In the United States District Court
for the Southern District of Ohio
Western Division

Courtney Dimidik, *On behalf of herself and those similarly situated*, Plaintiff, v. Hallrich Incorporated, *et al.*, Defendants.	Case No. 3:21-cv-00306 Judge Walter H. Rice Magistrate Judge Peter B. Silvain, Jr.

Plaintiff's Response in Opposition to Defendants' Motion to Compel Arbitration

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1. Introduction

Employers routinely require employees, even minimum wage workers, to sign arbitration contracts. *Cui bono*? Who benefits? It certainly isn't the employees.

It is time to have an honest conversation about forced arbitration in the employment setting. Current case law is largely based on a fantasy that arbitration provides a neutral forum to hear disputes that is effective and efficient. As this brief discusses, the reality is far different.

Plaintiff opposes Defendants' attempt to force her to arbitrate her wage claims for two overarching reasons:

First, arbitration acts as a private dispute resolution system. Private resolutions of Fair Labor Standards Act (FLSA) disputes are unenforceable unless a court or the Department of Labor

(DOL) reviews and approves the resolution. Because the arbitration rules forbid this review, the arbitration is unenforceable. Moreover, even if the rules were read to allow such a review, the review (to be effective) would negate the purported purpose of the arbitration—a final, binding adjudication of the dispute. When a contract's purpose is defeated, the contract is unenforceable. *See, e.g.*, *Bozeman v. Fitzmaurice*, 107 N.E.2d 627, 629 (Ohio 8th Dist.1951) (finding that "the vital object of the contract" was "frustrated," so it "fail[ed]").

Second, the arbitration agreement is unconscionable. Courts have repeatedly recognized the coercive nature of the employment relationship.[1] Still, courts have operated under the assumption that arbitration provides a neutral and effective forum for resolving employment disputes. The facts no longer justify that deferential assumption.

Plaintiff respectfully asks the Court to deny Defendants' Motion to enforce their arbitration agreements.

2. Prior courts' rosy assumptions about arbitration do not match the cold reality of forced arbitration.

As employment arbitration has grown in popularity (for employers), courts have based their decisions on outdate assumptions about arbitration that practice has shown to be incorrect. The fantasy is that arbitration provides a forum where a neutral expert can efficiently and effectively hear disputes. *Contra Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 685 (2010). Of course, the fantasy also involves a world where employees and employers are on equal footing in terms of knowledge and bargaining power. If this that were true, employees would have no complaints about proceeding to arbitration.

[1] *Tony & Susan Alamo Found. v. Secy. of Labor*, 471 U.S. 290, 302 (1985) ; *Kleiner v. First Natl. Bank*, 751 F.2d 1193, 1203 (11th Cir. 1985); *Crosby v. Stage Stores, Inc.*, 377 F.Supp.3d 882, 889 (M.D. Tenn. 2019).

The reality, however, is grim. Arbitration is not a neutral forum. The arbitration industry is itself a big business with motivations heavily stacked in favor of its main, repeat customers—employers. To behave otherwise would jeopardize the future business of organizations like the American Arbitration Association (AAA) and individual arbitrators (who are often practicing attorneys who represent companies). It is time for courts to recognize this unfortunate truth and evaluate the reality of forced arbitration.

The most important component of effective and fair adjudication is the neutrality of the decisionmaker. Arbitrators get paid by being selected to arbitrate disputes. Common sense indicates that they are likely to favor repeat customers, who, in this case, are employers. If they do not, they will not receive further business—but favoring employers results in repeat business.[2] Recent studies indicate that the "repeat player effect" is a real problem in arbitration.[3] In this case, the Defendant pizza company has over 1,750 employees subject to arbitration. A small fraction of those employees may arbitrate one time. In contrast, Defendant is likely to arbitrate hundreds of times.

Neutrality of the forum's rules is also critical to a fair resolution. Again, arbitration fails. After all, if the rules were fair, why would an employer force workers into the forum?

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[2] For example, in a nearly identical delivery driver minimum wage violation arbitration, the arbitrator Eric Epstein granted the pizza company's cross-motion for partial summary judgment as to the appropriate legal standard for adjudicating the claims. Arbitrator Epstein was promptly rewarded for providing a favorable decision—just twenty days later, Arbitrator Epstein had to disclose that he had accepted an offer of employment as arbitrator in another case where the same defense firm was represented another company. *See* Email of Hiro Kawahara to Counsel and attachment (attached as Exhibit 1).

[3]Jessica Silver-Greenberg and Michael Corkery, *In Arbitration, a 'Privatization of the Justice System,'* N.Y. Times, (Nov. 1, 2015) (accessible at https://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html) (attached as Exhibit 2).

Under the AAA rules,[4] the arbitrator has wide latitude to determine the course and scope of the private adjudication of the case. For example, the arbitrator has the power to rule on his or her jurisdiction (including any objections with respect to the existence, scope, or validity of the arbitration agreement),[5] the power to determine what discovery is necessary (with the caveat that such discovery should be consistent with the expedited nature of arbitration),[6] and the power to set the rules for conducting the proceedings, including by directing the order of proof, bifurcating proceedings, and directing the parties to focus their presentations on issues the decision of which could dispose of all or part of the case.[7] These rules provide the arbitrator, individuals unbound by the Code of Judicial Conduct for United States Judges or any similar code or regulation, with unchecked power to decide how a case should be resolved. Despite boasting "fairness," the parties have little to no recourse for the abuse of such power.

As another example is that, despite the Arbitration Plan's promise to the contrary, employees are not able to utilize subpoena power to obtain pre-hearing discovery or deposition testimony from non-parties. *See, e.g., Life Receivables Tr. V. Syndicate 102 at Floyd's of London*, 579 F.3d 210, 125–16 (2d Cir. 2008); *Hay Group, Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404, 407, (3d Cir. 2004); *COMSAT Corp. v. Nat'l Sci. Found.*, 190 F.3d 269, 275 (4th Cir. 1999); *Managed Care Advisory Group, LLC v. CIGNA Healthcare, Inc.*, 939 F.3d 1145, 1159–60 (11th Cir. 2019). In a wage case, where the employer purchases their vehicle reimbursement rate from a third-party

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[4] *See* AAA Employment Arbitration Rules and Mediation Procedures Excerpts (accessible in full at https://www.adr.org/sites/default/files/Employment%20Rules.pdf) (attached as Exhibit 3).
[5] *See id* at Rule 6(a).
[6] *See id.* at Rule 9.
[7] *See id.* at Rule 28.

company, the inability to subpoena a party that is directly involved in determining the employees' wages obliterates the employees' ability to effectively prosecute their claims.

Defendants' Arbitration Plan is even worse than the AAA's standard rules.

First, Defendants strip employees of the most powerful tool they have to adjudicate wage claims: the class and collective action. Doing so does nothing but limit Defendants' potential liability and make it cheaper to break the law than to follow it.

Second, the Arbitration Plan denies employees full discovery, which they *need* and are often entitled to in order to prove their case,[8] by modifying the already employer-friendly AAA Employment Rules. The Supreme Court has recognized that, particularly in wage cases, employers hold most or all of the evidence. *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 686–87 (1946). A limit on discovery only serves to harm the employee.

Third, the Arbitration Plan also overrides AAA Employment Rule 27, which allows arbitrator discretion to permit dispositive motions if the arbitrator determines that the moving party has shown substantial cause that the motion is likely to succeed and dispose of or narrow the issues in the case, and instead requires that the arbitrator allow summary judgment briefing.[9] While this change may seem innocuous at first blush, it is no coincidence that evidence shows that employers succeed in winning dismissal in over half of these motions.[10]

[8] *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 686–87 (1946), *superseded by statute on other grounds*, Portal-to-Portal Act of 1947, 29 U.S.C. § 251, *et seq.*, ("The remedial nature of [the FLSA] and the great public policy which it embodies, however, militate against making [the] burden [of proving damages] an impossible hurdle for the employee. Due regard must be given to the fact that it is the employer who has the duty under § 11 (c) of the Act to keep proper records… and who is in position to know and to produce the most probative facts…. Employees seldom keep such records themselves; even if they do, the records may be and frequently are untrustworthy."); Ohio Constitution, Art. II, § 34a (entitling an employee to request their employment records).

[9] *See* Ex. 3 at Rule 27.

[10] Alexander J.S. Colvin & Kelly Pike, *Saturns and Rickshaws Revisited: What Kind of Employment Arbitration System has Developed?*, 29 Ohio St. J. On Disp. Resol., 59, 68 (2014) (attached as Exhibit 4).

Fourth, the employer is allowed to amend the Plan "at any time."[11] So, if Defendants concoct any other ways to make it difficult for employees to vindicate their rights, they can add them. While change does not take effect until the employee and AAA have received notice, the employee has no similar right to alter the agreement.

One would expect that, if, in fact, the forum was so heavily stacked against employees, that it would show up in arbitration outcomes. It does. Although arbitration is confidential by its nature, recent empirical studies and investigations have demonstrated that employees fair far worse in arbitration than in court—not only are employees less likely to win, but employees also recover lower damages.[12]

The Supreme Court has said that arbitration must allow for the effective vindication of an employee's rights. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991). Arbitration, as it currently exists, does not. Under different circumstances, it could. But that is not the reality. Plaintiff asks that the Court deal with the world as it exists, not the fantasy.

3. History of the FLSA and FAA

How did we reach a point where courts recognize that employees lack the bargaining power to negotiate basic wages,[13] but simultaneously find that employees hold sufficient bargaining power to waive away their rights to courts, juries, and representative actions?

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[11] Doc. 14-1 at PageID 169. Further, despite reserving this right to themselves, there is no evidence that Defendants bothered to inform Anthony Digiorgi or Ronnie Edmonds, that the Plan's statute of limitations waiver was found illegal. *Jefferis v. Hallrich Corp.*, No. 1:18-CV-687, 2019 U.S. Dist. LEXIS 127825, at *16–18 (S.D. Ohio July 31, 2019), *report and recommendation adopted*, 2019 U.S. Dist. LEXIS 143045 (S.D. Ohio, Aug. 22, 2019).

[12] For an overview of research, *see* Stone, Katherine V.W., and Alexander J.S. Colvin, *The Arbitration Epidemic*. Economic Policy Institute, 414 (2015) (available at https://files.epi.org/2015/arbitration-epidemic.pdf) (accessed February 28, 2022) (attached as Exhibit 4); Alexander J.S. Colvin, *Mandatory Arbitration and Inequality of Justice in Employment*, 35 Berkeley J. Emp. & Lal. L. 71 (2014) (attached as Exhibit 5); Estlund, Cynthia, *The Black Hole of Mandatory Arbitration*, 96 N.C.L. Rev. 3 (2018) (attached as Exhibit 6).

[13] *Alamo*, 471 U.S. at 302; *Runyan v. Nat'l Cash Register Corp.*, 787 F.2d 1039, 1043 n.6 (6th Cir. 1986).

An historical review shows the development of a judicially-created doctrine of super-deference to arbitration contracts without foundation in the FAA and in defiance of the FLSA. This deference was improper in its genesis and currently relies upon false assumptions about arbitration.

3.1. Historical Overview

Congress passed the Federal Arbitration Act (FAA) in 1925 near the height of the *Lochner* era, when the freedom to contract was treated as an unqualified absolute right. *See generally, W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 400 (1937) (abrogating *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923) and *Lochner v. New York*, 198 U.S. 45 (1905), and ending the now-reviled "*Lochner* era").[14] In the early 1900s, most workers still earned their daily bread on farms rather than in factories,[15] and, for the first time in history, the 1920 Census showed a majority of Americans living in cities rather than the country.[16]

As the Twentieth century opened, massive changes swept American society, working life, and law. In 1938, during the Great Depression, Congress passed the Fair Labor Standards Act to protect American workers when they were at their most vulnerable and to standardize working conditions across the country to help revitalize the American economy.

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[14] *Holden v. Hardy*, 169 U.S. 366, 382 (1898) ("'The legislature has also recognized the fact… that the proprietors of these establishments and their operatives do not stand upon an equality, and that their interests are, to a certain extent, conflicting. The former naturally desire to obtain as much labor as possible from their employees, while the latter are often induced by the fear of discharge to conform to regulations which their judgment, fairly exercised, would pronounce to be detrimental to their health or strength. In other words, the proprietors lay down the rules and the laborers are practically constrained to obey them. In such cases self-interest is often an unsafe guide…. The whole is no greater than the sum of all the parts, and when the individual health, safety and welfare are sacrificed or neglected, the State must suffer.'").

[15] *See* Donald M. Fisk, *American Labor in the 20th Century*, U.S. Bureau of Labor Statistics (2003) (accessible at https://www.bls.gov/opub/mlr/cwc/american-labor-in-the-20th-century.pdf) (last accessed March 5, 2022) (attached as Exhibit 7).

[16] Donald A. Hicks, *Revitalizing Our Cities or Restoring Ties to Them? Redirecting the Debate*, 27 U. Mich. J.L. Reform 813, 824 (1994).

3.2. The Fair Labor Standards Act

When Congress enacted the Fair Labor Standards Act, it used the statute's opening sections to explain that the purpose of this law is to protect both workers and the American economy by creating a set of publicly-known, nationwide, minimum permissible employment standards—or in their own words:

> The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce. That Congress further finds that the employment of persons in domestic service in households affects commerce.
>
> It is hereby declared to be the policy of this Act, through the exercise by Congress of its power to regulate commerce among the several States and with foreign nations, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power.

29 U.S.C. § 202(a)–(b).

The protections of the FLSA are so strong that "the purposes of the Act require that it be applied even to those who would decline its protections." *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 302 (1985) [hereinafter *Alamo*]. That is because, for example, "[i]f an exception to the Act were carved out for employees willing to testify that they performed work 'voluntarily,' employers might be able to use superior bargaining power to coerce employees to make such assertions, or to waive their protections under the Act. Such exceptions to coverage would affect many more people than those workers directly at issue in this case and would be likely

to exert a general downward pressure on wages in competing businesses." *Id.* (internal citation omitted).

Since the passage of the FLSA, the Supreme Court has regularly affirmed Congress' ability to rectify "[s]ubstandard labor conditions [that] were deemed by Congress to be 'injurious to the commerce and to the states from and to which the commerce flows.'" *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 576–77 (1942) (citing *United States v. Darby*, 312 U.S. 100, 115 (1941)) (referencing, specifically that "If, in the judgment of Congress, time and a half for overtime has a substantial effect on these conditions, it lies with Congress' power to use it to promote the employees' well-being" and discussing how "Long hours may impede the free interstate flow of commodities by creating friction between production areas with different length work weeks, by offering opportunities for unfair competition, through undue extension of hours, and by inducing labor discontent apt to lead to interference with commerce through interruption of work.").

The Supreme Court's "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, [the Supreme Court has] 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." *Barrentine v. Ark.-Best Freight Sys.*, 450 U.S. 728, 740 (1981) (citing cases); *see also Walling v. Helmerich & Payne, Inc.*, 323 U.S. 37, 42 (1944) ("The [FLSA] clearly contemplates the setting of the regular rate in a bona fide manner through wage negotiations between employer and employee, provided that the statutory minimum is respected. But this freedom of contract does not include the right to compute the regular rate in a wholly unrealistic and artificial manner so as to negate the statutory purposes.").

For instance, the Supreme Court has found it "essential to uphold the Wage and Hour Administrator's authority to ban industrial homework in the embroideries industry, because 'if the prohibition cannot be made, the floor for the entire industry falls and the right of the homeworkers and the employers to be free from the prohibition destroys the right of the much larger number of factory workers to receive the minimum wage.'" *Id.* (citing *Gemsco, Inc. v. Walling*, 324 U.S. 244, 252–254 (1945)).

3.3. The Federal Arbitration Act

The common law, first in England and then in America, has long-opposed arbitration contracts. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510 n.4 (1974) (discussing how the common law refused to enforce arbitration agreements). Then, in 1925, Congress passed the Federal Arbitration Act, abrogating that common law doctrine and making arbitration contracts as valid as any other contact:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2.

In passing the FAA, Congress placed arbitration agreements "on equal footing with all other contracts." *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1424 (2017) (citing cases); *see also Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 220 n.7 (1985) [hereinafter *Dean Witter*] (quoting 65 Cong. Rec. 1931 (1924) ("[The FAA] creates no new legislation, grants no new rights, except a remedy to enforce an agreement in commercial contracts and in admiralty

contracts."). Arbitration contracts are entitled to the same treatment as other contracts and can be invalidated under general contract principles. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1622 (2018) [hereinafter *Epic Systems*] (citing cases) (discussing the how the FAA "permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability'" but does not permit "defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue"). This does not make arbitration agreements invincible, as the FAA does not pursue its purposes "at all costs." *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 234 (2013) [hereinafter *Italian Colors*] (quoting *Rodriguez v. United States*, 480 U. S. 522, 525–526 (1987).

Further, and unlike the FLSA, the FAA itself provides no internal statement of purpose. The text clearly demonstrates that the act is intended to end the historic general prohibition on arbitration—nothing more.

The lack of textual purpose, however, has not stopped courts from "discovering" purposes and supporting policies. For example, courts have found that there is a "liberal federal policy favoring arbitration agreements,"[17] that courts are required to "rigorously" "enforce arbitration agreements,"[18] and that the FAA has two purposes, "enforcement of private agreements and encouragement of efficient and speedy dispute resolution."[19] Each of these policies are the result of judge-made law lacking support. *Cf. Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1142 (2018) (explaining statutory interpretation). These extra-textual standards have, in turn, created a

[17] *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1630 (2018) (stating that "Instead of overriding Congress's policy judgments, today's decision seeks to honor them.")
[18] *Epic Systems*, 138 S. Ct. at 1621 (quoting *American Express Co. v. Italian Colors Restaurant*, 570 U. S. 228, 233 (2013).
[19] *Dean Witter*, 470 U.S. at 221; *see also AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011) (observing that "The overarching purpose of the FAA, evident in the text of §§ 2, 3, and 4, is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings.")

jurisprudence of excessive deference to arbitration contracts, which elevates them above normal contracts, contrary to the plain meaning and text of the FAA.

First, this idea of a "liberal policy favoring arbitration" was invented in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983) [hereinafter *Moses*]. After just quoting the statute, the Court simply states that there is a liberal policy without explanation:

> Section 2 is the primary substantive provision of the Act, declaring that a written agreement to arbitrate "in any maritime transaction or a contract evidencing a transaction involving commerce… shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary. The effect of the section is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act…. the Courts of Appeals have since consistently concluded that questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration. We agree. The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.

Moses, 460 U.S. at 24 (internal footnotes omitted). The same formulation was repeated more recently in *Gilmer*:

> The FAA was originally enacted in 1925…. Its purpose was to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts. Its primary substantive provision states that "[a] written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." The FAA also provides for stays of proceedings in federal district courts when an issue in the proceeding is referable to arbitration, § 3, and for orders compelling arbitration when one party has failed, neglected, or refused to comply with an arbitration agreement, § 4. These provisions manifest a "liberal

> federal policy favoring arbitration agreements." *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24, 74 L. Ed. 2d 765, 103 S. Ct. 927 (1983).

Gilmer, 500 U.S. at 24–25 (internal citations other than *Moses* omitted). And the proposition was summarily cited in *Epic Systems*. *Epic Systems*, 138 S. Ct. at 1621 ("The Act, this Court has said, establishes "a liberal federal policy favoring arbitration agreements.").[20]

Courts have treated the mere enactment of the FAA as making arbitration agreements special rather than simply permitting them. Enacting a statute, of course, shows that Congress favors its policies, but the *mere* enactment of a statute does not entitle it to special treatment as somehow superior to other statutes. That is doubly true if the FAA and FLSA are compared, because the FLSA give explicit textual indications of how it should be construed, something the FAA lacks. *See* Part 3.2, *supra*. If "[l]egislation is, after all, the art of compromise" and "limitations expressed in statutory terms [are] often the price of passage," then the clear explanation of the FLSA's purpose and Congressional intent should be given significant consideration. *Cf. Encino Motorcars*, 138 S. Ct. at 1142 (citing *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725 (2017)).

Second, the perceived requirement that courts must "rigorously" "enforce arbitration agreements" is also drawn from judge-made law. *See Epic Systems*, 138 S. Ct. at 1621 (quoting *Italian Colors*, 570 U. S. at 233. The Court in *Italian Colors* simply stated that "Courts must 'rigorously enforce' arbitration agreements according to their terms." *Id.* at 228 (quoting *Dean Witter*, 470 U. S. at 221). Earlier, the Supreme Court had stated that Congress' "preeminent

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[20] The Court in *Southland* followed the same idea but phrased it slightly differently: "enacting § 2 of the federal Act, Congress declared a national policy favoring arbitration…." *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984); *see also Preston v. Ferrer*, 552 U.S. 346, 349 (2008) ("As this Court recognized in *Southland Corp. v. Keating*… the [FAA], establishes a national policy favoring arbitration when the parties contract for that mode of dispute resolution.").

concern" in passing the FAA "was to enforce private agreements into which parties had entered, and that concern requires that we rigorously enforce agreements to arbitrate, even if the result is 'piecemeal' litigation, at least absent a countervailing policy manifested in another federal statute." *Dean Witter*, 470 U.S. at 221. Not only is the idea of rigorous enforcement drawn from the Court's assumption of Congressional intent, *there is* a profound countervailing policy manifested in the FLSA. *See Part* 3.2, *supra*.

Third, even if the super-deference to arbitration agreements must continue, "no legislation pursues its purposes at all costs." *Italian Colors.*, 570 U.S. at 234 (quoting *Rodriguez*, 480 U. S. at 525–526). A judge-created liberal policy favoring rigorous arbitration enforcement cannot be used to invalidate Congress' explicit enactment of the FLSA to protect both workers and the American economy with a set of publicly-known, nationwide, minimum permissible employment standards *See* Part 3.2, *supra* (citing 29 U.S.C. § 202).

Properly understood, arbitration contracts are entitled to equal treatment. *Epic Systems*, 138 S. Ct. at 1622. They are the same as other contracts, no better, no worse:

> [The FAA's] saving clause recognizes only defenses that apply to "any" contract. In this way the clause establishes a sort of "equal-treatment" rule for arbitration contracts..... The clause "permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability.'" *Concepcion*, 563 U. S., at 339.... At the same time, the clause offers no refuge for "defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Ibid.* Under our precedent, this means the saving clause does not save defenses that target arbitration either by name or by more subtle methods, such as by "interfer[ing] with fundamental attributes of arbitration." *Id.*, at 344....

Epic Systems, 138 S. Ct. at 1622.

Recently, the Supreme Court provided relevant guidance on how to properly interpret a statute:

> Because the FLSA gives no "textual indication" that its exemptions should be construed narrowly, "there is no reason to give [them] anything other than a fair (rather than a 'narrow') interpretation." Scalia, Reading Law, at 363. The narrow-construction principle relies on the flawed premise that the FLSA "'pursues'" its remedial purpose "'at all costs.'"

Encino Motorcars, 138 S. Ct. at 1142 (citing cases) (discussing the interpretation of FLSA exemptions).

Defendants' Motion encourages the Court enforce the FAA at all costs and relies upon a judicially fabricated liberal policy favoring rigorous enforcement arbitration. *See* Doc. 14 at PageID 147. The Court should reject those misbegotten standards because the FAA gives no textual indication that it should be construed liberally, so there is no reason to give them anything other than a fair (rather than a 'liberal' and 'rigorous') interpretation. *Cf. Encino Motorcars*, 138 S. Ct. at 1142 (quoting Antonin Scalia, Reading Law at 363 (2011)). The liberal-construction and rigorous enforcement principles rely on the flawed premise that the FAA pursues its arbitration-permitting purpose "at all costs." *Cf. id.* But the FAA savings clause permits an arbitration contract to fail or be invalidated just as any other contract. That savings clause is as much a part of the FAA's arbitration-permitting purpose as the validation of arbitration contracts. Thus, the Court has no license to give the FAA anything but a fair reading. *Cf. id.*

Seeing both the failure of employment arbitration and its abuses, Congress recently banned arbitration for Sexual Harassment cases.[21] Congress is also considering eliminating class and collective action arbitration, likely for the same reasons.[22]

4. Argument

As discussed below, Plaintiff contends that the arbitration agreement in this case is unenforceable for two reasons.

First, it is well-established that employees may not resolve FLSA (or the equivalent state law) disputes absent either judicial or Department of Labor oversight. *Lopez v. Silfex, Inc.*, No. 3:21-cv-61, 2021 U.S. Dist. LEXIS 232508, at *8–9 (S.D. Ohio Dec. 3, 2021) [hereinafter *Silfex*] (citing *Lynn's Food Stores, Inc. v. United States*, 679 F.2d 1350, 1355 (11th Cir. 1982) [hereinafter *Lynn's Food*]). Because arbitration is nothing more than a dispute resolution process where employees have less control than a settlement, the process is unenforceable.

Even if the process was enforceable on some level, the arbitrator's decision would be subject to thorough judicial or DOL review. Such a review would necessarily entail a de novo review of the facts and law, thereby defeating the fundamental purpose of the arbitration agreement. As with any contract, if the fundamental purpose is defeated (or impossible to perform), the contract is unenforceable. *Bozeman*, 107 N.E.2d at 630.

Second, the agreement is unconscionable as a matter of law. In virtually every other context, the employment relationship is recognized as a fundamentally coercive. *Alamo*, 471 U.S. at 302 (citing cases). But in arbitration, courts have relied upon the judge-created liberal policy

[21] Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, Public Law No: 117-90 (accessible at https://www.congress.gov/bill/117th-congress/house-bill/4445/text) (attached as Exhibit 8).
[22] Forced Arbitration Injustice Repeal Act, H.R. 1423, 116th Cong. (2019), (accessible at https://www.congress.gov/bill/116th-congress/house-bill/1423) (attached as Exhibit 9).

favoring rigorous arbitration enforcement to ignore this fact. This is improper. Moreover, arbitration, not as envisioned, but as actually practiced, does not allow employees to effectively vindicate their rights.

Defendants rely heavily on the *Jefferis* case, but it was decided on different grounds.[23] And here, Plaintiff additionally disputes the neutrality and fairness of the AAA, the Arbitration Plan's discovery modification provisions (*see* Part 2, *supra*), and, as well as the waiver provision, which the *Jefferis* court previously found unenforceable.

4.1. Arbitration is not enforceable because it evades the judicial and public scrutiny that the FLSA requires.

The FLSA is a unique law in that it creates non-waivable rights that are of a public-private nature. The nature of those rights requires courts to exercise additional protective measures not required in virtually any other setting. And, because of those measures, private resolution of FLSA claims is unenforceable. *Casso-Lopez v. Beach Time Rental Suncoast, LLC*, 335 F.R.D. 458, 461 (M.D. Fla. 2020). As discussed below, this applies as much to arbitration as it does to private settlements.

Plaintiff notes from the outset that Defendants are likely to say that some courts and the Sixth Circuit have allowed arbitration of FLSA cases. This is undoubtedly true. *See, e.g.*, *Gaffers v. Kelly Servs.*, 900 F.3d 293, 295 (6th Cir. 2018). No court, however, has addressed whether the

[23] *Jefferis*, 2019 U.S. Dist. LEXIS 127825, at *6 ("Plaintiffs oppose defendants' motion to compel mediation and arbitration on three bases: (1) the Plan signed by plaintiffs is an illusory promise, not a contract, and is unenforceable; (2) the Plan attempts to illegally waive the relevant statute of limitations; and (3) the Plan violates the Ohio Constitution, Article II, Section 34a.").

judicial (or DOL) oversight required by the FLSA either prevents arbitration altogether or strips the arbitrator of doing more than rendering a non-binding advisory opinion.[24]

4.1.1. The FLSA creates non-waivable rights that are of a public-private nature.

The FLSA is a remedial statute designed around the fact that employees lack the bargaining power to negotiate what Congress determined to be a wage sufficient for a minimum, acceptable standard of living. *See, e.g.*, *Alamo*, 471 U.S. at 302 (1985); *Runyan v. Nat'l Cash Register Corp.*, 787 F.2d 1039, 1043 n.6 (6th Cir. 1986). As a result, "Congress enacted the FLSA in 1938 with the goal of 'protect[ing] all covered workers from substandard wages and oppressive working hours.'" *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 147 (2012) (quoting *Barrentine*, 450 U.S. at 739)). Congress designed the FLSA "to ensure that each employee covered by the Act would receive [a] fair day's pay for a fair day's work and would be protected from the evil of overwork as well as underpay." *Barrentine*, 450 U.S. at 739 (internal quotation marks omitted) (citing *Overnight Motor Transportation Co.*, 316 U.S. at 578).

The purpose of the FLSA "was to secure for the lowest paid segment of the nation's workers a subsistence wage, [which] leads to the conclusion that neither wages nor the damages for withholding them are capable of reduction by compromise of controversies over coverage. [An unsupervised] compromise thwarts the public policy of minimum wages, promptly paid, embodied in the [FLSA], by reducing the sum selected by Congress as proper compensation for withholding wages." *Dees v. Hydradry, Inc.*, 706 F. Supp. 2d 1227, 1234–35 (M.D. Fla. 2010) (quoting *D. A. Schulte, Inc. v. Gangi*, 328 U.S. 108, 116 (1946)).

[24] *Gaffers* focused only on the question of whether the right to a collective action was waivable, which is not argued here. *Gaffers*, 900 F.3d at 295–97.

These protections mean nothing if employees can simply waive them. *Alamo*, 471 U.S. at 302.

The result of such a waiver would be to drive wages down. *See id.* Thus, the FLSA and its enforcement have both a private and public component. *Id.* This effects on how FLSA cases are adjudicated. First, cases must be open to public scrutiny. *Dees*, 706 F. Supp. 2d at 1233, 1245–46 (citing *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 705–08 (1945)). This scrutiny ensures that the purposes of the FLSA are carried out, protects employees from being taken advantage of (by their employer or their attorney), and permits defendants to obtain enforceable settlements. *Lynn's Food*, 679 F.2d at 1354–55; *Casso-Lopez*, 335 F.R.D. at 461; *Dees*, 706 F. Supp. 2d at 1241–46. Second, employees may not agree to resolve their claims outside of judicial or DOL scrutiny. *Silfex*, 2021 U.S. Dist. LEXIS 232508, at *8–9 (quoting *Lynn's Food*).

4.1.2. An employee may not resolve his or her FLSA claim outside of judicial or Department of Labor scrutiny.

The non-waivable and public nature of an employee's FLSA rights necessitate judicial or DOL oversight. Thus far, this has been most thoroughly explored in the context of FLSA settlement approval. As described in the next section, these principles apply as much to arbitration as to settlements.

This Court has previously recognized that "Congress made the FLSA's provisions mandatory and, except in two narrow circumstances, they are generally not subject to bargaining, waiver, or modification by *contract* or settlement." *Silfex*, 2021 U.S. Dist. LEXIS 232508, at *8–9 (emphasis added) (citing *Lynn's Food*, 679 F.2d at 1352–53; *O'Neil*, 324 U.S. at 706 and other cases); *see also Dees*, 706 F. Supp. 2d at 1235. FLSA settlements must either be supervised by the

Secretary of Labor or approved by a court. *Silfex*, 2021 U.S. Dist. LEXIS 232508, at *8–9 (citing *Lynn's Food*, 679 F.2d at 1353–55).

> Stated differently, unless supervised by the Department of Labor or approved by a district court, any compromise, relinquishment, or other diminution of an employee's FLSA rights — by whatever mechanism undertaken or procured, even by a rule of procedure — is illusory, ineffective, and unenforceable, and the employee can ignore the entire episode, including an executed settlement agreement (exactly what happened in *Lynn's Food*) and immediately sue the employer to obtain whatever FLSA rights the employee earlier purported to compromise, relinquish, or otherwise diminish. Also, any release, confidentiality or non-disclosure agreement, or any other covenant or agreement granting the employer anything else of value in exchange for the FLSA wage is unenforceable. The FLSA commands that result, the Supreme Court confirms that result, *Lynn's Food* and similar cases expound that result, and a district court must enforce that result — no evasive gimmicks allowed.

Casso-Lopez, 335 F.R.D. at 461.

"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." *Barrentine*, 450 U.S. at 740 (emphasis added) (quoting *O'Neil*, 324 U.S. at 707). "[T]he purposes of the [FLSA] require that it be applied even to those who would decline its protections" because "[i]f an exception to the Act were carved out… employers might be able to use superior bargaining power to coerce employees to… waive their protections under the Act. Such exceptions to coverage would affect many more people than those workers directly at issue in this case and would be likely to exert a general downward pressure on wages in competing businesses." *Alamo*, 471 U.S. at 302 (prohibiting employees from testifying that they worked on a voluntary basis); *see also Cheeks v. Freeport Pancake House, Inc.*, 796 F.3d 199, 205 (2d Cir. 2015) ("[A]lthough employees, through counsel, often voluntarily consent to dismissal of FLSA claims and, in some instances, are

resistant to judicial review of settlement, the purposes of FLSA require that it be applied even to those who would decline its protections.").

The Sixth Circuit recognizes that "the distinction between procedural and substantive rights is notoriously elusive." *Boaz v. FedEx Customer Info. Servs.*, 725 F.3d 603, 606 (6th Cir. 2013) (citing *Sun Oil Co. v. Wortman*, 486 U.S. 717, 726 (1988)). This places a "demanding" "obligation" on courts "to police FLSA settlements to ensure that they are fair and reasonable" *Lopez v. Nights of Cabiria, LLC*, 96 F. Supp. 3d 170, 178 (S.D.N.Y. 2015) [hereinafter *Nights of Cabiria*]. That analysis "implicates both the rights of the settling employee and the interests of the public at large," both must be satisfied to ensure that the FLSA is enforced:

> To fully implement the policy embodied by the FLSA, the district should scrutinize the compromise in two steps. First, the court should consider whether the compromise is fair and reasonable to the employee (factors 'internal' to the compromise). If the compromise is reasonable to the employee, the court should inquire whether the compromise otherwise impermissibly frustrates implementation of the FLSA (factors 'external' to the compromise). The court should approve the compromise *only if* the compromise is reasonable to the employee *and furthers implementation of the FLSA in the workplace*.

Id. at 178–79 (emphasis added) (quoting *Dees*, 706 F. Supp. 2d 1227).

This court has also recognized that although the Sixth Circuit has never definitively answered the question, "district courts in our Circuit regularly find that the FLSA context counsels in favor of courts approving settlements." *Silfex*, 2021 U.S. Dist. LEXIS 232508, at *8; *see also Athan v. United States Steel Corp.*, 523 F. Supp. 3d 960, 964–65 (E.D. Mich. 2021) (collecting cases). Additionally, this court observed that there is "a circuit split regarding whether Supreme Court precedent requires 'judicial approval of *all* FLSA settlements'" *Id.* (emphasis in

original). The Second,[25] Fourth,[26] Seventh,[27] Ninth,[28] and, of course, the Eleventh[29] Circuits have required judicial approval of FLSA settlements. The Eighth Circuit disclaims a position, despite appearing to have endorsed *Lynn's Food*.[30] While the First,[31] Third,[32] Tenth,[33] and D.C.[34] Circuits have not ruled, but their district courts embrace *Lynn's Food*. Only the Fifth Circuit has explicitly permitted a private settlement of FLSA claims, and even then, it was under unique circumstances.[35]

The Sixth Circuit has, however, endorsed heightened scrutiny of FLSA settlements due to "the well-known problems arising from the unequal bargaining positions of employers and employees and 'substandard wages and oppressive working hours'" which are implicated "to a significantly greater degree" in FLSA settlements. *Runyan*, 787 F.2d at 1043 n.6 (internal citations omitted) (citing *Barrentine*, 450 U.S. at 739; *Alamo*, 471 U.S. at 302). Further, courts in this

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[25] *Cheeks v. Freeport Pancake House, Inc.*, 796 F.3d 199, 205 (2d Cir. 2015).
[26] *Taylor v. Progress Energy, Inc.*, 493 F.3d 454, 462–63 (4th Cir. 2007), *superseded by regulation on other grounds as recognized in*, *Whiting v. Johns Hopkins Hosp.*, 416 F. App'x 312 (4th Cir. 2011).
[27] *Walton v. United Consumers Club, Inc.*, 786 F.2d 303, 306 (7th Cir. 1986).
[28] *Seminiano v. Xyris Enter.*, 602 F. App'x 682, 683 (9th Cir. 2015).
[29] *Nall v. Mal-Motels, Inc.*, 723 F.3d 1304, 1306–08 (11th Cir. 2013) (re-affirming *Lynn's Food*).
[30] *Barbee v. Big River Steel, LLC*, 927 F.3d 1024, 1026–27 (8th Cir. 2019) ("We have never taken a side on this issue."); *but see Copeland v. ABB, Inc.*, 521 F.3d 1010, 1014 (8th Cir. 2008).
[31] *See, e.g., Anderson v. Team Prior, Inc.*, No. 2:19-cv-00452-NT, 2021 U.S. Dist. LEXIS 162626, at *13 (D. Me. Aug. 27, 2021) ("'[I]n the FLSA context, for an employee's waiver of his rights to unpaid wages and liquidated damages to be binding, either the U.S. Secretary of Labor must supervise the settlement or a court must approve it.' .... Part of the court's role is to assure that the FLSA is being properly applied and that the lawsuit is not being used as a device to discount employees' rightful claims.").
[32] *Kane v. Ollie's Bargain Outlet Holdings, Inc.*, 2022 U.S. Dist. LEXIS 31113, at *3 (M.D. Pa. Feb. 22, 2022).
[33] *See, e.g.*, *Aguilar v. Pepper Asian*, Civil Action No. 21-cv-02740-RM-NYW, 2022 U.S. Dist. LEXIS 24278, at *23 n.2 (D. Colo. Feb. 10, 2022) ("The Tenth Circuit has not addressed whether an FLSA settlement requires court approval. However, the presiding judge in this case requires court approval of any FLSA settlement…").
[34] *See, e.g.*, *Carrillo v. Dandan Inc.*, 51 F. Supp. 3d 124, 130 (D.D.C. 2014) (endorsing the *Lynn's Food* court's "logical inferences from the Supreme Court's *Gangi* dicta…").
[35] *Martin v. Spring Break '83 Prods., Ltd. Liab. Co.*, 688 F.3d 247, 257 (5th Cir. 2012); *but see Bodle v. TXL Mortg. Corp.*, 788 F.3d 159, 163–65 (5th Cir. 2015) (discussing *Martin* and noting that "the union representative concluded it would be impossible to validate the number of hours claimed by the workers for unpaid wages" but conclusion "The general prohibition against FLSA waivers applies in this case, and the state court settlement release cannot be enforced against the plaintiffs' FLSA claims.").

district, [36] and across the Sixth Circuit,[37] routinely look to *Lynn's Food* when approving settlements. It is, therefore appropriate to find that *Runyan* indicates that the Sixth Circuit, if presented with the same issue under the FLSA, would require court approval of settlements or stipulations of dismissal. *Steele v. Staffmark Invs., Ltd. Liab. Co.*, 172 F. Supp. 3d 1024, 1028 (W.D. Tenn. 2016) (denying motion for settlement and ordering submission of the settlement agreement for review). In the Sixth Circuit, the private resolution of FLSA disputes requires judicial approval

4.1.3. At its core, arbitration is a means to resolve FLSA disputes.

It is black-letter law that an employee cannot bargain with her employer to be paid less than minimum wage. 29 U.S.C. § 206(a). Thus, an employee could not say "I agree to be paid $1 per hour." Such an "agreement" would have no effect. *Alamo*, 471 U.S. at 302; *Craig v. Bridges Bros. Trucking LLC*, 823 F.3d 382, 388 (6th Cir. 2016).

Based on the same principles, employees and employers cannot settle FLSA claims except for under the supervision of a court or the DOL. *Silfex*, 2021 U.S. Dist. LEXIS 232508, at *8–9. To hold otherwise would lead to the same result as the first type of waiver. Thus, an employee could not say "I contend that my employer has paid me only $1 per hour. I will resolve any claims I have arising from this situation for an additional $1 per hour."

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[36] *Silfex*, 2021 U.S. Dist. LEXIS 232508 (S.D. Ohio Dec. 3, 2021); *Pierce v. Diversified Health Mgmt.*, No. 2:21-cv-02624, 2021 U.S. Dist. LEXIS 184536, at *2 (S.D. Ohio Sep. 27, 2021); *Wachtelhausen v. CCBCC, Inc.*, No. 2:20-cv-06234, 2021 U.S. Dist. LEXIS 162275, at *5 (S.D. Ohio Aug. 26, 2021); *Kritzer v. Safelite Sols., LLC*, No. 2:10-cv-0729, 2012 U.S. Dist. LEXIS 74994, at *17 (S.D. Ohio May 30, 2012); *Gentrup v. Renovo Servs., LLC*, No. 1:07CV430, 2011 U.S. Dist. LEXIS 67887, at *6 (S.D. Ohio June 24, 2011).

[37] *Savanich v. Nat. Essentials, Inc.*, No. 5:20-cv-2088, 2021 U.S. Dist. LEXIS 223372, at *4 (N.D. Ohio Nov. 19, 2021); *Cross v. Hamilton Cty. Gov't*, No. 1:20-CV-227-KAC-CHS, 2021 U.S. Dist. LEXIS 249945, at *2 (E.D. Tenn. June 24, 2021); *Athan*, 523 F. Supp. 3d at 965 ("Although the Sixth Circuit has never definitively answered the question of whether court approval is required for FLSA settlement agreements, district courts in our Circuit regularly find that the FLSA context counsels in favor of courts approving settlements."); *Steele v. Staffmark Invs., Ltd. Liab. Co.*, 172 F. Supp. 3d 1024, 1026 (W.D. Tenn. 2016) ("The Sixth Circuit has yet to rule definitively on the question; however, based on the unique purpose of the FLSA and the unequal bargaining power between employees and employers, this Court finds that FLSA settlements require approval by either the Department of Labor or a court."); *Crawford v. Lexington-Fayette Urban Cty. Gov't*, No. 06-299-JBC, 2008 U.S. Dist. LEXIS 90070, at *12 (E.D. Ky. Oct. 23, 2008)

Arbitration presents a third type of waiver. In arbitration, the employee essentially assigns the ability to compromise his or her claim to a third-party. It is the equivalent of saying "I know that I cannot agree to work for less than minimum wage. But, if this third-party says I can, then I will." It is also the equivalent of saying "I relinquish control of settling my own claim and, instead, assign it to a third-party."

None of this passes muster under the FLSA. An employee can neither waive her right to a wage, nor assign to someone else the ability to waive that right. In the same way that an employee and employer cannot flip a coin to decide whether the employee should be or was paid minimum wage, the parties cannot agree to have a third party make that decision.

Consider that courts do not approve settlements negotiated directly between employees and employers. *Lynn's Food*, 679 F.2d at 1355. Courts will not allow employees represented by counsel to resolve their claims without court approval. *Casso-Lopez*, 335 F.R.D. at 461. The FLSA's prohibition of purely private settlements is necessary to ensure that employees (and employers!) are not being taken advantage of by their counsel:

> Based on the many 'stipulated' attempts at evasion submitted to me after *Dees*, either many FLSA plaintiff's lawyers unaccountably agree to these transparent and doomed devices with confidence that the court will reject the defendant's attempt, many plaintiff's lawyers are unaware of the employee's FLSA rights, or many plaintiff's lawyers are indifferent to the employee's FLSA rights (and choose, instead, the lawyer's quick payday over the employee's just payday). On the other hand, the willingness of defense lawyers to enter these putative settlements — perhaps accomplishing little or nothing for their client — might originate in an unawareness of the law explained in *Lynn's Food*, *Dees*, and elsewhere and might expose both lawyer and client to the same unpleasant surprise — another claim by the same plaintiff — experienced by counsel and client in *Lynn's Food*.

Id.

"[T]he act of filing the suit, airing the parties' dirty laundry in public and before a judge, and then coming to an agreement distinguishes stipulated judgments from private, back-room compromises that could easily result in exploitation of the worker and the release of his or her rights." *Mei Xing Yu v. Hasaki Rest., Inc.*, 944 F.3d 395, 406 (2d Cir. 2019). Such back-room compromises would include scenarios where, "the employer in an FLSA case might offer full monetary compensation to the employee for the FLSA claim but might require the employee to refrain from informing fellow employees about the result the employee obtained. Or the employer might require the employee to trim the shrubbery at the employer's home each weekend for a year. In either instance, the employee outwardly receives full monetary compensation for her unpaid wages, but effectively the additional term (the 'side deal') confers a partially offsetting benefit on the employer. To the extent that the employee receives a full wage but relinquishes something else of value, the agreement (even if exhibited to the court as a stipulation for 'full compensation' or an offer of judgment) involves a 'compromise,' and *Lynn's Food* requires judicial approval of the compromise." *Dees*, 706 F. Supp. 2d at 1240 (citing *Silva v. Miller*, 307 F. App'x 349, 351 (11th Cir. 2009)).

Arbitration further frustrates the vindication of FLSA rights due to its private and secretive nature. In addition to protections for individual workers, Congress also sought to protect "the public's independent interest in assuring that employees' wages are fair and thus do not endanger 'the national health and well-being.'" *O'Neil*, 324 U.S. at 706; *see also Joo v. Kitchen Table, Inc.*, 763 F. Supp. 2d 643, 645 (S.D.N.Y. 2011) (describing how employee rights under the FLSA have a "private-public" character where the public has an "independent interest" in assuring that the FLSA is properly enforced).

"[V]indication of FLSA rights throughout the workplace is precisely the object Congress chose to preserve and foster through the FLSA." *Dees*, 706 F. Supp. 2d at 1244. That is why the "overwhelming majority of courts reject the proposition that FLSA settlements can be confidential." *Souza v. 65 St. Marks Bistro*, No. 15-CV-327 (JLC), 2015 U.S. Dist. LEXIS 151144, at *13 (S.D.N.Y. Nov. 6, 2015). That is because "most" confidentiality provisions are "clearly designed to reduce the employer's exposure to having to pay FLSA wages to other employees, or having to litigate its obligation to pay other employees, by preventing other employees from learning of their rights." *Klich v. Konrad Klimczak*, No. 21-cv-4812 (BMC), 2021 U.S. Dist. LEXIS 222230, at *10 (E.D.N.Y. Nov. 16, 2021).

The rational for prohibiting arbitration of wage claims is similar to "[t]he rationale for rejecting confidential FLSA settlements… since '[s]ealing FLSA settlements from public scrutiny could thwart the public's independent interest in assuring that employees' wages are fair.'" *Nights of Cabiria*, 96 F. Supp. 3d at 178. "Preventing the employee's co-workers or the public from discovering the existence or value of their FLSA rights is an objective unworthy of implementation by a judicial seal, which is warranted only under 'extraordinary circumstances' typically absent in an FLSA case. Absent an 'overriding interest' in the preservation of some 'higher value,' the court should not abide the parties' request for a seal." *Dee*, 706 F. Supp. 2d at 1245–46. So too for arbitration.

There is nothing magical about an arbitrator. If two parties represented by counsel are not permitted to resolve their disputes without Court approval, then those parties cannot "agree" to have a third party to that which they cannot. It makes no difference that the arbitrator "decides"

who is right and wrong in a dispute. The parties lack the power to assign resolving wage disputes to either themselves, a third party, or some other non-judicial (or non-DOL) method.

Because employees may not compromise their claims outside of judicial (or DOL) supervision and approval, they may not agree to do so before an arbitrator. Thus, an arbitration agreement binding employees to a decision of the arbitrator for FLSA claims is unenforceable.

In the alternative, an arbitrator's decision is simply not enforceable itself under the FLSA, the same as any other private FLSA resolution. Thus, while the arbitrator could render a decision, a district court would need to conduct a full, de novo review of that decision. This would necessarily include discovery, arguments, briefing, and perhaps a hearing. Such a situation would fundamentally defeat the purpose of the arbitration, also rendering the agreement unenforceable.

4.2. The Defendants' forced mediation and arbitration agreement is unconscionable.

Even if the FLSA permitted the private resolution of disputes outside of judicial supervision, Defendants' Arbitration Plan is unconscionable and is therefore unenforceable.

Plaintiff recognizes, of course, that courts have held that arbitration agreements are not unconscionable. But those decisions rest on two flawed premises that should be reexamined.

First, the decisions have held that the employment relationship does not present an unduly coercive situation for a low-wage employee. This, however, seems to rest on the judge-created doctrine of super-deference to arbitration by enforcing arbitration because it ignores reality. As discussed below, in numerous situations, and with a high level of consistency, courts have found that the employment relationship is necessarily coercive. *See* Part 4.2.2, *infra*.

Second, the decisions rest on the assumption that arbitration involves a fair, neutral, and effective forum. The evidence is that this assumption is incorrect. The opposite is true. Arbitration

is stacked so heavily against employees that they are less likely to win arbitration cases and they recover lower damages.[38]

Arbitration frustrates the attainment of a fair and reasonable resolutions because even if arbitration may generally be a suitable forum, the "arbitral forum provided under an arbitration agreement must nevertheless allow for the effective vindication of that claim. Otherwise, arbitration of the claim conflicts with the statute's purpose of both providing individual relief and generally deterring unlawful conduct through the enforcement of its provisions." *Floss v. Ryan's Family Steak Houses, Inc.*, 211 F.3d 306, 313 (6th Cir. 2000) (citing *Gilmer*, 500 U.S. at 28). As discussed throughout this brief, the arbitral forum has been structured to deny workers the ability to effectively vindicate their rights. It is a forum effective for employers only.

4.2.1. Legal Standard

In determining the enforceability of an arbitration agreement, courts apply state law of contract formation. *Richmond Health Facilities v. Nichols*, 811 F.3d 192, 195 (6th Cir. 2016). Ohio law holds that arbitration agreements are, "'valid, irrevocable, and enforceable, except upon grounds that exist at law or in equity for the revocation of any contract.'" *Dacres v. Setjo, L.L.C.*, 2019-Ohio-2914, 140 N.E.3d 1041, ¶ 11 (8th Dist.) (quoting *Taylor Bldg. Corp. of Am. v. Benfield*, 117 Ohio St.3d 352, 2008-Ohio-938, 884 N.E.2d 12, ¶ 33; and O.R.C. § 2711.01(A).

A contract is unconscionable when one party lacks a meaningful choice and the contract's terms are unreasonably favorable to the other party. *Khaledi v. Nickris Properties*, 6th Dist. Huron

[38] Alexander J.S. Clovin, *The growing use of mandatory arbitration*, Economic Policy Institute (September 27, 2017), https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration-access-to-the-courts-is-now-barred-for-more-than-60-million-american-workers/ (last accessed March 9, 2022) (attached as Exhibit 10); American Association for Justice, *The Truth About Forced Arbitration* (September 2019), https://www.justice.org/resources/research/the-truth-about-forced-arbitration (last accessed March 9, 2022) (attached as Exhibit 11).

No. H-17-015, 2018-Ohio-3087, ¶ 27 (6th Dist.). Unconscionability has two parts: procedural and substantive unconscionability. *Id.*

Procedural unconscionability relates to the formation of the contract and relies on a totality of the circumstances. *Id.* at ¶¶ 27–28 (citing cases). When assessing an arbitration clause's procedural unconscionability: "courts consider the relative bargaining positions of the parties, whether the terms of the provision were explained to the weaker party, and whether the party claiming that the provision is unconscionable was represented by counsel at the time the contract was executed." *Id.* (citing *Porpora v. Gatliff Bldg. Co.*, 160 Ohio App.3d 843, 2005-Ohio-2410, 828 N.E.2d 1081, ¶ 17 (9th Dist.)).

Substantive unconscionability focuses on the terms of the agreement, court assess "the fairness of the terms, the charge for the service rendered, the standard in the industry, and the ability to accurately predict the extent of future liability." *Id.* at ¶32 (citing cases). There is no "bright-line" set of factors for determining substantive unconscionability, the relevant factors vary with the content of the agreement at issue. *Id.* at ¶ 32 (quoting *Ranazzi v. Amazon.com, Inc.*, 2015-Ohio-4411, 46 N.E.3d 213, ¶ 25 (6th Dist.).

4.2.2. Defendants' Arbitration Plan is Procedurally Unconscionable

Case law has presented a curious split on the same issue. On one hand, in an effort to enforce arbitration agreements, seemingly at all costs, courts have held that an employee's bargaining position is on par with a company of any size and sophistication. *See Gilmer*, 500 U.S. at 26; *Gaffers*, 900 F.3d at 295.

That context aside, courts have repeatedly recognized that the employment relationship is inherently coercive and subject to abuse on the part of employers. The most obvious example of

this is the Fair Labor Standards Act. Courts have consistently recognized that the FLSA was necessary because of the superior, coercive bargaining power that employers hold over their employees. *See, e.g.*, *Alamo*, 471 U.S. at 302; *Runyan*, 787 F.2d at 1043 n.6.

Courts have also recognized the coercive nature of employment relationships and the danger of employers unduly interfere with a class because of the power that the employment relationship grants employers. *Kleiner v. First Natl. Bank*, 751 F.2d 1193, 1203 (11th Cir. 1985) (citing *Zarate v. Younglove*, 86 F.R.D. 80, 90 n.13 (C.D. Cal. 1980)) ("Unsupervised, unilateral communications with the plaintiff class sabotage the goal of informed consent by urging exclusion on the basis of a one-sided presentation of the fact, without opportunity for rebuttal. The damage from misstatements could well be irreparable."); *Crosby v. Stage Stores, Inc.*, 377 F.Supp.3d 882, 889 (M.D. Tenn. 2019) (citing cases) ("[T]he potential for coercion and abuse of the class action is especially high when there is an ongoing business relationship between the two parties, particularly when that relationship is one of employer to employee."); *Dondore v. NGK Metals Corp.*, 152 F. Supp. 2d 662, 666 (E.D. Pa. Apr. 9, 2001) ("If defense counsel or counsel otherwise adverse to their interests is allowed to interview and take statements from often unsophisticated putative class members without the approval of counsel who initiated the action, the benefits of class action litigation could be seriously undermined."); *Bublitz v. E.I. duPont de Nemours & Co.*, 196 F.R.D. 545, 548 (S.D. Iowa 2000) (citing *Kleiner*, 751 F.2d. at 1202–03) ("Where the defendant is the current employer of putative class members who are at-will employees, the risk of coercion is particularly high; indeed, there may in fact be some inherent coercion in such a situation.").

That inherently unbalanced relationship is why employers are able force employees to sign arbitration agreements in the first place. The agreements serve only to the detriment of employees; thus, there is no rational reason for them to sign the agreements but-for the employer's superior bargaining power.

Defendant's Arbitration Plan is procedurally unconscionable and bears many hallmarks of a contract of adhesion. "An adhesion contract is a standard-form contract prepared by one party, to be signed by the party in a weaker position, usu(ally) a consumer, who adheres to the contract with little choice about the terms." *Bayes v. Merle's Metro Builders/Boulevard Constr., LLC*, 11th Dist. Lake No. 2007-L-067, 2007-Ohio-7125, ¶ 33 (11th Dist.). "Although an adhesion contract is not per se unconscionable, the more standardized the agreement and the less a party may bargain meaningfully, the more susceptible the contract or a term will be to a claim of unconscionability." *Id.* (internal quotation marks omitted). Defendants' Arbitration Plan is a preprinted, standardized form contract prepared by the Defendants and offered to employees that have no choice as to the terms. As Defendants admit, "[e]ach Plan signed by Plaintiffs is identical." (Doc. 14 at PAGEID 144). These agreements come about solely because of Defendants' superior bargaining power—no negotiation or actual bargaining is taking place. The Defendants are abusing their power as owners and operators over one hundred Pizza Hut franchise locations to contract around the FLSA by requiring the delivery drivers, sub-minimum wage workers often desperate to make ends meet, to give up FLSA protections in order to get a job.

There are also numerous problems in the text of the agreement, each undermining Plaintiff's ability to effectively vindicate her claims.

4.2.3. Defendants' Arbitration Plan is Substantive Unconscionable

As discussed in Part 2, *supra*, the terms of Defendants' contact and the AAA's pro-employer bias make Defendants' Arbitration Plan substantively unconscionable.

Undoubtedly, Defendants know the substantial, liability-limiting benefits of arbitration. That is why the use it.

What's more, Defendants have continued to force workers to sign an agreement that they know, at least in part, is illegal. Defendants inform this Court that the *Jefferis* Court enforced "the exact same Dispute Resolution Plan that each of the current Plaintiff Pizza Delivery Drivers signed." See Doc 14-1 at PAGEID 140. Defendants conveniently fail to mention that the Arbitration Plan's waiver of the statute of limitations periods were found to be "prohibited and unenforceable," but coyly state that "*even if* a provision of The Plan was found to be unfair, unreasonable, or otherwise unenforceable…" (which, of course, the *Jefferis* Court did find) "[t]he Plan's terms require that such provision be severed from the agreement and that the rest of The Plan remain intact… Hallrich previously has waived the Plan's time limitation on filing." *Id.* at PAGEID 149–150.

Defendants' own brief makes clear, Defendants are well aware that the time limitations set forth in their forced mediation and arbitration agreement are prohibited and unenforceable since at least August 2019. *See Jefferis v. Hallrich Corp.*, No. 1:18-CV-687, 2019 U.S. Dist. LEXIS 127825 *15–19 (S.D. Ohio July 31, 2019), *report and recommendation adopted*, 2019 U.S. Dist. LEXIS 143045 (S.D. Ohio Aug. 22, 2019). Despite this, Defendants have continued to require each of their employees to electronically sign the exact same document, containing prohibited and unenforceable terms that blatantly misrepresent the employees' legal rights. Why would

Defendants continue to require employees sign a document without removing the prohibited and unenforceable terms? Surely this change would require minimal effort on Defendants' part, particularly because the agreement is a single, form document.

The answer is easy—the illegal terms serve the monetary interests of the Defendants by misleading employees into believing the time for filing potential claims has passed. There can be no doubt that the Defendants' conduct demonstrates a willful violation of the FLSA. While Defendants again attempt to rely on the severability clause, when the cumulative effect of multiple illegal provisions "taints" the overall agreement and prevents a court from enforcing the agreement, severability is improper. *Scovill v. WSYX.ABC*, 425 F.3d 1012 (C.A.6, 2005). "The cumulative effect of so much illegality prevents us from enforcing the arbitration agreement. Because the sickness has infected the trunk, we must cut down the entire tree." *Alexander v. Anthony Internatl. L. P.*, 341 F.3d 256, 261 (C.A.3, 2003). When viewed in conjunction with the unconscionability of the agreement as a whole, it become clear that severability is improper here.

4.3. Defendants' Arbitration Plan's statute of limitations waiver is illegal.

Unsatisfied with forcing workers into arbitration, Defendants have gone even further. Defendants have continued to include a waiver of the FLSA statute of limitations in the Arbitration Plan. It claims shorten the employee's statute of limitations to a mere six months.[39] That provision was found illegal by *Jefferis* court. *Jefferis*, 2019 U.S. Dist. LEXIS 127825, at *15–19 (S.D. Ohio July 31, 2019), *report and recommendation adopted*, 2019 U.S. Dist. LEXIS 143045 (S.D. Ohio Aug. 22, 2019); *see also Boaz*, 725 F.3d at 606 (citing *Jewell Ridge Coal Corp. v. United Mine Workers*, 325 U.S. 161, 167 (1945)).

[39] Doc. 14-1 at PageID 162, 176, 190, 204, 218, 232 (¶ 5.B.)

Despite provisions like this being repeatedly struck down, Defendants have continued to include the illegal statute of limitations waivers in Arbitration Plans for their newly hired employees.[40] One does not have to wonder too long to understand why: although unenforceable, the provision is designed to fool employees into believing that their rights have been waived.

To the extent that the Court enforces the agreement at all, it should sever the following provisions as illegal:

> A Party must initiate proceedings under The Plan by filing with the AAA a written mediation request. The mediation request must be filed within six (6) months of the date of the occurrence of the event which gave rise to the Dispute or within some alternative period of time agreed upon by the Parties. The Parties waive any statute of limitations to the contrary. Failure of a Party to timely file the mediation request shall bar the Party from any relief or other proceedings under this Plan or otherwise, and any such Dispute shall be deemed to have been finally and completely resolved.

Doc. 14-1 at PageID 162 ¶ 5.B. (emphasis in original).

5. Conclusion

The Defendants' have successfully evaded liability for their wage practices for years, in no small part thanks to the nearly-blind deference to arbitration. As a result, hundreds of Defendants' employees have been stripped of their ability to fairly vindicate their rights to minimum wages. To enforce this agreement, despite willfully illegal and unconscionability, would be to enforce arbitration "at all costs." Accordingly, Defendants' Dispute Resolution Plan should be held unenforceable and the Plaintiff should be free to pursue her claims before this Court.

Respectfully submitted,

/s/ Emily Hubbard
Andrew R. Biller (Ohio Bar No. 0081452)

[40] Doc 14-1 at PageID (Courtney Dimidik, March 20, 2021); PageID 187 (Leah Taylor, November 25, 2020); PageID 215 (Haily Gordon, November 27, 2020); PageID 229 (Gavin Blankenship, October 8, 2021).

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Certificate of Service

The undersigned hereby certifies that the above document was filed on March 10, 2022, through the Court's ECF system, which will provide notice to all parties.

/s/ *Emily Hubbard*
Emily A. Hubbard