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What You Don't Know Can't Hurt You Unless You Work For JPMorgan Chase: The Fifth Circuit's Refusal to Notify Potential FLSA Plaintiffs Under Arbitration Agreements

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WHAT YOU DON'T KNOW CAN'T HURT YOU UNLESS YOU WORK FOR JPMORGAN CHASE: THE FIFTH CIRCUIT'S REFUSAL TO NOTIFY POTENTIAL FLSA PLAINTIFFS UNDER ARBITRATION AGREEMENTS

Abstract: On February 21, 2019, the United States Court of Appeals for the Fifth Circuit held in *In re JPMorgan Chase & Co.* that district courts may not send or require notice of a pending Fair Labor Standards Act collective action to employees bound by arbitration agreements. The decision represented a matter of first impression among the federal courts of appeals. This Comment argues that the Fifth Circuit's decision correctly applied the 1989 Supreme Court case, *Hoffmann-La Roche v. Sperling*, which gave district courts the power to facilitate notice in collective actions, to the new reality of arbitration agreements. This Comment further contends that, although the Fifth Circuit's opinion was legally correct, it creates case law that could minimize the effectiveness of Fair Labor Standards Act collective action suits.

INTRODUCTION

The primary goal of the Fair Labor Standards Act (FLSA) is to eliminate dangerous working conditions and check unfair business practices by regulating the wages and hours of workers.[1] The Department of Labor publicly enforces the FLSA, and individual employee-plaintiffs who consolidate similar claims into collective actions can privately enforce it.[2] In 1989, in *Hoffmann-La Roche v. Sperling*, the United States Supreme Court attempted to help the private enforcement mechanism run more efficiently by giving federal district courts discretion to facilitate notice of pending FLSA actions to potential employee-plaintiffs.[3] As a result, district courts developed a two-stage certifica-

[1] *See* Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. § 202 (2018) (declaring the policy underlying the FLSA).

[2] *Id.* § 216(b) (providing that a Fair Labor Standards Act (FLSA) action can be brought on behalf of a singular employee or on behalf of all employees similarly situated).

[3] *See* Hoffmann-La Roche v. Sperling, 493 U.S. 165, 172 (1989) (holding that district courts have discretion to facilitate notice to potential plaintiffs). *Hoffmann-La Roche v. Sperling* involved a collective action brought under the Age Discrimination in Employment Act (ADEA), but because the ADEA uses the same statutory language concerning collective actions as the FLSA, the holding applies to both types of collective action. *See id.* at 167 (noting that the language of the ADEA mirrors § 216(b) of the FLSA); *see also* 29 U.S.C. § 216(b); Age Discrimination in Employment Act, 29 U.S.C. § 626(b) (2018).

tion process for collective action suits.[4] Stage one consists of conditionally certifying a list of potential employee-plaintiffs for notice purposes.[5] Stage two consists of a more rigorous process in which defendants aim to decertify specific employee-plaintiffs who opted in.[6] The rise in the prevalence of employee arbitration agreements, however, has strained the functionality of this framework, as most standard arbitration agreements will waive an employee's right to join a collective action.[7]

In 2019, in *In re JPMorgan Chase & Co.*, the United States Court of Appeals for the Fifth Circuit considered when and how district courts should handle arbitration agreements during the certification and notice process of FLSA collective actions.[8] Although district courts across the country had considered this issue, no appellate court had ever reviewed it.[9] As a result, district courts remain split on the issue.[10] Some district courts have decided to assess and enforce the binding arbitration agreements before the conditional certification

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[4] *See In re* JPMorgan Chase & Co., 916 F.3d 494, 500 n.9 (5th Cir. 2019) (calling the two-stage certification processes the popular approach); *see, e.g.*, Reeves v. Alliant Techsystems, Inc., 77 F. Supp. 2d 242, 246–247 (D.R.I. 1999) (adopting the practice of two–stage certification and referencing its use by other district courts); Mooney v. Aramco Servs. Co., 54 F.3d 1213–14, 1216 (5th Cir. 1995) (describing the two–stage certification process, referred to as the "Lusardi method" and upholding the district court's use of it).

[5] *Mooney*, 54 F.3d at 1213–14.

[6] *Id.* at 1214; *see also* Morgan v. Family Dollar Stores, 551 F.3d 1233, 1261 (11th Cir. 2008) (describing the two-stage certification). Stage two is more rigorous because it occurs after discovery, so the court has much more information on which to base to its decision whether claimants are in fact similarly situated. *Mooney*, 54 F.3d at 1213–14.

[7] *See In re JPMorgan Chase*, 916 F.3d at 499 n.6 (noting that the recurring issue of how to deal with potential employee-plaintiffs bound by arbitration agreements has split district courts). Arbitration is an alternative dispute resolution process in which a neutral party, chosen by the disputing parties, makes a final, binding decision resolving the dispute. *Arbitration*, BLACK'S LAW DICTIONARY (11th ed. 2019). Roughly twenty-five million Americans are bound by arbitration agreements, a number that has steadily increased since the early 2000s. Jean R. Sternlight, *Disarming Employees: How American Employers Are Using Mandatory Arbitration to Deprive Workers of Legal Protection*, 80 BROOKLYN L. REV. 1309, 1310 n.8, 1317 n.47 (2015) (providing estimates on the number of employment arbitration agreements (citing Alexander J.S. Colvin, *Empirical Research on Employment Arbitration: Clarity Amidst the Sound and Fury?*, 11 EMP. RTS. & EMP. POL'Y J. 405, 411 (2007))).

[8] *In re JPMorgan Chase*, 916 F.3d at 502–04.

[9] *Id.* at 499–500, 499 n.6.

[10] *Id.* (noting that the issue was increasingly recurring and was causing district court splitting). *Compare* Hudgins v. Total Quality Logistics, LLC, No. 16 C 7331, 2017 WL 514191, at *4 (N.D. Ill. Feb. 8, 2017) (refusing to notify those who signed arbitration agreements), *with* Sawyer v. Health Care Sols. at Home, Inc., No. 5:16-cv-5674, 2018 WL 1959632, at *4 (E.D. Pa. Apr. 25, 2018) (holding that signing arbitration agreements does not preclude employees from conditional certification, as they have a right to receive notice), *with* Weckesser v. Knight Enters. S.E., LLC, Civil Action No. 2:16-CV-02053-RMG, 2018 WL 4087931, at *3 (D.S.C. Aug. 27, 2018) (allowing conditional certification of opt-in employee-plaintiffs subject to arbitration agreements because the court deals with the issue of arbitration agreement validity after discovery).

stage and thus not notify employees who signed the agreements.[11] Others have decided to notify those employees, allow them to opt into the class action, and wait until the decertification process to assess and enforce the arbitration agreements.[12]

After analyzing the decision in *Hoffmann-La Roche* and its policy rationales, the Fifth Circuit decided to enforce arbitration agreements at the conditional certification stage.[13] As a result of this holding, district courts in the Fifth Circuit must not notify any employee who signs a binding arbitration agreement of pending FLSA collective action suits.[14] This Comment argues that the Fifth Circuit faithfully applied *Hoffmann-La Roche*, but that its decision may consequently demolish the private enforcement mechanism of the FLSA.[15] Part I gives an overview of the legal and factual history of *In re JPMorgan Chase*.[16] Part II examines and discusses the district court split before the Fifth Circuit's decision and where the Fifth Circuit's decision fits within existing frameworks.[17] Finally, Part III argues that although the Fifth Circuit's ruling was legally correct, it creates a potential loophole by which employers can significantly avoid FLSA collective actions.[18]

I. Legal and Factual Context

In a matter of first impression, the Fifth Circuit Court of Appeals in *In re JPMorgan Chase & Co.* held that district courts do not have discretion to send a notice of a FLSA collective action to employees who are precluded from joining class actions by binding arbitration agreements.[19] Section A of this Part

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[11] *See infra* notes 57–60 and accompanying text (discussing the "First Approach" district courts used to address the issue before the Fifth Circuit's decision).

[12] *See infra* notes 61–68 and accompanying text (discussing the "Second Approach" and "Third Approach" that courts utilized prior to the Fifth Circuit's decision).

[13] *In re JPMorgan Chase*, 916 F.3d at 503 (citing *Hoffmann-La Roche*, 493 U.S. at 174) (holding that it is outside a district court's discretion to send notice of a pending FLSA collective action to employees who are under binding arbitration agreements); *see Hoffmann-La Roche*, 493 U.S. at 174 (articulating that the purpose of notice facilitation is the need for efficient disposition in a singular proceeding).

[14] *In re JPMorgan Chase*, 916 F.3d at 503 (holding that a district court within the Fifth Circuit shall not send notice of a pending FLSA collective action to employees who are under binding arbitration agreements). A ruling by the Fifth Circuit is only binding on the district courts within the Fifth Circuit. *See* 28 U.S.C. § 1291 (2018) (establishing the federal courts of appeals and their jurisdiction).

[15] *See infra* notes 19–102 and accompanying text.

[16] *See infra* notes 19–52 and accompanying text.

[17] *See infra* notes 53–76 and accompanying text.

[18] *See infra* notes 77–102 and accompanying text.

[19] *In re JPMorgan Chase*, 916 F.3d at 502–04. The Fifth Circuit Court of Appeals determined that, although the Supreme Court's decision in *Hoffmann-La Roche v. Sperling* gave the district court discretion to facilitate notice of FLSA collective action claims to potential employee-plaintiffs, it did not allow for notice to employee-plaintiffs who were bound by arbitration agreements. *Id.*; *see Hoff-*

provides an overview of the law relating to FLSA collective actions.[20] Section B details the facts and procedural history of *In re JPMorgan Chase*.[21]

A. The FLSA Collective Action and the Issue of Notice and Certification

Section 216(b) of the FLSA permits an employee to bring a collective action against an employer on behalf of other "similarly situated employees."[22] The primary goal of the class action mechanism is to combine similar employee claims so that employees can afford the heavy costs of enforcing their rights under the FLSA.[23] The original version of Section 216(b) mirrored the procedure of class actions under Federal Rule of Civil Procedure 23, which automatically binds similarly situated parties to the suit without the parties taking any affirmative action.[24] Worried about the economic effect of expanded employer liability, however, Congress passed the Portal-to-Portal Act of 1947, which amended the FLSA to require similarly situated employees to opt into the action by filing written consent with the court.[25]

Because FLSA collective actions require employee-plaintiffs to affirmatively opt in via written consent, notice of FLSA claims to potentially similarly situated employees is particularly important.[26] Unlike Rule 23, however, Sec-

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mann-La Roche, 493 U.S. at 172 (giving district courts discretion in facilitating notice to potential employee-plaintiffs of FLSA collective action claims).

[20] *See infra* notes 22–38 and accompanying text.

[21] *See infra* notes 39–52 and accompanying text.

[22] 29 U.S.C. § 216(b); *In re JPMorgan Chase*, 916 F.3d at 498. In determining whether employee-plaintiffs are similarly situated, the Fifth Circuit has no set definition. *See Mooney*, 54 F.3d at 1213–14 (discussing the Fifth Circuit's interpretation of the FLSA's "similarly situated" requirement). Rather courts perform ad hoc inquiries focused on similarities in the employment settings of individual employee-plaintiffs, similarities in defenses available to employers against each employee-plaintiff, and fairness considerations. *Id.* at 1215.

[23] G.W. Foster, Jr., *Jurisdiction, Rights, and Remedies for Group Wrongs Under the Fair Labor Standards Act: Special Federal Questions*, 1975 WIS. L. REV. 295, 296–97 (citing 83 CONG. REC. 9, 264 (1938)) (explaining that Section 216(b) gives the means and ability to individual employees, through cost-effective collective action, to enforce their own rights). Congress enacted the FLSA to eliminate substandard working conditions and check unfair business practices by regulating workers' wages and hours. 29 U.S.C. § 202. In drafting the collective action provision, Congress envisioned that private suits brought by collections of individual workers would supplement public enforcement by the Department of Labor. *See* Foster, *supra*, at 296–97 (explaining private enforcement and public enforcement).

[24] *Compare* Fair Labor Standards Act of 1938, 16(b), ch. 676, 52 Stat. 1060, 1069 (codified as amended at 29 U.S.C. § 216(b)) (declining to require absent parties to opt in), *with* FED. R. CIV. P. 23(c)(2) (omitting an opt-in requirement); *see also* Foster, *supra* note 23, at 325–26 (referring to the significant influence of Rule 23 on FLSA collective actions).

[25] Portal-to-Portal Act of 1947, Pub. L. No. 49, 5, 61 Stat. 84, 84, 87 (codified as amended at 29 U.S.C. § 216(b)). Congress recognized that the liability created by automatically binding similarly situated parties might create financial problems for employers, which would then negatively affect the United States economy. 29 U.S.C. § 251(a).

[26] *See* 29 U.S.C. § 216(b) (requiring FLSA employee-plaintiffs to file written consent to join). If potential plaintiffs do not know that such an action is pending, there is no way they can know to opt

tion 216(b) does not specifically empower district courts to facilitate notice of pending collective actions to potential class members.[27] In 1989, the Supreme Court resolved whether district courts may facilitate such notice in the seminal case on FLSA collective action procedure, *Hoffmann-La Roche v. Sperling*.[28] In *Hoffmann-La Roche*, the Court held that district courts have the broad discretion to facilitate notice of pending FLSA actions to potential opt-in employee-plaintiffs.[29] The Court clarified, however, that this did not give district courts unchecked discretion in managing these actions, and that district courts must exercise this authority to promote judicial efficiency, as well as to avoid the appearance of endorsing the merits of the action.[30]

Although *Hoffmann-La Roche* made clear that district courts have discretion to facilitate notice in Section 216(b) actions, the Court expressly declined to establish a framework for the exercise of such discretion.[31] As a result, courts have independently developed procedures to decide whether potential employee-plaintiffs are similarly situated and whether to certify the class.[32] The practice of a two-stage certification has become the norm.[33] In stage one,

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in. *See id*. As such, notifying similarly situated employees is key to gaining substantial involvement from the employees to spread the cost of the action. *See* Foster, *supra* note 23, at 264 (explaining that the goal of the collective action provision is to make private suits economically feasible for employee-plaintiffs).

[27] *Compare* 29 U.S.C. § 216(b) (failing to specify procedures for notifying putative, opt-in plaintiffs of pending actions), *with* FED. R. CIV. P. 23(c)(2) (setting forth notice provisions to inform putative, opt-out plaintiffs of pending class actions).

[28] *Hoffmann-La Roche*, 493 U.S. at 169–74 (granting district courts the authority to facilitate FLSA notice to potential employee-plaintiffs). *Hoffmann-La Roche* concerned a collective action brought under the ADEA, but because the ADEA used the same language for its collective actions as that contained in Section 216(b), the holding applies to both types of collective action. *See id.* at 167 (noting that the language of Section 216(b) of the FLSA is mirrored in the ADEA).

[29] *See id.* at 171–72 (stating that because trial courts are in the best position to efficiently handle joinder of additional parties, it is within their discretion to handle joinder under FLSA claims).

[30] *Id.* at 171, 174.

[31] *Id.* at 170.

[32] *See In re JPMorgan Chase*, 916 F.3d at 500 n.9 (referring to other methods district courts often use); *see also Mooney*, 54 F.3d at 1214 (describing two different types of class certification procedures).

[33] *See In re JPMorgan Chase*, 916 F.3d at 500 (making the same observation regarding the predominance of the two-stage certification). This two-stage certification procedure was clearly laid out in *Lusardi v. Xerox Corp*. 118 F.R.D. 351, 374 (D.N.J. 1987); *see In re JPMorgan Chase*, 916 F.3d at 500 (referring to two-stage certification as the "*Lusardi* method"). District courts in the First, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, and D.C. Circuits have formally adopted the two-stage certification process. *See* Carl Engstrom, Note, *What Have I Opted Myself Into? Resolving the Uncertain Status of Opt-In Plaintiffs Prior to Conditional Certification in Fair Labor Standards Act Litigation*, 96 MINN. L. REV. 1544, 1551, 1553 n.51 (2012) (citing decisions from these circuits adopting this approach); *see, e.g*., Morgan v. Family Tree Stores, Inc., 551 F.3d 1233, 1261 (11th Cir. 2008) (mandating the use of two-stage certification by Eleventh Circuit district courts); Thiessen v. Gen. Elec. Capital Corp., 267 F.3d 1095, 1105 (10th Cir. 2001) (approving the two-stage certification process within the Tenth Circuit). The only times courts seem to stray from this norm is when most

known as the conditional certification stage, the district court applies a lenient standard to decide whether potential employee-plaintiffs are similarly situated based only on the pleadings and any affidavits submitted by potential opt-in plaintiffs.[34] If so, the court conditionally certifies the class and orders notice of the action.[35] In stage two, following the defendant's motion for decertification, the court applies a more stringent standard and either certifies the class for the final time or refuses to do so and dismisses the potential opt-in employee-plaintiffs.[36]

This two-step certification process provides the model for FLSA collective actions.[37] District courts, however, are divided on whether to conditionally certify, and thus give notice to, potential employee-plaintiffs bound by arbitration agreements with class action waivers.[38]

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discovery has already occurred and district courts have enough information to directly make a second-stage determination. *Id*.

[34] *See, e.g.*, *Mooney*, 54 F.3d at 1213–14 (describing in depth the two-stage certification process). The first stage is considered lenient because it requires nothing more than substantial allegations that the class members were victims of a single policy or decision. *Id.* at 1214 n.8. To determine whether an employee is similarly situated, courts engage in an ad hoc inquiry, focusing on the similarities between the employee's situations, the defenses available to the employer, and overarching fairness. *Id*. at 1215. This stage is referred to as conditional certification because final certification of the class is conditioned upon stage two. *Id.*

[35] *Id.* at 1214.

[36] *See id.* (referencing courts' use of the extensive discovery record). Stage two is usually initiated by a defendant's motion for decertification, which aims at removing certain opt-in plaintiffs from the previously conditionally certified class when they are not in fact similarly situated. *Id.* The motion for decertification is filed after discovery, meaning that the court has much more information on which to base its similarly-situated decision. *Id.* If the court still finds that the opt-in plaintiffs are similarly situated, it will certify the class for the final time, and the case proceeds to trial. *Id.* If, on the other hand, the court finds that the opt-in plaintiffs are not similarly situated, the court dismisses them from the action without prejudice. *Id.*

[37] *See In re JPMorgan Chase*, 916 F.3d at 500 (calling the two-stage certification process the popular approach).

[38] *See id.* at 499–500, 499 n.6 (noting that potential employee-plaintiffs being bound by arbitration agreements is a recurring issue that has led to splitting); *see, e.g.*, *Weckesser*, 2018 WL 4087931, at *3 (allowing conditional certification of opt-in employee-plaintiffs subject to arbitration agreements); *Hudgins*, 2017 WL 514191, at *4 (refusing to notify those who signed arbitration agreements). This problem is exacerbated by the fact that roughly twenty-five million Americans—or twenty percent of the non-unionized American workforce—are covered by arbitration agreements, as well as the fact that the Supreme Court has recently favored arbitration. *See* AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011) (promoting a federal policy of upholding arbitration agreements when valid under contract law); Andrew D. Bradt & D.T. Rave, *Aggregation on Defendants' Terms:* Bristol-Myers Squibb *and the Federalization of Mass-Tort Litigation*, 59 B.C.L. REV. 1251, 1266 (2018) (remarking that Supreme Court case law regarding enforcement of arbitration agreements has stifled collective litigation); Sternlight, *supra* note 7, at 1310 (estimating that twenty percent of American employees are bound by arbitration agreements).

B. JPMorgan Chase's Request Not to Conditionally Certify and Notify Potential Employee-Plaintiffs Bound by Arbitration Agreements

In December 2017, Shannon Rivenbark filed a FLSA suit against JPMorgan Chase & Co. (JPMorgan Chase) on behalf of herself and all 42,000 individuals employed in JPMorgan Chase call centers from December 14, 2014 through the resolution of the case.[39] Eighty-five percent of the collective class signed a binding arbitration agreement.[40] The agreement made arbitration mandatory for all employee claims against JPMorgan Chase and waived employees' rights to participate in collective actions.[41] In May 2018, Rivenbark moved for conditional certification of the collective action, which would satisfy stage one of the two-stage certification process.[42] On December 10, 2018, following a hearing on the motion, the United States District Court for the Southern District of Texas conditionally certified the collective action.[43] The district court reasoned that it could not conclude whether the arbitration agreement precluded class members from joining the action until JPMorgan

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[39] *In re JPMorgan Chase*, 916 F.3d at 494; Petition for Writ of Mandamus at 4, *In re JPMorgan Chase*, 916 F.3d 494 (No. 4:17-CV-3786). Rivenbark alleged that all call-center employees worked several hours "off-the-clock" for which they were not paid as a result of corporate policy that required all call-center employees to take their first phone call the moment that their official shift started. Petition for Writ of Mandamus, *supra*, at 4; Plaintiff's Original Collective Complaint at 6, Rivenbark v. JPMorgan Chase & Co., 340 F. Supp. 3d 619 (S.D. Tex. 2018) (No. 4:17-CV-3786). This policy allegedly required Rivenbark and the putative class members to start and log into their computers, launch eight to ten different software programs, log into each program, and ensure that the programs were operating properly. Plaintiff's Original Collective Complaint, *supra*, at 6. This accounted for thirty minutes to one hour of daily startup time, which, in a five-day work week, equaled approximately two-and-a-half to five hours of "off-the-clock" work per week for which Rivenbark and the putative class members were not paid. *Id.*

[40] *In re JPMorgan Chase*, 916 F.3d at 497.

[41] *See* Petition for Writ of Mandamus, *supra* note 39, at 5 (quoting the arbitration agreement that JPMorgan Chase required employees to sign). Since mid-2009, all new JPMorgan Chase employees have assented to the arbitration agreement with the collective action waiver. *Id*. Under the waiver, employees must pursue their claims on an individual basis rather than in a collective manner. *Id.*

[42] *See* Petition for Writ of Mandamus, *supra* note 39, at 5; *see, e.g.*, *Mooney*, 54 F.3d at 1213–14 (describing that conditional certification satisfies stage one of the certification process). The plaintiffs relied on the lenient standard for conditional certification, which usually leads to conditional certification of and notice to the putative class. Petition for Writ of Mandamus, *supra* note 39, at 5; *see Mooney*, 54 F.3d at 1213–14 (describing the relaxed standard of conditional certification). In response, JPMorgan Chase contended that the court should not conditionally certify the class nor give notice to those employees who assented to the agreement, because doing so would be contrary to the agreements and the Federal Arbitration Act. Petition for Writ of Mandamus, *supra* note 39, at 6; *see* Federal Arbitration Act (FAA), 9 U.S.C. § 4 (2018) (permitting a party to petition a district court to enforce an arbitration agreement). In response, the plaintiffs clarified that they did not contest the validity or enforceability of the agreements, but rather that the agreements could not preclude employees' rights to receive notice of their FLSA rights. Petition for Writ of Mandamus, *supra* note 39, at 6.

[43] *In re JPMorgan Chase*, 916 F.3d at 497–98. At the hearing, the district court referred to the plaintiffs and potential plaintiffs as "victims of illegality" and suggested that not providing notice would disenfranchise employees beyond the relinquishment of individual rights affected by the arbitration agreements. *Id.* at 503.

Chase moved to compel arbitration.[44] As such, those under the arbitration agreement were potential employee-plaintiffs whom the court could notify.[45]

Following the conditional certification of the collective action, JPMorgan Chase moved for interlocutory appeal and an emergency stay of the order, both of which the district court denied.[46] As a result, on December 20, 2018, JPMorgan Chase filed a petition for a writ of mandamus in the Fifth Circuit Court of Appeals that attempted to exclude any employee who signed the arbitration agreement from receiving notice of the collective action.[47] JPMorgan Chase argued that the Fifth Circuit should reverse the district court's decision to conditionally certify the class and notify the call-center employees who were bound by arbitration agreements because, under *Hoffmann-La Roche*, district courts have no authority to require notice for individuals who cannot participate in a collective action as a result of arbitration agreements.[48] Alternatively, it argued that the district court erroneously treated the arbitration agreement as presumptively invalid by refusing to enforce it.[49]

Ultimately, the Fifth Circuit denied JPMorgan Chase's petition on the grounds that the district court did not patently err, because its decision aligned with every other district court in the Fifth Circuit that addressed the issue.[50]

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[44] *Id.* The court's analysis of this question was brief and did not advance any further reasoning. *See id.* (lacking a robust analysis of the exclusion of class members prior to a motion to compel arbitration).

[45] Petition for Writ of Mandamus, *supra* note 39, at 7–8. Along with the certification, the district court ordered that the plaintiff transmit notification to all putative members by first class mail and e-mail. *In re JPMorgan Chase*, 916 F.3d at 498.

[46] *In re JPMorgan Chase*, 916 F.3d at 498; *see* 28 U.S.C. § 1292(b) (2018) (giving district court judges the authority for interlocutory appeal). An interlocutory appeal is one that occurs before the trial court's final ruling on the case. *Interlocutory Appeal*, BLACK'S LAW DICTIONARY, *supra* note 7.

[47] *In re JPMorgan Chase*, 916 F.3d at 498–99. A writ of mandamus is a writ issued by an appellate court to force particular action on behalf of a lower court in order to correct the lower court's prior failure. *Writ of Mandamus*, BLACK'S LAW DICTIONARY, *supra* note 7. A writ of mandamus is an unusual remedy limited to actions in which there are no other appropriate means of relief. *In re JPMorgan Chase*, 916 F.3d at 499 (citing Cheney v. United States Dist. Court, 542 U.S. 367, 380–81 (2004)). Courts typically only grant the remedy when petitioners clearly establish their entitlement to it. *Id.* JPMorgan Chase argued that the district court's certification necessitated a grant of mandamus because providing notice to employees who could not participate in a collective action was an overextension of judicial power. Petition for Writ of Mandamus, *supra* note 39, at 10–13. JPMorgan Chase also emphasized the importance of the case beyond the Fifth Circuit, where district courts had split over the certification and notice issues in the absence of guidance from federal courts of appeals. *Id.* at 19–20. JPMorgan Chase simultaneously sought a motion for an emergency stay of the notice order pending resolution of the petition, which the court granted on December 21, 2018. *JPMorgan Chase*, 916 F.3d at 499.

[48] Petition for Writ of Mandamus, *supra* note 39, at 10–13.

[49] *Id.* at 15–19. The petitioners argued that before inviting arbitration agreement signers to participate in a collective, a court needs to conclude that the arbitration agreements are unenforceable. *Id.* Thus, because the court did not analyze the agreements, it treated them as presumptively invalid, which is in direct opposition to the liberal federal policy favoring such agreements. *Id.*

[50] *In re JPMorgan Chase*, 916 F.3d at 504. In its analysis of whether to grant the writ, the Fifth Circuit determined that there was no other adequate means of relief because the district court denied

Nonetheless, in its supervisory role, the Fifth Circuit held that the district court erred in ordering notice to employees bound by the agreements.[51] The Fifth Circuit reasoned that *Hoffmann-La Roche* does not provide district courts with the discretion to send notice of FLSA collective actions to those who are unable to join because of binding arbitration agreements.[52]

II. LEGAL POSITIONING OF *IN RE JPMORGAN CHASE*

Due to the lack of appellate guidance regarding whether plaintiffs may send notice of a FLSA collective action to employees bound by arbitration agreements, federal district courts have split over the issue, resolving it in three major way.[53] The United States Court of Appeals for the Fifth Circuit's decision in *In re JPMorgan Chase & Co.* represented a matter of first impression regarding the issue.[54] Section A of this Part describes the three resolution frameworks district courts have advanced before the Fifth Circuit's decision in *In re JPMorgan Chase*.[55] Section B details the Fifth Circuit's chosen framework and how its rationale compares to that of the other approaches.[56]

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interlocutory appeal. *Id.* at 499. As a result of this denial, the notice issue would be moot upon appeal of a final judgment, as the notice would have already occurred. *Id*. The court ruled that the writ was proper due to the prevalence of the issue and the district court split across the country. *Id.* at 499–500.

[51] *Id.* at 504. The Supreme Court has recognized the writ of mandamus as a supervisory tool for courts of appeals to correct errant decisions from district courts within their jurisdiction. 16 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 3934.1 (3d ed. 2012). Although, the Fifth Circuit determined that the district court did ultimately err, it held that the error was not "clear[] and indisputabl[e]," as is required for issuing of a writ of mandamus. *In re JPMorgan Chase*, 916 F.3d at 504.

[52] *In re JPMorgan Chase*, 916 F.3d at 502 (citing *Hoffmann-La Roche*, 493 U.S. at 170, 174). The Fifth Circuit reasoned that the potential employee-plaintiffs whom district courts had discretion to notify under *Hoffmann-La Roche* did not include those bound by arbitration agreements, because such employee-plaintiffs would never be eligible to participate in the suit. *Id.* The court stated that its reading of "potential employee-plaintiffs" aligned with the policy behind *Hoffmann-La Roche* to provide for expedient disposition and avoid encouraging litigation. *Id.* Additionally, the Fifth Circuit concluded that the district judge's decision to notify individuals bound by the arbitration agreements also violated the Supreme Court's instruction to maintain judicial neutrality because of the judge's reference to the employees as "victims of illegality." *Id.* at 503–04 (citing *Hoffmann-La Roche*, 493 U.S. at 170, 174).

[53] *In re* JPMorgan Chase & Co., 916 F.3d 494, 499 n.6 (5th Cir. 2019) (noting that the issue of potential collective employee-plaintiffs bound by arbitration agreements caused district court splitting). The issue was also increasingly litigated. *Id.* at 499; Petition for Writ of Mandamus, *supra* note 39, at 26 (stating that a Westlaw search produces 210 cases on the issue, fifty-two of which were decided in the last two years and only six of which were issued before 2008).

[54] *In re JPMorgan Chase*, 916 F.3d at 499–500. No other United States Court of Appeal has addressed this issue. *Id.*

[55] *See infra* notes 57–68 and accompanying text.

[56] *See infra* notes 69–76 and accompanying text.

A. Overview of the Three-Framework Split Before the Fifth Circuit's Holding

One resolution district courts advanced before *In re JPMorgan Chase* involves simply excluding employees who signed arbitration agreements from the conditionally certified collective and from receiving notice (the First Approach).[57] This resolution framework rests on the policy of judicial efficiency at the core of the Supreme Court's 1989 decision in *Hoffmann-La Roche v. Sperling*.[58] Expounding from that policy, subsequent district courts provided that notifying and adding these potential employee-plaintiffs would waste judicial time and resources because defendants would likely attempt to remove them from the litigation based on the arbitration agreements.[59] This framework assumes that the arbitration agreements are binding and enforceable, and that they will therefore necessarily lead to the disqualification of those who signed them.[60]

By contrast, in the second track district courts have taken before *In re JPMorgan Chase*, courts conditionally certify and notify all potential employee-plaintiffs who have signed arbitration agreements (the Second Approach).[61]

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[57] *In re JPMorgan Chase*, 916 F.3d at 499 n.6 (explaining that district courts have applied three distinct frameworks); *see, e.g.*, Hudgins v. Total Quality Logistics, LLC, Case No. 16 C 7331, 2017 WL 514191, at *4 (N.D. Ill. Feb. 8, 2017) (restricting notice to those who have not assented to arbitration agreements); Fischer v. Kmart Corp., Civ. No. 13-4116, 2014 WL 3817368, at *8 (D.N.J. Aug. 4, 2014) (holding that employees who consented to an arbitration agreement and collective action waiver were prevented from joining the collective action); Morangelli v. Chemed Corp., 10 Civ. 0876 (BMC), 2010 WL 11622886, at *3 (E.D.N.Y. June 15, 2010) (precluding those employees who signed binding arbitration agreements from joining the class).

[58] *See* Hoffmann-La Roche v. Sperling, 493 U.S. 165, 170–72 (1989) (explaining that district courts' discretion to facilitate notice is born out of the goal to accelerate resolution of the suit); *see, e.g.*, *Morangelli*, 2010 WL 11622886, at *3 (proclaiming it a failure of efficiency to certify workers bound by arbitration agreements because such workers inevitably would be disqualified).

[59] *See Hudgins*, 2017 WL 514191, at *4 (citing Daugherty v. Encana Oil & Gas (USA), Inc., 838 F. Supp. 2d 1127, 1130 (D. Colo. 2011)) (noting the frivolousness of allowing employee-plaintiffs with arbitration agreements to join a collective action only to force a defendant to move for dismissal based on arbitration agreements); *Morangelli*, 2010 WL 11622886, at *3 (proclaiming that it would be inefficient to certify all workers when those with arbitration agreements would likely be disqualified after lengthy motion practice).

[60] *See, e.g.*, Campanelli v. Image First Healthcare Laundry Specialists, Inc., 15-cv-04456-PJH, 2018 WL 6727825 at *4 (N.D. Cal. Dec. 21, 2018) (explaining that the court need not evaluate whether the arbitration agreements were enforceable, although it did, when declining certification of the employees who had signed them); *Daugherty*, 838 F. Supp. 2d at 1130 (stating that because the arbitration agreements were enforceable, it would be frivolous to notify those employees who had signed them). Without a binding arbitration agreement, collective action waivers and mandatory arbitration proceedings would be unenforceable, and thus employee-plaintiffs would not have waived their right to judicial process. *See* Federal Arbitration Act, 9 U.S.C. § 4 (2018) (providing that if an arbitration agreement does not meet certain criteria, the parties will not be referred to arbitration proceedings).

[61] *See In re JPMorgan Chase*, 916 F.3d at 499 n.6 (explaining that three frameworks exist in the district courts); *e.g.*, Sawyer v. Health Care Sols. at Home, Inc., No. 5:16-cv-5674, 2018 WL 1959632, at *4 (E.D. Pa. Apr. 25, 2018) (holding that signing arbitration agreements does not pre-

The Second Approach is based on the theory that all employee-plaintiffs have a right to receive notice of potential FLSA claims.[62] This resolution framework reasons that the right to receive notice of FLSA claims is independent of the right to participate in a collective action.[63] Accordingly, once conditionally certified and notified, the employee-plaintiffs who are subject to arbitration will be siphoned off to arbitration via the defendants' motion practices.[64] Some district courts have emphasized that the Second Approach is sound policy because it allows the statute of limitations to toll and creates a placeholder for employee-plaintiffs who have claims that an arbitrator determines must be addressed in federal court.[65]

Similarly, in the third resolution district courts advanced before *In re JPMorgan Chase*, courts certify collective actions and notify employees who have signed arbitration agreements (the Third Approach).[66] The Third Approach

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clude employees from conditional certification and notice); Williams v. Omainsky, CIVIL ACTION No. 15-0123-WS-N, 2016 WL 297718, at *8 (S.D. Ala. Jan. 21, 2016) (holding that, by signing arbitration agreements, employee-plaintiffs did not forfeit the right to receive notice of FLSA claims); Barnett v. Countrywide Credit Indus., Inc., No. CIV.A.3:01-CV-1182-M, 2002 WL 1023161, at *2 (N.D. Tex. May 21, 2002) (permitting plaintiffs to notify employees, even those who assented to arbitration agreements).

[62] *See Williams*, 2016 WL 297718, at *8 (holding that assenting to an arbitration agreement did not bar employees from their right to notice of potential FLSA claims); Moore v. C&J Energy Servs. Inc., CIVIL ACTION NO. H-15-1136, 2015 WL 12940139, at *5 (S.D. Tex. Dec. 8, 2015) (holding that the choice to arbitrate claims does not negate the right to receive notice of FLSA claims).

[63] *See Williams*, 2016 WL 297718, at *8 (recognizing a right to receive notice of FLSA claims); *Moore*, 2015 WL 12940139, at *5 (holding that there is an independent right to receive notice of FLSA claims).

[64] *See, e.g.*, *Sawyer*, 2018 WL 1959632, at *4 (postponing determination of the issue of the enforceability of arbitration agreements until final certification); *Williams*, 2016 WL 297718, at *32–33 (explaining that at the decertification stage, a defendant may move to compel arbitration against those employees who signed arbitration agreements and attempted to opt into the class); Maddy v. Gen. Elec. Co., 59 F. Supp. 3d 675, 685, 685 n.7 (D.N.J. 2014) (allowing those who signed arbitration agreements to be conditionally certified and noting that at the second stage of certification they will be sent to arbitration); *Barnett*, 2002 WL 1023161, at *2 (deciding that, although employee-plaintiffs may notify all employees, only those who had not signed arbitration agreements could fully opt into the litigation).

[65] *See Williams*, 2016 WL 297718, at *8 (explaining that simply agreeing to a different forum does not forfeit the right to receive notice of the litigation). The ability to opt in allows the employee-plaintiff to return to federal court if the arbitrator so decides and avoids a situation in which his or her claim is precluded by the statute of limitations as a result of a potentially lengthy arbitration proceeding. *Id.* at *8 n.15 (citing Grayson v. K Mart Corp., 79 F.3d 1086, 1106 (11th Cir. 1996)). A claim in an opt-in cause of action can only achieve a tolling of the statute of limitations where a plaintiff opts in after being conditionally certified and notified. *Id.* Additionally, a plaintiff can only accomplish subsequent re-entry into the collective action if the plaintiff opts in after the conditional certification stage but before the decertification stage. *Id.*

[66] *See In re JPMorgan Chase*, 916 F.3d at 499 n.6 (explaining the three distinct frameworks); *e.g.*, Meyer v. Panera Bread Co., 344 F. Supp. 3d 193, 206-07 (D.D.C. 2018) (certifying the collective); Weckesser v. Knight Enters. S.E., LLC, Civil Action No. 2:16-CV-02053-RMG, 2018 WL 4087931, at *3 (D.S.C. Aug. 27, 2018) (allowing conditional certification of opt-in employee-plaintiffs that allegedly assented to arbitration agreements); Hanson v. Gamin Cargo Control, Inc.,

is based on the idea that the agreements might be unenforceable, and courts should therefore evaluate them on the merits.[67] Accordingly, the enforceability of these arbitration agreements should be addressed at the decertification stage, because discovery is necessary to illuminate the facts necessary for this determination.[68]

B. The Positioning of the Fifth Circuit's Decision Within the Three Frameworks

In *In re JPMorgan Chase*, the Fifth Circuit defined possible employee-plaintiffs as persons ultimately eligible to participate in the pending suit.[69] By clearly defining a subset of employees who district courts could not treat as possible employee-plaintiffs, the Fifth Circuit's decision gave district courts a basis on which to exercise the broad discretion that *Hoffmann-La Roche* gave them.[70] More importantly, *In re JPMorgan Chase* instructed district courts within the Fifth Circuit not to conditionally certify employees who have signed arbitration agreements so long as the agreements are shown to be valid under state contract law.[71]

Although at first glance this framework may seem like a straightforward adoption of the First Approach, the two-pronged aspect is a hybrid of the First Approach and the Third Approach.[72] The framework that the Fifth Circuit cre-

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CIVIL ACTION NO: 4:13-CV-0027, 2013 WL 12107666, at *2 (S.D. Tex. Aug. 9, 2013) (providing notice to all potential class members).

[67] *See Meyer*, 344 F. Supp. 3d at 206 (reasoning that because court assesses the enforceability of arbitration agreements on their merits, it is better to make that decision at the decertification stage); *Weckesser*, 2018 WL 4087931, at *3 (allowing the conditional certification of opt-in employee-plaintiffs that allegedly assented to arbitration agreements because a determination of the enforceability of such agreements would not be properly before the court until the employee-plaintiffs join the action); *Hanson*, 2013 WL 12107666, at *2 (holding that the issue of whether a plaintiff who opts in is subject to a valid arbitration agreement is to be determined through discovery and decertification).

[68] *See supra* note 67 (citing to cases employing the Third Approach, wherein the courts believed it better to rule on the validity of arbitration agreements after discovery).

[69] *In re JPMorgan Chase*, 916 F.3d at 502. The court concluded that considering individuals unable to take part in the litigation to be potential employee-plaintiffs would have contradicted the Supreme Court's admonitions in *Hoffmann-La Roche v. Sperling*. *Id.* (citing *Hoffmann-La Roche*, 493 U.S. at 174).

[70] *Compare Hoffmann-La Roche*, 493 U.S. at 170 (giving district courts discretion to authorize notice without providing guidance on how to exercise it), *with In re JPMorgan Chase*, 916 F.3d at 501–02 (holding that a district court may not send notice to an employee subject to a binding arbitration agreement). *Hoffmann-La Roche* clarified that district courts did not have unchecked discretion in managing collective action notification by admonishing district courts to maintain judicial neutrality. 493 U.S. at 174.

[71] *In re JPMorgan Chase*, 916 F.3d at 502–03.

[72] *See id.* (mixing the First Approach, under which courts refuse to certify and notify those who have assented to valid arbitration agreements, with the Third Approach, under which courts evaluate the arbitration agreements to ensure their validity); *infra* notes 73–76 and accompanying text (describing the Fifth Circuit's approach's resemblance to the First and Third approaches).

ated in *In re JPMorgan Chase* largely resembles the First Approach because it refuses to conditionally certify and notify individuals who have assented to valid arbitration agreements.[73] The Fifth Circuit's reasoning, like that of other courts that have employed the First Approach, was based on the concerns of judicial efficiency discussed in *Hoffmann-La Roche*.[74] By evaluating whether the arbitration agreement was binding under state contract law, however, the Fifth Circuit's framework also incorporated the policy reasoning at the heart of the Third Approach.[75] It did so by stopping short of ruling that courts must automatically certify and notify employees who signed arbitration agreements and, instead, making sure district courts first answer whether the agreements are valid under state contract law.[76]

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[73] *Compare In re JPMorgan Chase*, 916 F.3d at 503 (holding that where a preponderance of the evidence shows that the employee entered a valid arbitration agreement, a district court may not notify that employee), *with Hudgins*, 2017 WL 514191, at *4 (limiting notice to only those who had not signed arbitration agreements), *Fischer*, 2014 WL 3817368, at *8 (preventing employees with arbitration agreements from joining the certified collective), *and Morangelli*, 2010 WL 11622886, at *3 (excluding from the conditionally certified class those employees who signed binding arbitration agreements).

[74] *In re JPMorgan Chase*, 916 F.3d at 502 (citing *Hoffmann-La Roche*, 493 U.S. at 174); *see Hoffmann-La Roche*, 493 U.S. at 174 (stating that the purpose of notice facilitation is the need for expedient disposition in one proceeding). The Fifth Circuit, like district courts adopting the First Approach, emphasized the drain on efficiency that accompanies notifying individuals who will ultimately be removed from the proceeding. *Compare In re JPMorgan Chase,* 916 F.3d at 502 (explaining that notifying those who cannot ultimately participate in the collective action encourages litigation), *with Hudgins*, 2017 WL 514191, at *4 (noting the judicial waste created by allowing employee-plaintiffs with arbitration agreements to join only for them to be dismissed because of those agreements), *and Morangelli*, 2010 WL 11622886, at *3 (referring to the judicial inefficiency of certifying all workers when those with arbitration agreements would likely be dismissed regardless).

[75] *See In re JPMorgan Chase*, 916 F.3d at 502–03 (noting the Fifth Circuit's framework); *Meyer*, 344 F. Supp. 3d at 206 (certifying the collective because the enforceability of arbitration agreements is determined on the merits); *Weckesser*, 2018 WL 4087931, at *3 (allowing conditional certification because the court had no ability to determine whether the arbitration agreements were enforceable); *Hanson*, 2013 WL 12107666, at *2 (holding that because the court would deal with the issue of the arbitration agreement's validity after discovery, employee-plaintiffs were entitled to notify all potential class members). The Fifth Circuit attempted to alleviate the concern that the unenforceability of arbitration agreements would require courts to unnecessarily notify employees who are ineligible to join the class. *In re JPMorgan Chase*, 916 F.3d at 502–03. More specifically, the Fifth Circuit provided that a district court should permit parties to submit additional evidence on this issue and should make sure that an employer seeking to preclude an employee carries the burden of proof by a preponderance of the evidence. *Id.*

[76] *Compare In re JPMorgan Chase*, 916 F.3d at 502–03 (providing that to disqualify employee-plaintiffs from collective action notification, employers must prove that the arbitration agreement is binding), *with Meyer*, 344 F. Supp. 3d at 206 (holding that the enforceability of arbitration agreements is a determination based on the merits that is best made after conditional certification), *Weckesser*, 2018 WL 4087931, at *3 (permitting conditional certification because the court was unable to determine the enforceability of the arbitration agreements), *and Hanson*, 2013 WL 12107666, at *2 (ruling that notice would be provided to all potential class members because the validity of arbitration agreements should be addressed after discovery).

III. The Fifth Circuit's Correct Ruling Threatens the Effectiveness of the FLSA

Although *In re JPMorgan Chase & Co.*'s framework for approaching FLSA notification of employees bound by arbitration agreements is only precedential within the Fifth Circuit, it is the most faithful way to apply *Hoffmann-La Roche v. Sperling*, and other federal courts should embrace it.[77] Section A of this Part discusses why the Fifth Circuit's ruling was a correct interpretation and extension of the Supreme Court precedent.[78] Section B proposes that, in light of the prevalence of arbitration agreements with collective action waivers, this framework creates a problem going forward in the FLSA's enforcement scheme.[79]

A. The Fifth Circuit's Framework Is the Most Closely Aligned with Supreme Court Case Law

Before, *In re JPMorgan Chase & Co.*, appellate courts have never clearly defined how district courts should exercise their discretion when facilitating notice in a collective action.[80] Nonetheless, *Hoffmann-La Roche* provided two guideposts for the exercise of discretion.[81] First, courts should use their discretion to promote efficient proceedings.[82] Second, courts should not use their discretion in a manner that appears to endorse the merits of the action.[83]

The Fifth Circuit correctly defined "potential plaintiff" in the context of whether district courts have discretion to conditionally certify and provide notice of FLSA collective actions to employee-plaintiffs who signed arbitration agreements because its decision is guided by the policy goals of *Hoffmann-La Roche*.[84] The court rightly focused on the judicial waste that would accumulate

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[77] *See* Hoffmann-La Roche v. Sperling, 493 U.S. 165, 170–72 (1989) (reasoning that the discretion to facilitate notice emanates from a desire to expedite disposition of FLSA actions); *In re* JPMorgan Chase & Co., 916 F.3d 494, 499–500 (5th Cir. 2019) (explaining that conditionally certifying employees under binding arbitration agreements would create judicial inefficiencies).

[78] *See infra* notes 80–90 and accompanying text.

[79] *See infra* notes 91–102 and accompanying text.

[80] *Hoffmann-La Roche*, 493 U.S. at 170 (giving district courts discretion to authorize notice but declining to detail how it should be exercised).

[81] *Id.* at 170, 174 (proclaiming that district courts should use their discretion to promote judicial efficiency and neutrality).

[82] *Id*. at 170.

[83] *Id*. at 174 (explaining that the discretion to facilitate notice is born out of the goal to expedite disposition of actions, but that the discretion should not be unfettered to the degree that it appears as judicial endorsement of the action).

[84] *See id.* at 170, 174 (providing the policy goals behind the notice facilitation authority); *In re JPMorgan Chase*, 916 F.3d at 502 (agreeing with the petitioners that possible plaintiffs should be those who will be eligible to partake in the action). The Fifth Circuit quickly disarmed the rights-based theory of the Second Approach by noting that *Hoffmann-La Roche* stated that district courts may, but are not required to, facilitate notice to possible plaintiffs. *In re JPMorgan Chase*, 916 F.3d at 502, 503 n.19 (citing *Hoffmann-La Roche*, 493 U.S. at 174).

by notifying and adding employee-plaintiffs who would later be forced out of the action.[85] Additionally, the court reasoned that notifying those not eligible to proceed could potentially lend itself to breaches of judicial neutrality.[86]

The Fifth Circuit's hybrid approach does the best of any current approach to minimize this risk of judicial inefficiency while also making sure that those bound by enforceable arbitration agreements are not notified.[87] Full-scale adoption of both the Second and Third Approach would bring judicial inefficiency caused by dealing with extensive decertification motion practice.[88] Given that the policy behind granting district courts discretion to facilitate notice is to have a single, efficient proceeding, it does not follow that district courts should allow employers to flood proceedings with motions to compel arbitration that have nothing to do with the FLSA claims.[89] The Fifth Circuit's hybrid

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[85] *See In re JPMorgan Chase*, 916 F.3d at 502 (observing that notifying those who cannot participate in the collective delays the litigation, which *Hoffmann-La Roche* prohibits).

[86] *See id.* at 503–04 (describing the opinionated quotes from the district judge that the court took issue with). Most of the Fifth Circuit's analysis involved comments the district judge made at the motion for conditional certification hearing, in which he called the employees "victims of illegality." *Id.* The Fifth Circuit, however, also discussed *Hoffmann-La Roche*'s disallowance of notice facilitation power being used for claim solicitation. *Id.* at 504. *Hoffmann-La Roche*'s prohibition of claim solicitation spurs from the idea that ordering that notice be sent to individuals who cannot participate would signal that the case had some merit and that those receiving notice should at least bring individual claims, thus violating the policy of judicial neutrality. *Id.*; *see Hoffmann-La Roche*, 493 U.S. at 174 (holding that district court intervention in the notice process must not be used for the solicitation of claims).

[87] *See In re JPMorgan Chase*, 916 F.3d at 502–03 (prohibiting district courts from notifying employees with binding arbitration agreements because such notification would be inefficient, and mandating that employers must establish the validity of arbitration agreements before conditional certification). The Third Approach is driven by the fear that arbitration agreements may be invalid and that employees who should get notice will not. *See* Weckesser v. Knight Enters. S.E., LLC, Civil Action No. 2:16-CV-02053-RMG, 2018 WL 4087931, at *3 (D.S.C. Aug. 27, 2018) (allowing the conditional certification of opt-in employee-plaintiffs bound by arbitration agreements because the court was unable to determine whether the agreements were enforceable). By allowing courts to address this issue before conditional certification, the Fifth Circuit quelled that fear. *See In re JPMorgan Chase*, 916 F.3d at 502–03 (requiring employers to prove the existence and validity of the agreement when they seek to remove an employee from conditional certification based on an arbitration agreement).

[88] *See* Hudgins v. Total Quality Logistics, LLC, No. 16 C 7331, 2017 WL 514191, at *4 (N.D. Ill. Feb. 8, 2017) (citing Daugherty v. Encana Oil & Gas (USA), Inc., 838 F. Supp. 2d 1127, 1130 (D. Colo. 2011)) (observing the frivolousness of allowing those under arbitration agreements to join only to force defendants to formally move for dismissal later); Morangelli v. Chemed Corp., 10 Civ. 0876 (BMC), 2010 WL 11622886, at *3 (E.D.N.Y. June 15, 2010) (mentioning the inefficiency of certifying all workers when those under arbitration agreements would, after lengthy motion practice, be disqualified regardless).

[89] *See Hoffmann-La Roche*, 493 U.S. at 170–72 (proclaiming that district courts' authority to facilitate notice stems from the goal of expediting disposition of FLSA actions). Courts have agreed—because of judicial and monetary efficiency—to address arbitration agreements initially, rather than waiting until after discovery to deal with potentially thousands of individual motions to compel arbitration. *See Morangelli*, 2010 WL 11622886, at *3 (stating that it would be inefficient to certify all workers because those subject to arbitration agreements would likely be disqualified when the defendant, ultimately, compelled arbitration); *see also Hudgins*, 2017 WL 514191, at *4 (noting the frivo-

approach, influenced by the First Approach and the policy of efficient resolution, is therefore the most faithful way to apply *Hoffmann-La Roche*.[90]

B. Projections and Implications Signal a Strain on FLSA Enforcement Moving Forward

Although the Fifth Circuit's decision may be legally correct, the framework creates an opportunity that employers could use to escape private enforcement of the FLSA.[91] If other courts were to adopt the Fifth Circuit's holding in *In re JPMorgan Chase*, it could lead to a loophole through which employers could significantly reduce the risk of large FLSA collective actions.[92] The Fifth Circuit's holding suggests that employees under binding arbitration agreements will never be notified of any potential claims.[93] In that case, so long as those agreements are valid, employees who file the suit will move swiftly to arbitration, and others will never receive notice that they may have a claim.[94] Furthermore, the existence, use, and effect of this loophole will likely

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lousness of allowing employee-plaintiffs with arbitration agreements to join a collective action only to force a defendant to move for dismissal based on those arbitration agreements (citing *Daugherty*, 838 F. Supp. 2d at 1130)).

[90] *See Hoffmann-La Roche*, 493 U.S. at 170–72 (noting the purpose of expediting the disposition of suits); *In re JPMorgan Chase*, 916 F.3d at 502 (explaining that granting district courts authority to conditionally certify employees who signed binding arbitration agreements would allow entrance for plaintiffs who cannot ultimately participate). The framework that the Fifth Circuit laid out mirrors the policy and function of the First Approach, with the exception that the Fifth Circuit evaluates the enforceability of arbitration agreements before deciding whether to conditionally certify and give notice. *See In re JPMorgan Chase*, 916 F.3d at 499 n.6 (describing the First Approach, which excludes employees who are bound by arbitration agreements from the conditionally certified collective, and thus, from receiving notice).

[91] *See infra* notes 92–95 and accompanying text (illuminating how the Fifth Circuit's ruling may create a novel loophole for employers wishing to avoid FLSA collective action).

[92] *See In re JPMorgan Chase*, 916 F.3d at 502 (holding that district courts do not have discretion to send notification of FLSA collective actions to employees under binding arbitration agreements). The assumption that other federal courts will adopt the Fifth Circuit's holding is not farfetched, as district courts within the Fourth, Sixth, and Seventh Circuits have since done so. *See, e.g.*, Graham v. Word Enters. Perry, LLC, Case No. 18-cv-10167, 2019 WL 2959169, at *5 (E.D. Mich. June 18, 2019) (following the Fifth Circuit's decision in *In re JPMorgan Chase & Co.*); Dietrich v. C.H. Robinson Worldwide, Inc., Case No: 18 C 4871, 2019 U.S. Dist. LEXIS 48555, at *3–5 (N.D. Ill. Mar. 20, 2019) (same); Mode v. S-L Distrib. Co., LLC, 3:18-cv-00150-RJC-DSC, 2019 WL 1232855, *4 n.3 (W.D.N.C. Mar. 14, 2019) (same).

[93] *See In re JPMorgan Chase*, 916 F.3d at 502 (holding that district courts cannot send notice of FLSA collective actions to employees bound by arbitration agreements).

[94] *See* Federal Arbitration Act, 9 U.S.C. § 4 (2018) (providing for the enforcement of written agreements to arbitrate); AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011) (declaring Supreme Court policy to enforce arbitration agreements so long as they are valid under contract law); *In re JPMorgan Chase*, 916 F.3d at 502 (ruling that it is not within district courts' discretion to send notification of FLSA collective actions to employees bound by arbitration agreements); Bradt & Rave, *supra* note 38 (noting the commonplace practice of including such clauses in employment contracts).

become more prevalent as the percentage of American labor governed by arbitration agreements continues to climb.[95]

The potential widespread use of the loophole raises concerns about the future effectiveness of the FLSA.[96] As a result of the loophole, employees would find it more difficult to join claims and form collective actions.[97] This inability would undermine the collective action prong of the FLSA, one of its two enforcement mechanisms.[98] If employees cannot join collective actions, it may be economically infeasible for them to bring these costly suits alone.[99] This would leave FLSA enforcement solely to the Department of Labor, which cannot reasonably protect all workers' rights.[100] Ultimately, if the FLSA seriously lacks or entirely loses one of its enforcement mechanisms, it is substantially likely that it will fail to achieve its goal of maintaining suitable working conditions for American workers.[101] Thus, to protect the integrity of the FLSA's collective action prong and its overarching goals, proponents and protectors of American labor should petition the legislative branch to amend the FLSA and prevent the existence of arbitration agreements from interfering with employee's collective action rights.[102]

CONCLUSION

In *In re JPMorgan Chase & Co.*, the Fifth Circuit Court of Appeals addressed whether a district court may give notice of potential FLSA claims to em-

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[95] *See AT&T Mobility LLC*, 563 U.S. at 339 (declaring liberal federal policy favoring arbitration agreements); Sternlight, *supra* note 7, at 1310 (citing an empirical analysis regarding the percentage of the American workforce under arbitration agreements). As of the date of this Comment, roughly twenty percent of non-unionized American labor force is covered by arbitration agreements, and this number is expected to rise according to past trends and current empirical research. Sternlight, *supra* note 7, at 1312 n.9.

[96] *See infra* notes 97–102 and accompanying text (explaining how the loophole created by the Fifth Circuit's ruling may erode the effectiveness of FLSA enforcement via collective action).

[97] *See* 9 U.S.C. § 4 (providing for the enforcement of written agreements to arbitrate); *In re JPMorgan Chase*, 916 F.3d at 504 (holding that district courts cannot notify employees under binding arbitration agreement of FLSA collective actions).

[98] *See* Fair Labor Standards Act of 1938, 29 U.S.C. § 216(b) (2018) (describing collective action enforcement). The FLSA provides that an action can be brought on behalf of a singular employee or on behalf of all employees similarly situated. *Id.* The Department of Labor publicly enforces the FLSA, whereas individual employee-plaintiffs who consolidate similar claims into collective actions privately enforce it. *Id.*

[99] *See* Foster, *supra* note 23, at 296–97 (explaining the rationale for private enforcement).

[100] *Id.*

[101] *See* 29 U.S.C. § 202 (declaring the goals of the FLSA); Foster, *supra* note 23, at 296–97 (describing that Congress envisioned that private collective action suits would work in tandem with public enforcement through the Department of Labor to meet FLSA's goals).

[102] *See* Portal-to-Portal Act of 1947, Pub. L. No. 49, 5, 61 Stat. 84, 84, 87 (codified as amended 29 U.S.C. § 216(b)) (requiring FLSA employee-plaintiffs to file written consent with the court to be added to an action); *In re JPMorgan Chase*, 916 F.3d at 502 (holding that employees bound by arbitration agreements cannot be receive notice of FLSA collective actions from district courts).

ployees who signed binding arbitration agreements. In its analysis, the Fifth Circuit noted and examined the three different approaches that federal district courts have applied to such situations. The Fifth Circuit ultimately sided with the various federal district courts that have refused to certify and notify such employees. Applying *Hoffmann-La Roche v. Sperling*, the court defined the potential plaintiffs whom district courts have discretion to notify as only those employee-plaintiffs who may ultimately partake in the suit. Thus, the Fifth Circuit held that, so long as arbitration agreements are binding, district courts may not send notice of collective action suits to the employees bound by such agreements. In so ruling, the Fifth Circuit faithfully relied on *Hoffmann-La Roche*'s emphasis on judicial efficiency. Although the Fifth Circuit's holding was a correct modernization of *Hoffmann-La Roche*, because it was grounded primarily on judicial efficiency, the decision may lead to the erosion of the FLSA.

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