the employees are likely to be represented by counsel, and therefore "the settlement is more likely to reflect a

reasonable compromise of disputed issues rather than a mere waiver of statutory rights brought about by an employer's overreaching." *Id.* Whether the employee is represented by counsel or not, however, approval by the courts is required. The Eleventh Circuit recently reaffirmed its holding in *Lynn's Food*, extending it to cover settlement of suits brought by former employees as well as current employees. *See Nall v. Mal-Motels, Inc.*, 723 F.3d 1304, 1307 (11th Cir. 2013).[4]

The Eighth Circuit has adopted the Eleventh Circuit's rule. In *Copeland v. ABB, Inc.*, 521 F.3d 1010, 1014 (8th Cir. 2008), the Eighth Circuit stated that "FLSA rights are statutory and cannot be waived." The only exceptions, according to the court, are where the Secretary supervises payment of unpaid wages pursuant to section 16(c) or where a stipulated judgment is entered in a suit brought directly against a private employer under section 16(b). *See id.* (citing *Lynn's Food*, 679 F.2d at 1353); *see also Beauford v.*

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[4] The Eleventh Circuit has indicated that where an employer tenders the full amount of unpaid wages claimed by an employee and the employee concedes that the claim is therefore moot, this may not represent a "formal settlement agreement" that would need to be approved by a court. *See Dionne v. Floormasters Enter., Inc.*, 667 F.3d 1199, 1205 (11th Cir. 2012). However, in *Floormasters*, the court did not rule that settlements in full satisfaction of the plaintiff's claim should not be subject to scrutiny pursuant to *Lynn's Food*. *Id.; accord Silva v. Miller*, 307 Fed. App'x 349, 351 (11th Cir. 2009) (per curiam) ("On its face, *Lynn's Food* suggests no exception to judicial oversight of settlements when the employee receives all wages due; . . . We do not say what, if any, judicial oversight applies under *Lynn's Food* when full satisfaction of the FLSA claim is made.").

ActionLink, LLC, __ F.3d __, Nos. 13-3265, 13-3380, 2015 WL 1260453, at *7 (8th Cir. Mar. 20, 2015). The Seventh Circuit has also endorsed *Lynn's Food*, explaining that:

> [T]he Fair Labor Standards Act is designed to prevent consenting adults from transacting about minimum wages and overtime pay. Once the Act makes it impossible to agree on the amount of pay, it is necessary to ban private settlements of disputes about pay. Otherwise the parties' ability to settle disputes would allow them to establish subminimum wages. Courts therefore have refused to enforce wholly private settlements.

Walton v. United Consumers Club, Inc., 786 F.2d 303, 306 (7th Cir. 1986) (citing *Lynn's Food*, 679 F.2d at 1352). The Sixth and Fourth Circuits have also acknowledged that waiver of an FLSA claim in a private settlement is not valid. *See Taylor v. Progress Energy, Inc.*, 493 F.3d 454, 460 (4th Cir. 2007); *McConnell v. Applied Performance Techs., Inc.,* 98 Fed. App'x 397, 398 (6th Cir. 2004).[5] By contrast, in *Martin v. Spring Break '83 Productions, L.L.C.*, 688 F.3d 247, 255 (5th Cir.), *cert. denied*, __ U.S. __ , 133

[5] The Federal Circuit has also recognized that *Lynn's Food* applies to private-sector employees, but it has held that the same settlement-approval rules do not apply to federal-sector collective bargaining agreements. *See O'Connor v. United States*, 308 F.3d 1233, 1244 (Fed. Cir. 2002).

S. Ct. 795 (2012), the Fifth Circuit upheld a release of FLSA claims brought about by a private settlement between the employer and a union.[6]

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[6] Most district courts that have addressed the issue follow *Lynn's Food*, even in the absence of binding circuit precedent. *See, e.g., Bettger v. Crossmark, Inc.*, No. 1:13-CV-2030, 2015 WL 279754, at *3 (M.D. Pa. Jan. 22, 2015) ("Although the Third Circuit has not addressed whether such § 216(b) actions claiming unpaid wages may be settled privately without first obtaining court approval, district courts within the Third Circuit have followed the majority position and assumed that judicial approval is necessary"); *Duprey v. The Scotts Co., LLC*, 30 F. Supp. 3d 404, 407-08 & n.2 (D. Md. 2014) (noting that most judges in the Fourth Circuit follow *Lynn's Food* but "the precedent in this Circuit is unclear as to whether court approval is *required* in cases subject to dismissal under Fed. R. Civ. P. 41(a)(1)(A)"); *Snook v. Valley Ob-Gyn Clinic, P.C.*, 14-cv-12302, 2014 WL 7369904, at *1-2 (E.D. Mich. Dec. 29, 2014); *Carrillo v. Dandan, Inc.*, CV 13-671, 2014 WL 2890309, at *4-5 (D.D.C. June 26, 2014); *Peralta v. Soundview at Glen Cove, Inc.*, No. 11-CV-0867, 2013 WL 2147792, at *1 (E.D.N.Y. May 16, 2013) ("It is well settled in [the Second] Circuit that judicial approval of . . . FLSA settlements is required."); *Till v. Saks Inc.*, No. C 11-00504, 2014 WL 1230604, at *1 (N.D. Cal. Mar. 21, 2014); *Peterson v. Mortg. Sources Corp.*, No. 08-2660-KHV, 2011 WL 3793963, at *4 (D. Kan. Aug. 25, 2011); *but see, e.g., Sarceno v. Choi*, No. 13-1271, 2014 WL 4380680, at *10-11 (D.D.C. Sept. 5, 2014)("The Court concurs with the reasoning of the Fifth Circuit in *Martin* that a private settlement of FLSA claims may be enforceable, even if the settlement was reached without United States Department of Labor or judicial supervision or approval, but only when the agreement resolves a bona fide dispute between the parties and the terms of the settlement are fair and reasonable"); *Picerni v. Bilingual Seit & Preschool, Inc.*, 925 F. Supp. 2d 368, 369-79 (E.D.N.Y. 2013) (rejecting the rule that court approval is required for FLSA settlements in the first instance in favor of a rule that would examine the fairness of such settlements and validity of a waiver in subsequent litigation, if there is any).

5. The Department has repeatedly expressed its view that FLSA settlements between private parties must be supervised by the Department or approved by a court. Over three decades ago, in response to the employer in *Lynn's Food* attempting to obtain subsequent judicial approval for the invalid releases it had obtained from its workers, the Department explained that "the only way an employer can obtain judicial sanction of a compromise settlement of the amount of the employees' back wages is by submitting to a court a proposed consent judgment in a §16(b) suit brought by the employees against the employer to recover for alleged FLSA violations." *Lynn's Food*, Brief for the Sec'y of Labor at 13. In a 1988 Senate hearing on waivers under the Age Discrimination in Employment Act ("ADEA"), the Solicitor of Labor and the Assistant Secretary for the Employment Standards Administration "made clear that the Secretary of Labor does not recognize as valid any waiver of FLSA rights that is not supervised either by the Secretary pursuant to section 16(c) (or, in the case of a private action filed under section 16(b)) by a federal court." H.R. Rep. No. 101-664, at 17-18 (1990) (citing *Age Discrimination in Employment Act - Waiver of Rights*, S. Hrg. No. 100-717 Before the Subcomm. on Labor of the S. Comm. on Labor & Human Res., at 110-15 (1988)).[7]

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[7] When Congress amended the ADEA in 1990 to include numerous specific requirements governing the waiver of ADEA claims, see Older Workers Benefit Protection Act, Pub. L. 101-433, § 201, 104 Stat. 978, 988 (codified at 29 U.S.C. 626(f)), it was clear that Congress viewed FLSA waivers as distinct from ADEA

The Department also expressed this view in *Taylor v. Progress Energy*, a case in which the Fourth Circuit analogized Family and Medical Leave Act ("FMLA") waivers to FLSA waivers, holding that FMLA waivers of rights (both prospective and retrospective) were prohibited "in the absence of prior approval of the DOL or a court." *Taylor v. Progress Energy, Inc.*, 415 F.3d 364, 371 (4th Cir. 2005), *reh'g granted & judgment vacated* (2006), *judgment reinstated*, 493 F.3d 454 (2007), *cert. denied*, 554 U.S. 909 (2008). Arguing that the Fourth Circuit's interpretation of the applicable FMLA regulation was incorrect, the Department distinguished waiver under the FLSA from waiver under other protective employment legislation:

> The judicial prohibition against private settlements, and consequent requirement that all FLSA settlements must be approved by the Department or a court . . . is based on policy considerations unique to the FLSA. The FLSA is a broad remedial statute setting the floor for minimum wage and overtime pay. *See Brooklyn Sav. Bank,* 324 U.S. at 706. It was intended to protect the most vulnerable workers who lacked the bargaining power to

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waivers, in that FLSA rights could not be privately waived absent Department supervision or court approval, *see* H.R. Rep. No. 101-664, sec. (B)(2) (1990).

> negotiate a fair wage or reasonable work hours with their employers. *Id.* at 706-07. Based on the courts' perception of the characteristics of the workers protected by the FLSA, it is virtually alone among federal employment statutes in its restriction on settlements.

Brief for the Sec'y of Labor as Amicus Curiae in Support of Pet. for Reh'g En Banc, *Taylor v. Progress Energy, Inc.*, 493 F.3d 454 (4th Cir. 2007) (No. 04-1525), 2005 WL 6718391, at *13. The United States also filed an amicus brief at the Supreme Court's invitation recommending that the petition for certiorari in *Progress Energy* be denied, stating the following:

> DOL's interpretation of the regulation as barring only prospective waiver of FMLA rights is consistent with this Court's decisions in employment-law cases disfavoring prospective waivers of rights while encouraging the settlement of claims. . . . The sole exception is for FLSA claims. The court of appeals stressed the FLSA analogy and followed decisions of this Court prohibiting private settlements of FLSA claims. That reasoning was erroneous. First, the prohibition against private FLSA settlements is based on policy considerations unique

> to that statute. *See Barrentine v. Arkansas-Best Freight Sys., Inc.,*450 U.S. 728, 740 (1981); *D.A. Schulte, Inc. v. Gangi,* 328 U.S. 108, 114-115 (1946); *Brooklyn Sav. Bank v. O'Neil,* 324 U.S. 697, 706-707 (1945). The FLSA is a broad remedial statute setting the floor for minimum wage and overtime pay and was intended to protect the most vulnerable workers, who lacked the bargaining power to negotiate a fair wage or reasonable work hours with their employers. See *id.* at 706-07. By contrast, the policy considerations underlying the settlement of FMLA claims are much more akin to those underlying Title VII, the ADA, and the ADEA, all of which have been construed to permit unsupervised settlement of claims. Like those statutes, the FMLA is not primarily focused on hourly-workers and their wages, but protects all segments of the workforce, from low-wage workers to highly paid professionals.

Brief for the United States as Amicus Curiae, *Taylor v. Progress Energy, Inc.*, 554 U.S. 909 (2008) (No. 07-539), 2008 WL 2095733, at *13-14 (citations and internal footnote omitted).

The Department reiterated its position regarding FLSA settlements as compared to settlements under

other employment statutes in the final rule amending the FMLA regulations in 2008:

> The judicial prohibition against private settlements under the FLSA is based on policy considerations unique to the FLSA. The FLSA is a remedial statute setting the floor for minimum wage and overtime pay. It was intended to protect the most vulnerable workers, who lacked the bargaining power to negotiate a fair wage or reasonable work hours with their employers. The judicially-imposed restrictions on private settlements under the FLSA have not been read into other employment statutes that reference the FLSA and should not be read into the FMLA.

Family & Medical Leave Act of 1993, 73 Fed. Reg. 67,934, 67,987 (Nov. 17, 2008).

The Department recently addressed the prohibition against waivers of FLSA claims in *Boaz v. FedEx Customer Information Services, Inc.*, 725 F.3d 603, 607 (6th Cir. 2013), where the Sixth Circuit held that an employment agreement could not shorten the statute of limitations for bringing an FLSA claim because that would operate as a waiver of that claim. The amicus brief filed jointly by the Department and the Equal Employment Opportunity Commission reiterated that the "FLSA is unique . . . because it . . . prohibits the

private settlement of *existing* claims absent supervision from the Department of Labor or authorization by a court." Brief for the Sec'y of Labor & Equal Emp't Opportunity Comm'n as Amici Curiae in Support of Plaintiff-Appellant, *Boaz v. FedEx Customer Info. Servs., Inc.*, 725 F.3d 603 (6th Cir. 2013) (No. 12-5319), 2012 WL 2953029, at *19.

6. No circuit has addressed the specific question presented in this case as to whether and to what extent the FLSA falls within the "applicable federal statute" exception to Rule 41, nor has the Department previously addressed the interplay between Rule 41 and the rules regarding settlement of FLSA claims.[8] However, as explained above, the courts, Congress, and the Department have recognized over the course of many years that private compromises of FLSA rights are subject to unique oversight in order to

[8] The "applicable federal statute" exception in Rule 41(a)(1)(A) is not specifically discussed in the Advisory Committee Notes beyond a statement that the rule "preserve[s]" provisions in statutes such as 8 U.S.C. 1329 (immigration violations) and 31 U.S.C. 3730 (qui tam actions), which explicitly require court approval for a dismissal. Fed. R. Civ. P. 41 Advisory Comm. Notes, 1937 Adoption. An example of a statute that has been found to be an exception to Rule 41 is the Prison Litigation Reform Act, which does not contain explicit language regarding court approval prior to dismissal, but which courts have recognized restricts litigants' right to dismiss an action without a court order under Rule 41(a) due to the statute's requirement that cases be screened for frivolousness under a "three strikes" provision. *See, e.g., Large v. Beckham Cnty. Dist. Ct.*, 558 Fed. App'x 827, 828 (10th Cir. 2014); *Glenn v. Gillis*, No. 5:12-cv-133, 2012 WL 3240674, at *3 (N.D. Fla. July 11, 2012).

effectuate the statutory intent to provide subsistence wages to the lowest-paid workers, and to provide a wage floor to prevent unfair competition among employers. These longstanding rules would be undermined if the FLSA is not considered to come within the "applicable federal statute" exception under Rule 41 insofar as the rule permits private parties to stipulate without any court approval to the dismissal *with prejudice* of their FLSA claims. Rule 41(a)(1)(B) states that if the parties' stipulation of dismissal does not otherwise specify, a Rule 41(a)(1) dismissal is without prejudice, but it permits the parties to stipulate to a dismissal with prejudice. If Rule 41(a)(1) were to permit private parties in FLSA suits to dismiss their claims with prejudice, such dismissals would preclude a plaintiff from later bringing an FLSA claim. The employee would thus be waiving FLSA rights without any court or Department of Labor oversight, an outcome that would contravene established FLSA law.

As the Supreme Court opined in *Gangi*, stipulated judgments guard against the danger of allowing employees with inferior bargaining power to compromise their statutory rights under the FLSA because they require "submitting the judgment to *judicial scrutiny*." 328 U.S. at 113 n.8 (emphasis added). Although this statement is dictum, it should nevertheless be given proper consideration. *See United States v. Oakar*, 111 F.3d 146, 153 (D.C. Cir. 1997) ("'[C]arefully considered language of the Supreme Court, even if technically *dictum*, generally must be treated as authoritative[.]'") (quoting *Doughty*

v. Underwriters at Lloyd's, 6 F.3d 856, 861 n.3 (1st Cir.1993)). In other words, merely filing a stipulation of dismissal to dismiss private FLSA claims with prejudice – even where parties are represented by counsel – is not sufficient.

The Department notes that, as courts have recognized, being represented by counsel does not always, or necessarily, ensure fairness for low-wage workers who "often face extenuating economic and social circumstances and lack equal bargaining power; therefore, they are more susceptible to coercion or more likely to accept unreasonable, discounted settlement offers quickly." *Socias v. Vornado Realty L.P.*, 297 F.R.D. 38, 40 (E.D.N.Y. 2014); *see, e.g., Nall*, 723 F.3d at 1306 (plaintiff agreed to accept the employer's out-of-court settlement offer because the employer was "pressuring her" and she "was homeless at the time and needed money"); *Walker v. Vital Recovery Servs., Inc.*, 300 F.R.D. 599, 600 n.4 (N.D. Ga. 2014) (many of the plaintiffs in an FLSA collective action accepted offers of judgment for $100 because they were "unemployed and desperate for any money they can find"); *Martinez v. Bohls Bearing Equip. Co.*, 361 F. Supp. 2d 608, 632 (W.D. Tex. 2005) (plaintiff accepted one-third of the overtime compensation he believed he was owed under duress because his wife was terminally ill and he needed money to fix his truck). Nor is there any assurance that the plaintiff's attorney will not "keep the lion's share of the proceeds" as part of the settlement agreement. *See Socias*, 297 F.R.D. at 41. Also, there is no guarantee that a plaintiff's attorney will not collude with the employer

to achieve a resolution that is in the employer's interest. S*ee, e.g., Zhou v. Wang's Rest.*, No. C 05-0279, 2007 WL 134441, at *1-2, 8-9 (N.D. Cal. Jan. 16, 2007) (a worker was pressured to drop his claims and replace his previous counsel, who had "got too close to establishing Defendant's wrong-doing," with new counsel who was being represented by the employer's counsel in another action, presenting "an example of the kind of employer abuse of superior bargaining power" that the Supreme Court has decried). Moreover, requiring judicial approval of settlements has a deterrent effect, as it "provides an incentive for [employers] to engage in meaningful settlement negotiations with employees and encourages their future compliance with the Act." *Socias*, 297 F.R.D. at 41. For many of these reasons, several district courts have determined that the FLSA is one of the "applicable federal statutes" that limits Rule 41(a)(1). *See, e.g., Armenta v. Dirty Bird Group, LLC*, No. 13cv4603, 2014 WL 3344287, at *3 (S.D.N.Y. June 27, 2014); *Socias*, 297 F.R.D. at 40-41; *Wolinsky*, 900 F. Supp. 2d at 340-41; *Minsterman v. S.L. Nusbaum Realty Co.*, No. 2:10cv303, 2011 WL 9687817, at *1 (E.D. Va. Jan. 21, 2011); *Dees v. Hydrady, Inc.*, 706 F. Supp. 2d 1227, 1244-47 (M.D. Fla. 2010); *but see Picerni*, 925 F. Supp. 2d at 379 (concluding that requiring court approval before permitting the parties to dismiss an FLSA action "runs afoul" of Rule 41).

Conclusion

While the Department is sensitive to the potential burdens placed on its own caseload and that of the

judiciary, as well as the general interest in efficient resolution of disputes, the unique purpose of the Act – "to secure for the lowest paid segment of the nation's workers a subsistence wage," *Gangi,* 328 U.S. at 116 – and the unequal bargaining power between employers and employees that is prevalent today, just as it was in 1945 when the Supreme Court first examined these issues, warrant judicial scrutiny of a private settlement prior to a stipulation to dismiss FLSA claims with prejudice.

For the foregoing reasons, the Department submits that the FLSA falls within the "applicable federal statute" exception to Rule 41, such that parties in a private lawsuit brought pursuant to the FLSA may not stipulate to the dismissal of FLSA claims with prejudice without court approval.

Respectfully submitted,

M. PATRICIA SMITH
Solicitor of Labor

JENNIFER S. BRAND
Associate Solicitor

PAUL L. FRIEDEN
Counsel for Appellate Litigation

s/Laura Moskowitz
LAURA MOSKOWITZ
Senior Attorney
U.S. Department of Labor

Office of the Solicitor
200 Constitution Ave., NW, Room N-27l6
Washington, D.C. 20210
(202) 693-5555