

The Limits of Comprehensive Peace: The Example of the FLSA

Lonny Hoffman[†]

Christian J. Ward^{††}

Normally, cases can be settled on broad terms that release all related claims. Although there are added protections that must be satisfied when a settlement is proposed in the class action context (which are provided by insisting on judicial approval of the proposed deal), even then the class representatives and defendant can usually agree to compromise the class's ability to later bring all transactionally-related claims. But how should the law deal with cases that involve multiple claims with different claim-vindication procedures? In this paper we consider the FLSA, which is one of the most important examples of such a law. For decades, courts have consistently held that workers aggrieved by an employer's statutory violations may not use modern opt-out class action procedures to vindicate their rights. A frequently litigated, but unsettled, question is whether a class action brought alleging state law wage and hour claims can be settled on terms that require absent class members to release both state and federal claims, even though the federal claims could not have been asserted through the class suit.

I. INTRODUCTION.....	266
II. LOOKING ACROSS THE LANDSCAPE.....	273
A. Conditions Imposed on the Settlement of FLSA Claims	274
1. Supreme Court Refuses To Permit Compromises Of Mandatory Statutory Guarantees.....	274

DOI: <https://dx.doi.org/10.15779/Z38NK36460>

[†] Law Foundation Professor of Law, University of Houston Law Center. The authors wish to thank Aaron Bruhl, Richard Carlson, Dave Fagundes, Julius Getman, Nantiya Ruan, Teddy Rave, and Ronald Turner for commenting on an earlier draft of this paper. Disclosure: the authors represented the plaintiffs in the FLSA collective action, In Re Wells Fargo Wage and Hour Employment Practices Litigation (No. III), MDL No. 4:11-MD-2266 (S.D. Texas).

^{††} Senior Counsel, Yetter Coleman LLP.

2.	Congressional Reaction to O’Neil and Gangi	275
3.	Judicial Reaction: Conditions Imposed On Settling FLSA Claims	276
B.	Resolving FLSA Claims Through An Opt-Out Class Action Procedure	279
1.	The Earliest Cases: Strange Bedfellows	279
2.	Most Courts Asked to Approve a Class Action Settlement Have Found Section 216 Does Not Permit FLSA Rights to be Released Through an Opt-Out Procedure	281
3.	Only a Few Courts Have Considered Whether To Give Preclusive Effect To a Prior Opt-Out Settlement.....	283
III.	SECTION 216 DOES NOT PERMIT FLSA RIGHTS TO BE RESOLVED THROUGH AN OPT-OUT CLASS ACTION PROCEDURE	289
A.	Section 216’s Explicit Conditions	289
1.	Section 216’s Explicit Conditions For Vindicating FLSA Rights Do Not Permit Those FLSA Rights To Be Resolved Through An Opt-Out Class Action Procedure	289
2.	Because Section 216 is the Exclusive Means for Enforcing FLSA Violations, Its Conditions Cannot be Sidestepped by Using Other Procedural Means.....	291
3.	Section 216 Must be Construed in Light of Its Unique Policy Considerations, Including the Strict Approach Taken With Regard to Compromises of FLSA Claims....	294
B.	Under Section 216, Opt-Out Class Members Are Not Parties For FLSA Purposes.....	296
1.	Use of “Party Plaintiff” Reveals Congress’s Understanding That Employees are Bound Only by Judgments in Cases in Which They Directly Participate .	296
2.	Preclusion Law Does Not Bind Non-Parties to a Judgment Purporting to Resolve Their FLSA Rights	299
C.	Our Reading of Section 216 Does Not Categorically Prohibit FLSA Settlements	302
IV.	CONCLUSION	303

I. INTRODUCTION

This paper examines a frequently litigated question that, with little guidance from above, has left the lower courts divided. We consider this issue

in the specific context of the Fair Labor Standards Act (“FLSA”),¹ but our examination broadly implicates a vexing problem that arises in many different settings. The problem is this: how should the law deal with cases that involve multiple claims with different claim-vindication procedures?

As to the FLSA, the issue arises because courts have consistently held that to remedy an employer’s statutory violations, workers must either directly bring an individual suit or affirmatively join an action brought by another employee.² This construction, a direct consequence of the statute’s written consent requirement in 29 U.S.C. § 216,³ means that workers aggrieved by an employer’s statutory violations may not use modern opt-out class action procedures that are available under Rule 23 of the Federal Rules of Civil Procedure (and comparable state class action law). The unsettled question under the FLSA is whether a class action brought alleging state law wage and hour claims can be settled on terms that require absent class members to release both their state and federal claims, even though the federal claims could not have been asserted through the class action suit alleging state law violations.

Parties may ordinarily settle disputes on broad terms that release all related claims. While there are additional judicial safeguards for plaintiffs in class action suits, even then the class representatives and defendant can usually agree to compromise the class’s ability to later bring all transactionally-related claims. For instance, a class action suit that asserts a state antitrust claim can settle all unasserted, but factually-related, federal antitrust causes of action.⁴ So too can a plaintiff alleging a federal discrimination claim compromise on behalf of the entire class both the federal claim that was asserted and all related state discrimination claims that could have been, but were not, brought.⁵ Indeed, there is a general presumption in favor of comprehensive settlement, which even allows for the compromise of claims that could not have been asserted together in the same suit. In the well-known case, *Matsushita Electric Industrial Co., Ltd. v.*

1. 19 U.S.C. §§ 201-219 (2012).

2. See 29 U.S.C. § 216(b).

3. *Id.* (“No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.”).

4. See *Marrese v. Am. Acad. of Orthopaedic Surgeons*, 470 U.S. 373, 381-83 (1985) (holding that the preclusive effect of a prior state-law judgment in a subsequent federal antitrust case were determined by state rules on *res judicata*); see also RESTATEMENT (SECOND) OF JUDGMENTS § 25(e) (AM. LAW INST. 1982) (“When the plaintiff brings an action on the claim in a court, either state or federal, in which there is no jurisdictional obstacle to his advancing both theories or grounds, but he presents only one of them, and judgment is entered with respect to it, he may not maintain a second action in which he tenders the other theory or ground.”); *id.* at *illus.* 10 (referencing federal and state antitrust claims).

5. See, e.g., *Dechberry v. N.Y.C. Fire Dep’t*, 124 F. Supp. 3d 131, 144 (E.D.N.Y. 2015) (holding that all state and federal employment discrimination claims that accrued prior to date employee signed settlement agreement and general release in prior federal action against city were precluded by agreement and release).

Epstein,⁶ the Supreme Court held that the Full Faith and Credit Act requires federal courts to give preclusive effect to a state court judgment approving a settlement even as to claims that could not have been adjudicated in the state court action.⁷

But while cases usually can be settled on broad terms that release all related claims, the FLSA is one (and probably the most litigated) example of a law that provides for special claim vindication procedures. There are a number of other federal statutes that provide for special claim vindication procedures. Congress has modeled both the Equal Pay Act⁸ and the Age Discrimination in Employment Act⁹ on the FLSA's private enforcement procedure, so the same question reverberates through all three statutory frameworks. Other federal statutes that authorize minimum damage recoveries do not allow the statutory claim to be prosecuted through class action procedures.¹⁰ Similarly, many state statutes proscribe certain types of claims from being litigated in a class suit, such as the New York state law¹¹ involved in the Court's 2010 decision in *Shady Grove Orthopedic Associates, P. A v. Allstate Ins. Co.*¹² In all of these circumstances, the hard question is whether the special statutory procedures justify a departure from the normal rule that permits multiple-claim settlements, which make it possible for parties to more easily reach a comprehensive peace.

In this article, we consider the problem from the particular vantage point of the FLSA. Because the statute has such a rich history—it was first enacted in 1938 and remains the primary authority regulating wage and hour conditions in the United States¹³—and because FLSA cases are some of the most frequently litigated suits filed in federal court, the statute serves as fertile ground for our examination.

* * *

To more fully appreciate the stakes involved in this ongoing legal battle over settlement of FLSA claims, it is necessary to understand the statute's public-private enforcement scheme. The FLSA authorizes both the Department of Labor and individual workers to bring civil suits against employers who violate its minimum wage and overtime pay standards. In

6. 516 U.S. 367 (1996).

7. *Id.* at 369.

8. 29 U.S.C. § 206 (2012).

9. *Id.* §§ 621-634.

10. *See, e.g.*, 15 U.S.C. § 1640(a)(2)(B) (2012) (Truth in Lending Act); 15 U.S.C. § 1693m(a)(2)(B) (Electronic Fund Transfer Act); and 12 U.S.C. § 4010(a)(2)(B)(i) (Expedited Fund Availability Act).

11. N.Y. C.P.L.R. § 901(b) (McKinney 2017) (precluding a suit to recover a "penalty" from being litigated as a class action).

12. 559 U.S. 393 (2010).

13. Charlotte Alexander et al., *Stabilizing Low-Wage Work*, 50 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 1, 14 (2015) (noting that "eight decades after its enactment, the FLSA remains the primary source of wage protection for low-wage workers").

reality, public enforcement of the statute has rarely been sufficient to effectuate these statutory objectives. Caught in a negative feedback loop in which institutional failures (from inadequate resources and bureaucratic ineptitude to lack of political will) disincentivize workers from reporting statutory violations, the Department has not been able to ensure the FLSA's substantive guarantees.¹⁴ But even if public enforcement has never lived up to its potential, private enforcement of statutory violations faces other challenges. One of the most significant obstacles that workers must overcome to protect their own rights is that an employer's illegal conduct as to any single worker is rarely enough to make an individual lawsuit financially viable. For this reason, one of the FLSA's most important provisions is section 216, which authorizes "similarly situated" employees to join together in a single lawsuit against their common employer.¹⁵ Known as "collective actions," these civil suits are a frequently used procedural means for privately enforcing federal wage and hour standards. Under section 216, all employees who wish to participate in a collective action must file written consent to join, a requirement Congress imposed in 1947.

When the modern class action rule was promulgated in 1966, authorizing courts for the first time to certify a class action by requiring members of the class to affirmatively elect to exclude themselves from the class (*i.e.*, to "opt out" of it),¹⁶ the opportunity arose for plaintiffs to argue that they should be able to certify FLSA actions as opt-out classes. Because opt-out rates in class action suits tend to be very low, the ability to aggregate FLSA claims on an opt-out basis would significantly expand the scope of FLSA actions.¹⁷ By contrast, a procedural system that requires potential class

14. For a sobering picture of the deficiencies in both federal and state public enforcement, see Nantiya Ruan, *What's Left to Remedy Wage Theft? How Arbitration Mandates that Bar Class Actions Impact Low-Wage Workers*, 2012 MICH. ST. L. REV. 1103, 1111-15 (2012). See also David Weil & Amanda Pyles, *Why Complain? Complaints, Compliance, and the Problem of Enforcement in the U.S. Workplace*, 27 COMP. LAB. L. & POL'Y J. 59, 62 (2005) (discussing difficulties of basing public enforcement on worker-generated complaints).

15. 28 U.S.C. § 216(b) (2012); see Nantiya Ruan, *Same Law, Different Day: A Survey of the Last Thirty Years of Wage Litigation and Its Impact on Low-Wage Workers*, HOFSTRA LAB. & EMP. L.J. 355, 364 (2013) ("Private civil litigation is often the only available remedy [for FLSA violations] because filing a complaint with the federal or state labor regulatory agency that has jurisdiction over one's wage claim is unavailing for the average worker.").

16. See FED. R. CIV. P. 23(c)(2) (requiring notice and the opportunity to opt out for Rule 23(b)(3) classes).

17. Matthew W. Lampe & E. Michael Rossman, *Procedural Approaches for Countering the Dual-Filed FLSA Collective Action and State-Law Wage Class Action*, 20 LAB. LAW. 311, 313 (2005) ("Section 216(b)'s opt-in mechanism tends to limit the size of FLSA classes and, consequently, an employer's exposure to damages in a given case."). On the rate at which absent class members exercise their right to opt out, see Theodore Eisenberg & Geoffrey Miller, *The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues*, 57 VAND. L. REV. 1529, 1532 (2004) (demonstrating that opt-out rate in class actions is typically well below 1%); THOMAS E. WILLGING ET AL., FED. JUDICIAL CTR., EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS 52 (1996) (finding 1.2% opt-out rate for three-quarters of class action cases in cohort).

members to opt in will always have a lower—usually, much lower—participation rate. While it is possible to mount campaigns to get workers to join collective actions in greater numbers, studies estimate that the opt-in rate for FLSA collective actions is typically between fifteen to thirty percent,¹⁸ and it is not uncommon for participation rates to be much lower.¹⁹ The practical effect, then, of requiring workers to affirmatively choose to bring suit or opt in to an FLSA action is that it is much harder to privately enforce violations of the FLSA.²⁰

Given the stakes, it came as no surprise that not long after Rule 23 was amended in 1966, employees sought to certify their FLSA actions as opt-out class actions. However, those early attempts to take advantage of the new class action rule were staunchly opposed by employers and the defense bar, and quickly thwarted.²¹ Over the years, courts have consistently held that because section 216 requires employees to submit written consent to join a collective action—that is, because they must affirmatively opt in to participate—FLSA claims cannot be litigated through the opt-out class action procedure.²²

That might have been the end of the matter, except that the FLSA is not the only source of wage and hour regulations. Employees can also seek relief under state law, which may, in some cases, provide greater protections than the FLSA.²³ Importantly, the judicial decisions that refuse to permit FLSA

18. Julius Getman & Dan Getman, *Winning the FLSA Battle: How Corporations Use Arbitration Clauses to Avoid Judges, Juries, Plaintiffs, and Laws*, 86 ST. JOHN'S L. REV. 447, 451 (2012) (noting that the opt-in rate for FLSA actions “seldom tops thirty percent”); Lampe & Rossman, *supra* note 17, at 314 (“Commentators generally find that, in FLSA collective actions, the opt-in rate—i.e., the percentage of persons falling within the definition of the putative class who file consents to join the action—is typically between 15 and 30 percent . . .”).

19. See, e.g., *Thiebes v. Wal-Mart Stores, Inc.*, No. CIV. 98–802–KI, 2002 WL 479840, at *3 (D. Or. Jan. 9, 2002) (observing that, according to plaintiffs’ calculations, only 2.7% of eligible employees opted in to the collective action).

20. See Deborah R. Hensler & Thomas D. Rowe, Jr., *Beyond “It Just Ain’t Worth It”: Alternative Strategies for Damage Class Action Reform*, 64 LAW & CONTEMP. PROBS. 137, 146–47 (2001) (“Returning to an opt-in requirement for damage class actions would leave in place a vehicle for collective litigation, but the vehicle would be substantially under-powered in comparison to the current model. . . . [R]esearch suggests that an opt-in class action regime might screen out many who would, in fact, wish to participate in a lawsuit brought on their behalf but did not take the steps necessary to opt in.”).

21. See, e.g., *LaChapelle v. Owens-Ill, Inc.*, 513 F.2d 286, 288 (5th Cir. 1975) (per curiam) (rejecting plaintiff’s attempt to look to Rule 23 to certify an opt-out class action under the Age Discrimination in Employment Act, which is applied in accordance with §216(b) of the FLSA).

22. See, e.g., *id.*; *Schmidt v. Fuller Brush Co.*, 527 F.2d 532, 536 (8th Cir. 1975); see also FED. R. CIV. P. 23 advisory committee’s note to 1966 amendment (“The present provisions of 29 U.S.C. § 216(b) are not intended to be affected by Rule 23, as amended.”).

23. The federal statute explicitly permits states to set higher wage and overtime provisions. See 29 U.S.C. § 218(a) (2012) (“No provision of this chapter or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this chapter or a maximum work week lower than the maximum workweek established under this chapter.”); *Overnite Transp. Co. v. Tianti*, 926 F.2d 220, 222 (2d Cir. 1991) (“[E]very Circuit that has considered the issue has reached the same conclusion—state overtime

actions to be litigated through the opt-out class action are based on an interpretation of the FLSA's section 216, and so do not apply to state law wage and hour claims.²⁴

Unable to litigate FLSA claims as opt-out class actions, the plaintiff's employment bar eventually realized that they might try to bring suit to enforce both FLSA and state wage claims in a single action. In these "hybrid" suits, which began to be filed with regularity in the mid-2000s,²⁵ state law claims are brought on a representative basis through a class action while the plaintiff also asserts a claim under the FLSA's collective action procedure, hoping the court will approve it and allow other employees to then opt in to that portion of the case.²⁶ After some initial reluctance to allowing state and federal claims to be tried together, courts since the late 2000s have largely permitted plaintiffs to litigate these hybrid actions.²⁷ This, in turn, has led employers and their lawyers to rethink their strategic options.

As is often true with complex litigation, if a lawsuit ever matures to the point where it makes sense for the employer to settle, then the incentives shift and the employer will want to do everything it can to make the scope of the settlement as wide as possible, so that it can extinguish all claims in one fell swoop.²⁸ As courts began to allow hybrid actions to proceed, the employment defense bar and their clients came to the realization that it may sometimes prove beneficial to have the ability to obtain a judgment or reach a settlement to fully resolve in one action all of the claims, federal and state, that might arise from wage and hour violations. There was just one problem. Having

wage law is not preempted by . . . the FLSA."); *see also* *Knepper v. Rite Aid Corp.*, 675 F.3d 249, 262 (3d Cir. 2012) (finding even state enforcement of standards identical with those in FLSA not preempted).

24. *See* *Beltran-Benitez v. Sea Safari, Ltd.*, 180 F. Supp. 2d 772, 774 (E.D.N.C. 2001) ("[T]he FLSA's prohibition of Rule 23 class actions does not bar the application of Rule 23 to a separate cause of action in the same complaint.").

25. *See* *Ellis v. Edward D. Jones & Co.*, 527 F. Supp. 2d 439, 459 n. 19 (W.D. Pa. 2007) ("The 'explosion' of hybrid lawsuits involving both state and FLSA claims is a much more recent phenomenon."); *Kuncl v. Int'l Bus. Machs. Corp.*, 660 F. Supp. 2d 1246, 1250 (N.D. Okla. 2009) ("The filing of hybrid lawsuits involving both a Rule 23 class action and a FLSA collective action appears to be a recent trend.").

26. Filing state and federal claims together may also have been used by some in attempts to overcome the shorter federal statute of limitations period in states with longer periods, such as in New York. *See, e.g., Iglesias-Mendoza v. La Belle Farm, Inc.*, 239 F.R.D. 363, 369 (S.D.N.Y. 2007) (suggesting in a hybrid case that "notice will be sent to employees who have worked for the defendants over the last six years whether or not the FLSA action is subject to a shorter statute of limitations" and "certifying the same class period for plaintiffs' FLSA and New York Labor Law claims").

27. *Lang v. DirecTV, Inc.*, 735 F. Supp. 2d 421, 429 (E.D. La. 2010) ("In cases with both FLSA collective action claims and Rule 23 class action claims based on state law, most courts have held that the differences between opt-in and opt-out procedures do not justify remanding the state law claims."). Part II, *infra*, further discusses this issue.

28. *See* D. Theodore Rave, *Governing the Anticommons in Aggregate Litigation*, 66 VAND. L. REV. 1183, 1185 (2013) ("Defendants want peace, and they are often willing to pay for it. Plaintiffs therefore may stand to gain if they can package all of their claims together and sell them to the defendant (i.e., settle) as a single unit; that is, they can charge a premium for total peace.").

previously insisted that workers should not be able to litigate their FLSA claims through an opt-out class action, how could they now maintain that the opt-out class suits could be used to resolve FLSA claims? This is where the story gets really interesting.

Over the last few years, some have suggested that the solution to the problem might lie in trying to draw a distinction between bringing an FLSA claim and compromising it through settlement.²⁹ On this view, employees can only initiate a lawsuit under the FLSA through the burdensome effort of bringing suit or affirmatively opting in to a collective action brought by another employee; but the statute should not be read to stand in the way of resolving the FLSA claims of employees who fail to exercise their right to opt out of a class action settlement. Put more succinctly, the argument is that the federal statute distinguishes between *vindicating* statutory rights and *extinguishing* them.

An employer has every incentive to pursue this legal stratagem. If FLSA claims can be resolved, but not initiated, on an opt-out basis, defendant employers would avoid having to defend against large FLSA collective action suits while still retaining the flexibility of settling FLSA claims (by settling the state law class action suit that the named plaintiff has brought) against all current and prospective employee claimants. Even better, when they do decide to settle a case, employers have also tried to insist that only those workers who take the further step of submitting a claim form should be eligible to receive any settlement proceeds in exchange for giving up their FLSA claim.³⁰ This strategy has the virtue, from the employer's vantage point, of helping it obtain the most comprehensive peace possible at the lowest anticipated payout.

Requiring that absent class members complete a claim form to recover settlement monies is a common practice in class action litigation, but the irony of its use in settlements of hybrid state class actions/FLSA collective actions can hardly be overstated—and is certainly not lost on employers. On

29. See, e.g., *Richardson v. Wells Fargo Bank, N.A.*, 839 F.3d 442, 451 (5th Cir. 2016) (acknowledging “that FLSA claims cannot be asserted using an opt out class action procedure” but declining “to conclude that the FLSA prohibits state courts from supervising and approving an opt out class action settlement that releases FLSA claims”).

30. See, e.g., *Adams v. Inter-Con Sec. Sys., Inc.*, No. C-06-5428 MHP, 2007 WL 3225466, at *8 (N.D. Cal. Oct. 30, 2007) (approving settlement of hybrid action with claim form procedure for sharing in settlement and noting that “each individual member of the Rule 23 Classes or Nationwide FLSA Collective Action who does not timely opt-out will release claims . . . regardless of whether he or she submits a Claim Form or receives any share of the settlement fund”); *Myles v. AlliedBarton Sec. Servs., LLC*, No. 12-cv-05761-JD, 2014 WL 6065602, at *2 (N.D. Cal. Nov. 12, 2014) (rejecting settlement and noting that “[t]here is no guarantee that all the members of the proposed class would see any of this money. To get paid, putative class members must mail in a claim form within forty-five days of notice from the settlement administrator.”); *Kakani v. Oracle Corp.*, No. C 06-06493 WHA, 2007 WL 1793774, at *3 (N.D. Cal. June 19, 2007) (rejecting similar settlement structure in which class members who opt out waive their state and federal claims but, under proposed settlement, class members “who do not submit a valid and timely claim form will not receive a Settlement Award”).

this view, employees cannot litigate their FLSA rights on an opt-out basis because the statute requires that they opt in to an FLSA case, but, while those rights will be lost if they do not opt out of the class suit, employees must still take the affirmative step of filing a claim form (i.e., opting-in to the settlement) to receive any share of the settlement.

We have only recently begun to see this new gambit tested in the courts. As some of the hybrid cases have matured, and employers have begun to settle cases on terms that include a release of all claims, whether arising under state or federal law, the lower courts have struggled with whether a class judgment can preclude the subsequent assertion of FLSA rights by an absent class member who did not opt out of the action.³¹ In late 2016, the Fifth Circuit Court of Appeals became the first federal appellate court to reach the preclusion question—and it concluded that FLSA rights resolved through a state law opt-out class action settlement *could* extinguish the FLSA rights even of employees who did not opt in to the settlement.³² With the lower courts divided and only one circuit having weighed in as of this writing, greater clarity is needed, which we hope to provide. The paper proceeds as follows.

The descriptive analysis begins in Part II by examining the case law from the lower courts. We begin by looking at the conditions that courts have generally imposed on settlements of FLSA claims. Consideration of the general conditions imposed by courts on voluntary compromises of FLSA claims necessarily forms the predicate for our later examination of the cases that have decided whether the FLSA rights of employees can be settled away through an opt-out class action procedure.

In Part III, we argue that a plain reading of section 216 is that FLSA rights may not be resolved through an opt-out procedure and, as a result, preclusive effect should not be given to a judgment approving a class settlement that extinguishes the FLSA rights of absent class members who do not opt in to the case. This does not mean that the statute categorically forbids FLSA claims from being settled as part of a class action; but to honor Congress's special treatment of a worker's statutory rights, FLSA rights may only be extinguished by strictly following the statute's express conditions. At the end, we lay out what minimum conditions must be imposed.

Part IV is a brief concluding section.

II.

LOOKING ACROSS THE LANDSCAPE

Before considering the cases that have addressed whether FLSA claims of absent class members can be compromised through settlement of a state

31. For additional discussion, see *infra* Part II(B).

32. *Richardson*, 839 F.3d at 442. See *infra* text accompanying notes 116-33.

law class suit, we begin by taking a broader look at the conditions that courts have generally imposed on settlements of FLSA claims.

A. Conditions Imposed on the Settlement of FLSA Claims

1. Supreme Court Refuses To Permit Compromises Of Mandatory Statutory Guarantees

As enacted in 1938, the FLSA did not expressly impose any conditions on the settlement by an employee of claims relating to an employer's violation of the statute.³³ However, in 1945 the Supreme Court held, in *Brooklyn Sav. Bank v. O'Neil*,³⁴ that unless there was a genuine dispute over the amount of compensation owed, an employee could not waive his right to full compensation, including the right to recover statutorily-mandated liquidated damages that an employer owes when it fails to pay the required minimum wage or compensate for overtime worked.³⁵ *O'Neil* found that just as the FLSA statutory guarantees of minimum wages and overtime compensation may not be bargained away or waived, so too did the statute prohibit waiver of claims for liquidated damages.³⁶ The Court recognized in the FLSA's passage

an intent on the part of Congress to protect certain groups of the population from substandard wages and excessive hours The statute was a recognition of the fact that due to the unequal bargaining power as between employer and employee, certain segments of the population required federal compulsory legislation to prevent private contracts on their part which endangered national health and efficiency[.]³⁷

In essence, the Court was saying that public policy considerations trump private contracting. "To permit an employer to secure a release from the worker who needs his wages promptly will tend to nullify the deterrent effect which Congress plainly intended that Section 16(b) should have."³⁸ The Court did not reach the issue of whether parties could compromise FLSA claims that were subject to a bona fide dispute as to the amount of compensation owed.³⁹

33. See Fair Labor Standards Act of 1938, Pub. L. No. 75-718, 52 Stat. 1060 (codified as amended at 19 U.S.C. §§ 201-219 (2012)).

34. 324 U.S. 697 (1945).

35. *Id.* at 714 ("Our decision . . . has not necessitated a determination of what limitation, if any, Section 16(b) of the [FLSA] places on the validity of agreements between an employer and employee to settle claims arising under the Act if the settlement is made as the result of a bona fide dispute between the two parties, in consideration of a bona fide compromise and settlement.").

36. *Id.*

37. *Id.* at 706.

38. *Id.* at 709-10.

39. See *id.* at 715.

The following year, in *D.A. Schulte, Inc. v. Gangi*,⁴⁰ the Court clarified that even when there is a bona fide dispute as to whether the employer was exempt from FLSA coverage, a release of an employee's claim for liquidated damages is not enforceable.⁴¹ The Court's rationale was again based on the policy underlying the FLSA to protect vulnerable workers and to effectuate the "public purposes" of the statute.⁴² Even though *Gangi* did not permit compromise of a claim concerning coverage, the Court nevertheless reiterated that it was not deciding whether compromises of other types of bona fide disputes, "such as a dispute over the number of hours worked or the regular rate of employment," could be permissible.⁴³

2. Congressional Reaction to *O'Neil* and *Gangi*

The Court's decisions in *O'Neil* and *Gangi* were strongly criticized by the business community for discouraging employers from voluntarily restituting back wages to employees.⁴⁴ During this same period (1944-1946), the Supreme Court decided three other cases that interpreted the FLSA favorably for employees.⁴⁵ These cases,⁴⁶ especially the last, *Anderson v. Mt. Clemens Pottery Co.*, were the primary catalysts for the passage of the Portal-to-Portal Act in 1947. The legislation took its name from the basic question that lay at the heart of the cases being brought: when, exactly, does the workday begin and end? For example, should employers have to pay for the time it takes workers to get from the plant entrance to their workplace, or for donning the work clothes they need to wear? In other words, does it cover a worker from "portal-to-portal"? At bottom, the question was about what activities by employees were to be included in calculating the "workweek" for purposes of applying the FLSA's minimum wage and maximum hour protections. Faced with having to answer this basic question, the Court interpreted the statute broadly to extend coverage to time employees spent at work for which they previously had not been compensated.⁴⁷ As the Court concluded, "'Workweek' is a simple term used by Congress in accordance with the common understanding of it. For this Court to include in it items that

40. 328 U.S. 108 (1946).

41. *Id.* at 114-15.

42. *Id.* at 115.

43. *Id.*

44. Marc Linder, *Class Struggle at the Door: The Origins of the Portal-to-Portal Act of 1947*, 39 *BUFF. L. REV.* 53, 162-66 (1991).

45. *Tenn. Coal, Iron & R.R. Co. v. Muscoda Local No. 123*, 321 U.S. 590 (1944); *Jewell Ridge Coal Corp. v. Local No. 6167, UMW*, 325 U.S. 161 (1945); and *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946).

46. *Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123*, 321 U.S. 590 (1944); *Jewell Ridge Coal Corp. v. Local 6167*, 325 U.S. 161 (1945); *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946).

47. *Mt. Clemens Pottery Co.*, 328 U.S. at 690-91.

have been customarily and generally absorbed in the rate of pay but excluded from measured working time is not justified in the absence of affirmative legislative action.”⁴⁸ Predictably, the decisions generated negative reactions from the business community, which described itself as under siege from portal litigation stemming from the Court’s decisions.⁴⁹

While most of the public outcry centered on the Court’s expansion of the scope of compensable work, the decisions in *O’Neil* and *Gangi* nevertheless also figured in the legislative debates. Moreover, all of the Court’s decisions fundamentally turned on the tension between effectuating statutory protections and honoring private contract rights. Ultimately, proponents of reform were able to amend the statute to address the decisions in *O’Neil* and *Gangi*—but only in a limited way. The Portal-to-Portal Act of 1947 allowed compromises of bona fide disputes as to the amount of compensation owed, but only as to pending cases; the change was not applicable to future actions.⁵⁰ We discuss the 1947 Act in greater detail below in Part III.A.

Two years later, Congress amended the FLSA again to add section (c) to section 216:

The Secretary [of Labor] is authorized to supervise the payment of the unpaid minimum wages or the unpaid overtime compensation owing to any employee or employees under section 206 or section 207 of this title, and the agreement of any employee to accept such payment shall upon payment in full constitute a waiver by such employee of any right he may have under subsection (b) of this section to such unpaid minimum wages or unpaid overtime compensation and an additional equal amount as liquidated damages.⁵¹

The effect of the amendment is that any claim for liquidated damages that arose after 1947 can be voluntarily compromised, provided that the employee receives back wages in full and the settlement is approved by the Department of Labor.

3. *Judicial Reaction: Conditions Imposed On Settling FLSA Claims*

Congress’s response to *O’Neil* and *Gangi* left open a number of questions for the courts to address regarding when, and under what circumstances, an employee’s FLSA claim could be compromised. These questions included: (1) Would a release of claims brought after 1947 be valid if grounded in a bona fide factual dispute over compensation owed? (2) Were

48. *Id.* at 698 (Burton, J., dissenting).

49. Linder, *supra* note 44, at 169.

50. Pub. L. No. 81-49, § 3, 61 Stat. 84, 86 (codified as amended at 29 U.S.C. § 253 (2012)).

51. Fair Labor Standards Act of 1949, Pub. L. No. 81-393, § 14, 63 Stat. 910, 919 (codified as amended at 29 U.S.C. § 216(c) (2012)).

unsupervised settlements permitted under the FLSA?; and (3) Can FLSA claims be settled through an opt-out class action procedure?

The courts quickly settled the first issue. Because Congress did not overturn the decisions in *O'Neil* and *Gangi*, those cases remain good law even after the 1947 and 1949 amendments to the statute. Thus, even today, only bona fide factual disputes over amount of compensation owed can be settled. If there is not any actual dispute that the plaintiff was entitled to the compensation sought, then to permit a claim to be compromised for less than the full amount owed is said to be the equivalent of paying less than minimum wage or not paying time and a half for overtime.⁵²

On the second question, in the leading case, *Lynn's Food Stores, Inc. v. United States*, the Eleventh Circuit held that unsupervised settlements of FLSA claims are not permitted.⁵³ In *Lynn's Food*, an investigation into the employer's practices by the Department of Labor led to an administrative finding that the employer had violated the FLSA's minimum wage, overtime, and record-keeping requirements.⁵⁴ When the employer was unable to negotiate a resolution with the Department of Labor, it reached out directly to its employees and was able to convince fourteen of them to agree to waive all claims against it in exchange for \$1,000—to be split among the fourteen employees.⁵⁵ This amount represented a tenth of the total liability for back wages the Department of Labor had found the employer owed.⁵⁶

The Eleventh Circuit refused to enforce the settlement, reasoning that there were only two ways in which an employee's FLSA claim could be settled after Congress's enactment of section 216(c).⁵⁷ The first method, under section 216(c), permits waiver of an employee's rights to bring a suit for liquidated damages, provided that the Secretary of Labor supervises the payment of back wages to the employees, who accept payment of back wages in full in exchange for giving up their right to later sue for liquidated damages.⁵⁸ If the Department of Labor is not involved, then a dispute over an employer's FLSA violations can only be settled for less than the statutory minimum owed if a court approves the settlement as fair.⁵⁹ Moreover, the

52. See, e.g., *Runyan v. Nat'l Cash Register Corp.*, 787 F.2d 1039, 1041-42 (6th Cir. 1986) (noting the historical development of the prohibition on compromising undisputed rights to minimum and overtime wages and liquidated damages under the FLSA); *Caserta v. Home Lines Agency, Inc.*, 273 F.2d 943, 946 (2d. Cir. 1959) (“[A]greements and other acts that would normally have controlling legal significance are overcome by Congressional policy. An agreement by appellee not to claim overtime pay for the work here in question would be no defense to his later demanding it.”).

53. 679 F.2d 1350, 1353 (11th Cir. 1982).

54. *Id.* at 1352.

55. *Id.*

56. *Id.*

57. *Id.* at 1352-53.

58. *Id.* at 1353.

59. *Id.*

settlement must reflect a compromise of a bona fide dispute, such as a factual dispute over the number of hours worked or amount of compensation owed.⁶⁰ Because the settlement in *Lynn's Food* was neither scrutinized and approved by the Department of Labor nor found by a court to be “a fair and reasonable resolution of a bona fide dispute over FLSA provisions,” the Eleventh Circuit refused to approve the settlement.⁶¹ The courts have been nearly unanimous in following *Lynn's Food* in requiring supervision of settlements.⁶²

60. *Id.* at 1355 (“Other than a section 216(c) payment supervised by the Department of Labor, there is only one context in which compromises of FLSA back wage or liquidated damage claims may be allowed: a stipulated judgment entered by a court which has determined that a settlement proposed by an employer and employees, in a suit brought by the employees under the FLSA, is a fair and reasonable resolution of a bona fide dispute over FLSA provisions.”).

61. *Id.*

62. *See* *Dunn v. Teachers Ins. & Annuity Ass'n of Am.*, No. 13-cv-05456-HSG, 2016 WL 153266, at *3 (N.D. Cal. Jan. 13, 2016) (“Most courts hold that an employee’s overtime claim under FLSA is non-waivable and, therefore, cannot be settled without supervision of either the Secretary of Labor or a district court.” (citing *Lynn's Food*, 679 F.2d at 1352-55)). One case that seems not to go as far as the Eleventh Circuit is *Martin v. Spring Break '83 Prods., LLC*, 688 F.3d 247 (5th Cir. 2012), although a close look at the decision suggests that the Fifth Circuit may not have intended to veer too far. In *Martin*, a labor union, acting on behalf of its members pursuant to a collective bargaining agreement, settled a dispute with the employer over compensation owed to the employees for overtime hours they had worked. *Id.* at 249. Even before the union and the employer could execute the settlement, however, the employees brought suit under the FLSA in federal court seeking to recover for the employer’s violations. *Id.* at 249-50. The Fifth Circuit held that the agreement was binding on the employees, even though they had not authorized the union to settle the claims on their behalf. *Id.* at 249. In doing so, the Fifth Circuit appeared to depart from *Lynn's Food* by approving a private settlement of FLSA claims that had not been brought under section 216 (or in any lawsuit, for that matter) and had not been judicially approved.

But the difference between *Martin* and *Lynn's Food* may not be all that great. Certainly, unlike *Lynn's Food*, the settlement in *Martin* was understood to resolve “a bona fide dispute as to the amount of hours worked” and there was no suggestion that employees and their employer could (or did) compromise a legal dispute over substantive statutory rights. *Id.* at 255 (internal quotation marks omitted) (quoting *Martinez v. Bohls Bearing Equip. Co.*, 361 F. Supp. 2d 608, 631 (W.D. Tex. 2005)). Moreover, the court in *Martin* itself suggested that the concerns expressed in *Lynn's Food* were not implicated: “[A]lthough no court ever approved this settlement agreement, the same reason for enforcing a court-approved agreement i.e., little danger of employees being disadvantaged by unequal bargaining power[,] applies here.” *Id.* at 255-56 (alteration in original) (internal quotation marks omitted) (quoting *Thomas v. State of Louisiana*, 534 F.2d 613, 615 (5th Cir. 1976)). *Martin*, thus, may stand only for the proposition that in the Fifth Circuit there appears to be a narrow exception permitting unsupervised settlements of bona fide disputes, but only when the court is satisfied that the employees negotiated with equal bargaining power in compromising a claim over the amount of compensation owed to them, and in settlement received compensation for the disputed hours. In effect, with such conditions, a private settlement is enforceable under *Martin* only if it would have received judicial approval had it been submitted to a district court, as other courts have noted. *See* *Steele v. Staffmark Invs., LLC*, 172 F. Supp. 3d 1024, 1030 (W.D. Tenn. 2016) (“Had the settlement agreement proven as unreasonable as many presented to various courts across the country, it is hard to fathom that the holding [in *Martin*] would have been the same.”).

In any event, subsequent decisions from the Fifth Circuit have seemed to narrow the divide between the circuits even further. *See, e.g.*, *Bodle v. TXL Mortg. Corp.*, 788 F.3d 159, 164-65 (5th Cir. 2015) (reaffirming “the general rule establish[ing] that FLSA claims . . . cannot be waived,” and citing, *inter alia*, *Lynn's Food* in refusing to enforce the state court release of plaintiffs’ FLSA claims). Moreover, *Bodle* acknowledged that its own “*Martin* exception” is limited to “unsupervised settlements that are reached due to a bona fide FLSA dispute over hours worked or compensation owed” given that “such an exception would not undermine the purpose of the FLSA because the plaintiffs did not waive their claims through some sort of bargain but instead received compensation for the disputed hours.” *Id.* at 165.

B. Resolving FLSA Claims Through An Opt-Out Class Action Procedure

That brings us to the third unresolved question: whether section 216 permits FLSA claims to be compromised through an opt-out class action procedure. To be clear, the issue here is not judicial approval of the class settlement. Rule 23 (and its state law equivalents) already requires the court to sign off on the settlement as fair, reasonable, and adequate. The issue, instead, is whether the opt-in requirement of section 216 permits the FLSA claims of absent class members to be resolved when they have not opted in to the proceeding.

As we will see, this issue arises in several different contexts. Most of the earliest cases considered the issue only in *dicta*: the central question in those cases was whether to allow state and federal claims to be tried in the same action. When courts have directly confronted the issue, it has arisen most often in the context of a court approving a proposed settlement. Finally, in a few reported instances, courts have been faced with deciding whether to accord preclusive effect to a prior judgment approving a settlement whose terms, defendants argue, extinguished the FLSA rights of all absent class members. Across all of the varied contexts, the courts are divided on the core question of whether section 216 permits class settlements of FLSA claims.

1. The Earliest Cases: Strange Bedfellows

Almost all of the earliest cases that discuss whether FLSA claims can be resolved through an opt-out class action procedure considered the question only in *dicta*—and, it bears adding, from a peculiar perspective. That is to say, the question of the effect of a settlement of FLSA claims arose in these cases because the defendants argued, in support of not allowing a hybrid state class action/federal collective action to proceed, that a judgment rendered on the state law claims could preclude the employee-plaintiff from later asserting FLSA claims based on the same set of factual events as the state law claims. We say that the question arose in a peculiar way because concern that employees may lose their ability to later assert FLSA rights is certainly an oddly solicitous one to hear from the defendant-employer. One court even pointed out that the argument made for strange bedfellows.⁶³

The first case to suggest that a state law class action judgment could preclude future FLSA claims was *Klein v. Ryan Beck Holdings, Inc.*, where the court perfunctorily asserted that the matter of preclusion was self-evident: “Plainly, adjudication of either of plaintiff’s claims could have preclusive

63. *Guzman v. VLM, Inc.*, No. 07-CV-1126 (JG)(RER), 2008 WL 597186, at *11 n.11 (E.D.N.Y. Mar. 2, 2008) (“[D]efendants, apparently in an abundance of concern for the rights of absent Rule 23 class members, are worried that someone who fails to opt out of the Rule 23 class action will have all claims that could have been brought in that action, including any FLSA claim, resolved by *res judicata* without opting in to the FLSA action.”).

effect on the other,” the court said without further elaboration.⁶⁴ The very next court to consider the question also recognized, in dicta, the possibility that adjudication of similar state law claims might preclude adjudication of claims under FLSA at a later date.⁶⁵ The district court in *Ellis v. Edward D. Jones & Co., LP* ultimately held that the incompatibility of Rule 23 and section 216 does not permit the state and federal claims to be litigated together.⁶⁶ The court further suggested the possibility that settlement of the state law claims could preclude later assertion of FLSA claims.⁶⁷

While several other federal district courts, mostly in the Southern or Eastern Districts of New York, followed *Klein*,⁶⁸ at least one district court did not. *Woodard v. FedEx Freight East, Inc.*, which permitted the state and federal claims to be tried together, recognized that some courts might find that employees who did not opt in to the FLSA collective portion of the hybrid case were precluded from subsequently asserting a claim under the federal statute, but thought such a result legally erroneous.⁶⁹ The court reasoned that giving preclusive effect to a judgment in an opt-out class is “a result plainly at odds with Congress’s intent to allow workers to preserve FLSA claims by declining to opt in.”⁷⁰ The court further noted that “the requirement that an employee opt out of a hybrid action to preserve the employee’s FLSA claim is contrary to the letter and spirit of § 216(b).” “By crafting the opt-in scheme,” *Woodard* concluded, “Congress envisaged employees taking affirmative action to assert, not to preserve, their FLSA rights.”⁷¹

64. No. 06 Civ. 3460(WCC), 2007 WL 2059828, at *7 (S.D.N.Y. July 13, 2007) (holding that, notwithstanding preclusion concern, state and federal law claims could still be tried in the same suit).

65. See *Ellis v. Edward D. Jones & Co.*, 527 F. Supp. 2d 439, 446 (W.D. Pa. 2007).

66. *Id.* at 452.

67. *Id.* at 446.

68. See *Guzman*, 2008 WL 597186, at *10 n.11; *Gardner v. W. Beef Props., Inc.*, No. 07-CV-2345, 2008 WL 2446681, at *3 (E.D.N.Y. June 17, 2008) (allowing state and federal claims to be tried in one hybrid action and noting, in dicta, that nothing in section 216(b) exempts FLSA claims from ordinary class action res judicata principles); *Damassia v. Duane Reade, Inc.*, 250 F.R.D. 152, 163 (S.D.N.Y. 2008) (approving prosecution of hybrid action and noting, with regard to the future possibility of preclusion attaching to a judgment in the hybrid action, that “potential class members who do not opt out of the class action could have ‘all claims that could have been brought in that action, including any FLSA claim, resolved by res judicata without opting in to the FLSA action’”) (quoting *Guzman*, 2008 WL 597186, at *10 n.11); *McCormick v. Festiva Dev. Grp., LLC*, No. 09-365-P-S, 2010 WL 582218, at *13 n.5 (D. Me. Feb. 11, 2010) (allowing hybrid case to be litigated and noting that “employees continue to risk preclusion of FLSA claims if they fail to opt out of state-law wage and hour class actions”); *Khadera v. ABM Indus., Inc.*, 701 F. Supp. 2d 1190, 1196 (W.D. Wash. 2010) (refusing to certify a state wage and hour class action, noting that “[a]n opt-out state law class raises concerns for individual litigants because of the possible res judicata implications of a class-wide resolution”).

69. 250 F.R.D. 178, 186 & n.7 (M.D. Pa. 2008).

70. *Id.* at 186 n.7 (quoting *Chase v. AIMCO Props., L.P.*, 374 F. Supp. 2d 196, 202 (D.D.C. 2005)).

71. *Id.*

2. *Most Courts Asked to Approve a Class Action Settlement Have Found Section 216 Does Not Permit FLSA Rights to be Released Through an Opt-Out Procedure*

As mentioned previously, almost all the early cases discussed the effects of a class action settlement on FLSA claims in dicta only. But, as it turns out, the very first court to directly consider the scope of a judgment approving the settlement of a hybrid action held that it would violate the FLSA to permit the class settlement to extinguish the FLSA rights of absent class members who did not opt in to the collective action portion of the case.⁷² Rejecting the jointly proposed settlement of a hybrid Rule 23/FLSA collective action, the district court in *Kakani v. Oracle Corp.*, in addition to expressing other concerns with the proposed settlement, refused to approve the portion of the agreement that sought to extinguish FLSA rights of all absent class members:

The settlement agreement would violate the Federal Fair Labor Standards Act. The FLSA prohibits traditional class actions and authorizes only an *opt-in* collective action. . . . Under no circumstances can counsel collude to take away FLSA rights including the worker's right to control his or her own claim without the burden of having to opt out of someone else's lawsuit. Workers who voluntarily send in a claim form and affirmatively join in the action, of course, can be bound to a full release of all federal and state rights. But it is unconscionable to try to take away the FLSA rights of all workers, whether or not they choose to join in affirmatively.⁷³

Since *Kakani*, nearly every other court has similarly refused to approve release terms in a class action settlement that would extinguish FLSA rights of absent class members because they failed to opt out in the earlier suit.⁷⁴ As

72. See *Kakani v. Oracle Corp.*, No. C 06-06493 WHA, 2007 WL 1793774, at *7 (N.D. Cal. June 19, 2007).

73. *Id.* (citation omitted).

74. See *Shaver v. Gills Eldersburg, Inc.*, No. 14-3977-JMC, 2016 WL 1625835, at *1 (D. Md. Apr. 25, 2016) (approving settlement of hybrid Rule 23/FLSA case but noting that “[i]n the event that a potential class member neither opts-in to the FLSA collective by submitting the claim form, nor opts-out of the Rule 23 state law class by submitting the opt-out form, that member will receive a portion of the settlement distribution he would be entitled to under the distribution formula. By virtue of his failure to opt-out of the Rule 23 state law class, a member in this category is deemed only to release his state law wage-and-hour claims against Defendants.” (citation omitted)); *Myles v. AlliedBarton Sec. Servs., LLC*, No. 12-cv-05761-JD, 2014 WL 6065602, at *3 (N.D. Cal. Nov. 12, 2014) (“The FLSA prohibits traditional class actions and authorizes only an opt-in collective action. But the proposed settlement here operates as an opt-out settlement. That does not work for the compromise or release of FLSA claims.”) (citation omitted)); *Stokes v. Interline Brands, Inc.*, No. 12-cv-05527-JD, 2014 WL 5826335, at *4 (N.D. Cal. Nov. 10, 2014) (rejecting settlement of hybrid case that approved release of FLSA rights and noting that “[t]he treatment of the FLSA issue is particularly egregious. The complaint says nothing at all about FLSA claims and yet the release purports to give away class members’ rights under the statute. That is wholly unacceptable. Even worse, the proposed settlement improperly seeks to compromise FLSA claims in a Rule 23 context. As this court has made clear, FLSA claims cannot be treated within a class action under Rule 23.”); *Barbosa v. Cargill Meat Sols. Corp.*, 297 F.R.D. 431, 439, 456 (E.D. Cal. 2013) (approving a settlement of wage-and-hour claims with express provisions “that Settlement Class Members who do not respond to the Notice (*i.e.*, neither opt out of the class nor file a claim form) do not release any

one court recently put it: “The FLSA prohibits traditional, opt-out class actions and authorizes only opt-in collective actions,” citing section 216 and the *Kakani* court’s similar conclusion.⁷⁵ That court noted further that it also had serious reservations about the proposed settlement’s requirement that only class members who affirmatively file a claim form could receive compensation under the settlement:

[I]f a Class Member chooses not to opt-into the FLSA collective action by not filing a claim form, he or she would have released all state law claims for no compensation at all. In essence, Class Members are assessed a penalty (in the full amount of their share of the settlement) for not opting-into the FLSA class. We question the legality of imposing such a penalty on the exercise of a federal right to not opt-in under the FLSA.⁷⁶

The only published decision approving the release of FLSA claims of all absent class members through an opt-out class action settlement is a recent case, *Pliego v. Los Arcos Mexican Restaurants, Inc.*⁷⁷ *Pliego* acknowledged that other courts have not given their imprimatur to class settlements purporting to extinguish FLSA claims but, disagreeing with those decisions, concluded that “normal *res judicata* principles apply in hybrid FLSA/Rule

claims under the FLSA” and that “waivers of claims expressly under the FLSA shall only be binding on the Settlement Class members who opted-in”); *Lounibos v. Keypoint Gov’t Sols. Inc.*, No. 12-cv-00636–JST, 2013 WL 3752965, at *6 (N.D. Cal. 2013) (rejecting a proposed release in a hybrid action involving state-law claims on behalf of a putative Rule 23 class and FLSA claims, and noting that “[t]o be entirely consistent with the FLSA, this release provision would need to explicitly state that any claims released by class members who do not opt out do not include claims under the FLSA, because class members cannot adjudicate their FLSA claims through this action unless they affirmatively opt in to the action by providing their written consent”); *McClellan v. Health Sys., Inc.*, No. 11–03037–CV–S–DGK, 2013 WL 594204, at *2 (W.D. Mo. 2013) (rejecting proposed settlement provision purporting to bind FLSA collective action members who failed to opt out, noting that “[d]efendants’ proposed settlement provision—requiring that all collective action members who fail to opt-out of the collective action release their claims—is not legal under the FLSA. Rule 23 opt-out procedures are insufficient to extinguish FLSA claims of eligible employees. . . . If an employee does not become a plaintiff, she is not bound by a subsequent judgment.”); *Tijero v. Aaron Bros., Inc.*, No. C 10–01089 SBA, 2013 WL 60464, at *7–8 (N.D. Cal. Jan. 2, 2013) (“The Court finds that the proposed settlement is obviously deficient because approval of the settlement would violate the FLSA. . . . In contrast, in a collective action under the FLSA, only those claimants who affirmatively opt-in by providing a written consent are bound by the results of the action. Accordingly, the Court finds that it is contrary to § 216(b) to bind class members to a release of FLSA claims where, as here, the members have not affirmatively elected to participate in the lawsuit by filing a written consent form.”) (citation omitted); *La Parne v. Monex Deposit Co.*, No. SACV 08-0302 DOC (MLGx), 2010 WL 4916606, at *3 (C.D. Cal. Nov. 29, 2010) (approving a settlement on the condition that “only class members who affirmatively ‘opt-in’ to the Settlement should be bound by the Settlement’s release of FLSA liability”); *Misra v. Decision One Mortg. Co.*, No. SA CV 07-0994 DOC (RCx), 2009 WL 4581276, at *2, *9 (C.D. Cal. Apr. 13, 2009) (preliminarily approving hybrid action settlement under which “184 ‘Opt-in Plaintiffs’” who “have received notice of the class action and have already ‘opted in’ as required under the Fair Labor Standards Act” would have the opportunity to accept or reject the settlement offer and “[t]he ‘Rule 23 Plaintiffs’ [who] have not yet opted into the class [would] not be bound by the settlement should they choose not to opt in”).

75. *Sharobiem v. CVS Pharmacy, Inc.*, No. CV 13-9426-GHK (FFMx), 2015 WL 10791914, at *3 (C.D. Cal. Sept. 2, 2015).

76. *Id.*

77. 313 F.R.D. 117, 132 (D. Colo. 2016).

23 collective/class actions, thus binding non opt-out Rule 23 Class Members who do not specifically opt-in to the release of FLSA claims to the ultimate judgment.”⁷⁸ *Pliago* stressed, however, that the class notice and claim forms would need to “conspicuously state the differences between federal and state law claims, describe what federal rights the claimants are releasing by returning the claim form, and stat[e] clearly that the federal claims for which release would be given upon the filing of a claim include those arising under the FLSA.”⁷⁹

3. *Only a Few Courts Have Considered Whether To Give Preclusive Effect To a Prior Opt-Out Settlement*

Finally, beyond the cases cited above, only a few published decisions have decided whether to give preclusive effect to a prior class judgment releasing the FLSA claims of all absent members.

In late 2009, a district court in the Northern District of Oklahoma, disagreeing with *Kakani* and the other courts that had refused to approve class settlements releasing FLSA claims, concluded that giving preclusive effect to a prior opt-out class judgment does not violate section 216.⁸⁰ In *Kuncl v. IBM Corp.*, the terms of a previously settled hybrid suit expressly extinguished all state and FLSA claims of absent class members who did not opt out.⁸¹ The district court approved the settlement without any discussion as to whether section 216 permitted the FLSA claims of all class members who failed to opt out to be released.⁸² When one of the absent class members who did not opt out of the class action, but had not opted in to the FLSA collective action portion of the case, subsequently brought suit, the question was whether the prior class action judgment approving the settlement was preclusive of his FLSA claims.⁸³ The district court in *Kuncl* held that it was, concluding that in section 216 Congress did not abrogate normal *res judicata* analysis.⁸⁴

The next decision came several years later when the court in *Donatti v. Charter Communications, LLC*. refused to give preclusive effect to a prior opt-out class action judgment approving a settlement of all state and federal wage and hour claims against an employer.⁸⁵ “[T]he court’s certification of

78. *Id.*

79. *Id.*

80. *Kuncl v. IBM Corp.*, 660 F. Supp. 2d 1246, 1254 (N.D. Okla. 2009).

81. *Id.*

82. *See id.* at 1247-49; *see also* Order (1) Confirming Final Certification of Classes and Collective Action; and (2) Granting Final Approval to Class Action Settlement, *Rosenburg v. IBM Corp.*, No. CV 06-00430, 2007 WL 2043855 (N.D. Cal. July 12, 2007).

83. *Kuncl*, 660 F. Supp. 2d at 1249.

84. *Id.* at 1254.

85. No. 11-4166-CV-C-MJW, 2012 WL 5207585, at *4 (W.D. Mo. Oct 22, 2012).

only the Rule 23 class action made the FLSA claims in the settlement agreement simply individual actions on behalf of the named plaintiffs in the case and those plaintiffs who opted in to the settlement agreement,” the court noted.⁸⁶ Reading the language of section 216 as unambiguous, and citing a prior well-known earlier Fifth Circuit case, the court observed that “[i]t is crystal clear that § 16(b) precludes pure Rule 23 class actions in FLSA suits.”⁸⁷ Thus, although the parties to the prior class action tried to extinguish the FLSA claims of all employees who were in the class but did not opt out, the absence of a collective action or section 216(b) certification precludes their extinguishment. Otherwise, granting preclusive effect would “essentially eliminate the requirements of FLSA collective action certification which are distinct from Rule 23 certification, as well as the opt-in requirement of the FLSA.”⁸⁸

Since *Donatti*, a handful of reported decisions have considered the preclusive effect of a prior class judgment and all have followed *Kuncl* to find that the FLSA rights of absent class members were extinguished by failing to opt out of the settlement.⁸⁹ Of these district court cases, *Lipnicki v. Meritage Homes Corp.*⁹⁰ is the most interesting. In *Lipnicki*, defendants sought dismissal of the claims of employees who, after having been members of a separately settled state opt-out class suit, filed written consent to join the section 216 collective action brought in *Lipnicki*.⁹¹ There were over one hundred plaintiffs in total who opted in to *Lipnicki*, of whom only fifteen had been members of the prior state class action.⁹²

The named plaintiffs in the state class action had only asserted claims arising under state law; they made no claim under the FLSA.⁹³ The named plaintiffs and the defendant reached a settlement that purported to bind anyone in the class who did not opt out.⁹⁴ The settlement terms also required that class members remaining in the class had to submit a claim form to receive compensation from the settlement. All of the California Plaintiffs in *Lipnicki* submitted claim forms and subsequently received their share of the settlement.⁹⁵

86. *Id.* (citing *Espenscheid v. DirectSat USA, LLC*, 688 F.3d 872, 877 (7th Cir. 2012)).

87. *Id.* (alteration in original) (internal quotation marks omitted) (quoting *LaChapelle v. Owens-Ill., Inc.*, 513 F.2d 286, 288 (5th Cir. 1975) (per curiam)).

88. *Id.* at *5.

89. *See, e.g.*, *Keeler v. AIG Domestic Claims, Inc.*, No. B226691, 2011 WL 6318485, at *14-15 (Cal. Ct. App. Dec. 19, 2011); *Lipnicki v. Meritage Homes Corp.*, No. 3:10-CV-605, 2014 WL 923524, at *15 (S.D. Tex. Feb. 13, 2014).

90. 2014 WL 923524.

91. *Id.* at *1, *13.

92. *Id.* at *13. For ease of reference, we will refer to these fifteen, as the court did, as the “California Plaintiffs.” *See id.*

93. *Id.*

94. *Id.*

95. *Id.*

The terms of the settlement contained broad release language, although the *Lipnicki* court's recitation of those terms does not make clear whether any of the California Plaintiffs had personally signed the release.⁹⁶ Indeed, the court's opinion seems to suggest, to the contrary, that the release may only have been executed by the class representatives and their attorneys.⁹⁷ The release itself was also notable insofar as it did not specifically reference the FLSA.⁹⁸ Instead, the release only referred to the surrender of "any and all claims . . . which arise from or are in any way connected with the factual allegations and claims asserted in the [California] Lawsuit, including, without limitation, any and all claims for [] alleged failure to pay wages and overtime compensation."⁹⁹

The California Plaintiffs in *Lipnicki* argued that the release was invalid as to their FLSA claims.¹⁰⁰ Their primary argument was that the release from the state law class action was invalid because *Lynn's Food* requires that any compromise of statutory rights must be approved by a court "in a case asserting FLSA claims."¹⁰¹ Since the California settlement was not a case involving FLSA claims, they argued that the release could not bind them.¹⁰²

The district court rejected their argument.¹⁰³ According to *Lipnicki*, it did not matter whether the state class action sought recovery under the FLSA or even if the release did not expressly surrender FLSA claims.¹⁰⁴ Under general preclusion law principles, a subsequent FLSA suit is barred if predicated on the same facts as the state law claim that had been released.¹⁰⁵ So long as the court overseeing the class settlement scrutinized it as fair and adequate under Rule 23(e), then the release provision in that settlement would preclude subsequent litigation of all related claims under general preclusion law principles.¹⁰⁶

The only remaining question, according to *Lipnicki*, was whether in the FLSA Congress intended to create an exception to normal preclusion law principles.¹⁰⁷ For the district judge in *Lipnicki*, this was the crux of the

96. *See id.*

97. *See id.* ("The named plaintiffs, their attorney, and attorneys for Meritage executed the settlement agreement containing the broad release, waiving the right to bringing any future claims related to the factual allegations in that case, including claims for unpaid wages and overtime.")

98. *See id.*

99. *Id.* (alterations in original).

100. *Id.*

101. *See id.*

102. *Id.*

103. *Id.* at *14-15.

104. *Id.*

105. *Id.* at *15.

106. *See id.* at *13.

107. *Id.* at *15.

issue.¹⁰⁸ And on this point, *Lipnicki* concluded that Congress intended no such exception.¹⁰⁹ But this is where things get more complicated.

In concluding that the FLSA does not create any special exception to general preclusion law, *Lipnicki* was consistent with the prior decisions in *Kuncl* and *Klein* (which the court cited),¹¹⁰ but what is surprising (and makes *Lipnicki* harder to unpack) is that the district court's primary support for its conclusion came from its reading of the Fifth Circuit's decision in *Martin v. Spring Break '83 Productions, L.L.C.*¹¹¹ Recall that *Martin* was the case that seemed to diverge from the majority rule of *Lynn's Food* that private, unsupervised settlements of FLSA claims are not enforceable.¹¹² But *Martin* never addressed whether section 216 permits FLSA claims to be compromised through an opt-out procedure because that case involved a private, out-of-court settlement signed by union representatives, not a prior class action.¹¹³

Lipnicki nevertheless read *Martin*'s acceptance of the private settlement in that case as support for the view that there is nothing "special about FLSA claims that takes them outside the ordinary rule that class action settlements are enforceable."¹¹⁴ *Lipnicki* then summed up the rationale for holding the plaintiffs' FLSA claims to be precluded as based on "the generally binding effect of class action settlements, the Fifth Circuit's view that FLSA claims can be settled privately, and a court's duty to scrutinize a class action settlement for fairness to absent class members."¹¹⁵

In addition to these district court decisions, in late 2016, in *Richardson v. Wells Fargo Bank, N.A.*, the Fifth Circuit became the first federal circuit to hold that a prior opt-out class action settlement may preclude FLSA

108. *Id.*

109. *Id.*

110. *See id.* at *15-16. (recognizing that numerous other courts had declined to approve Rule 23 settlements releasing FLSA claims of absent class members, but interpreting those cases as exercises of prudential discretion rather than as determinations of the exclusionary function of section 216's opt-in requirement).

111. *See* 2014 WL 923524, at *14 ("[*Martin*] held that a union's settlement of its members' FLSA claims precluded a subsequent private FLSA lawsuit by its members. In doing so, it rejected the position that a 'release is invalid because individuals may not privately settle FLSA claims' and instead held that 'a private compromise of claims under the FLSA is permissible where there exists a bona fide dispute as to liability.' By 'private' the *Martin* Court is referring to settlements made outside of the court system without a lawsuit having been filed. In that sense, the issue in this case is an easier call because the release was part of the settlement of a lawsuit, and one that required court approval." (quoting *Martin v. Spring Break '83 Productions, L.L.C.*, 688 F.3d 247 (5th Cir. 2012)).

112. *See supra* note 62 and accompanying text.

113. *See* 688 F.3d at 249-50.

114. 2014 WL 923524, at *14. Note also that *Lipnicki* was decided before the Fifth Circuit's decision in *Bodle*. *See supra* note 62 and accompanying text. *Bodle*'s description of "the *Martin* exception" suggests that it would not actually apply to the dispute in *Lipnicki*, which was over whether the plaintiff home salespeople were within the scope of the "outside sales" exemption under substantive provisions of the FLSA. *See Lipnicki*, 2014 WL 923524, at *1.

115. *Id.* at *16.

claims.¹¹⁶ Following a rationale consistent with *Lipnicki*'s, the *Richardson* panel affirmed a summary judgment ruling that the plaintiffs' FLSA claims were precluded by the release in the prior settlement.¹¹⁷ As in *Lipnicki*, the *Richardson* plaintiffs had been members of an opt-out settlement class in a California state court action.¹¹⁸ The prior action settled claims brought under California labor law by a class of home mortgage consultants against employer Wells Fargo, and Wells Fargo asserted that the settlement and release in the California action precluded the claims of California plaintiffs in the *Richardson* FLSA collective action.¹¹⁹

Richardson structured its analysis according to "the Supreme Court's two-part framework from *Matsushita*: (1) whether 'state law indicates that the particular claim or issue would be barred from litigation in a court of that state,' and (2) whether the FLSA expressly or impliedly creates an exception to the Full Faith and Credit Act such that we should not give preclusive effect to the judgment of the state court."¹²⁰ First it noted that California res judicata law follows the standard principles regarding finality of a prior decision on the merits and identity of claims and parties.¹²¹ Further, California law considers a judicially approved settlement agreement to be a final judgment on the merits, and therefore applies res judicata to absent class members in a class action settlement, and holds that a class settlement may bar subsequent claims based on the same underlying facts even if the claims were not and could not have been presented in the prior class action.¹²²

The court found that the class action settlement agreement contained a clear release of the class members' FLSA claims and had received approval by the California court as "fair, reasonable and adequate," meaning California law would accord it preclusive effect.¹²³ The *Richardson* court thus conceived the issue before it as whether the FLSA presents an exception to California's (not atypical) preclusion rules.¹²⁴ The court's primary holding was that because the prior action "asserted state causes of action in an opt out class action" and was not an FLSA collective action, the plaintiffs had become parties to the class action settlement by failing to opt out and thus

116. See 839 F.3d 442, 455 (5th Cir. 2016).

117. *Id.*

118. See *id.* at 445.

119. *Id.*

120. *Id.* at 449 (quoting *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 375 (1996)).

121. *Id.*

122. *Id.*

123. *Id.* at 450 (internal quotation marks omitted) (quoting Order Granting Final Approval of Class Action Settlement and Entry Of Judgment, *Lofton v. Wells Fargo Home Mortg.*, No. CGC-11-509502 (Cal. Super. Ct. July 27, 2011)).

124. See *id.*

“became bound by the settlement terms, including the release of their FLSA claims.”¹²⁵

Richardson reasoned that, while section 216 prohibits FLSA claims from “be[ing] asserted using an opt out class action procedure,”¹²⁶ section 216 does not support the additional conclusion that state courts may not supervise and approve an opt out class action settlement that releases FLSA claims.¹²⁷ The court expressly disagreed with *Donatti* and “agree[d] with *Lipnicki*’s reasoning that the FLSA did not create a special exception to the enforceability of judicially approved settlement agreements.”¹²⁸ The panel further reasoned that Fifth Circuit precedent allowing FLSA claims to be arbitrated or (in seeming conflict with the majority rule of *Lynn’s Food*) privately settled provided further supported for its conclusion.¹²⁹ The court adopted *Lipnicki*’s view that the district court cases refusing to approve the release of FLSA claims through an opt-out class action settlement were exercises of judicial discretion as opposed to a statutory bar on settling FLSA claims in an opt-out proceeding.¹³⁰

Finally, turning to what it characterized as “the second inquiry under *Matsushita*: whether the FLSA creates an exception to the Full Faith and Credit Act such that preclusive effect should not be granted here,” the court concluded that the FLSA does not create such an exception.¹³¹ The panel found no irreconcilable conflict between section 216’s mandate that FLSA claims be litigated on an opt-in basis and according preclusive effect to a prior settlement releasing FLSA claims in an opt-out class action suit.¹³² It reasoned that this conclusion was bolstered by *Matsushita*’s holding that a state court settlement releasing claims that could be asserted only in federal court precluded a subsequent federal action.¹³³

* * *

With the lower courts divided, and only one circuit to have weighed in as of this writing, greater clarity is needed on how the statute should be interpreted. We endeavor to provide that much needed guidance in Part III.

125. *Id.* at 451.

126. *Id.* (citing the Fifth Circuit’s seminal precedent in *LaChapelle v. Owens-III, Inc.*, 513 F.2d 286, 288 (5th Cir. 1975) (per curiam)).

127. *Id.*

128. *Id.*

129. *See id.* (citing *Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 297-98 (5th Cir. 2004) (arbitration) and *Martin v. Spring Break ‘83 Prods., LLC*, 688 F.3d 247, 253-57 (5th Cir. 2012) (private settlement)).

130. *Id.*

131. *Id.* at 453 (citation omitted).

132. *Id.* at 454.

133. *Id.* (noting further that state courts have concurrent jurisdiction over FLSA claims).

III.

SECTION 216 DOES NOT PERMIT FLSA RIGHTS TO BE RESOLVED
THROUGH AN OPT-OUT CLASS ACTION PROCEDURE

The law is clear that section 216 only permits an employee to bring a claim under the FLSA either individually or through the section's collective action procedure. The question is whether that is all the statutory section does. Some have argued that section 216 should be understood to limit only how FLSA claims can be *litigated*, not how FLSA claims can be *resolved*. Read in this manner, the statute does not trump generally applicable preclusion law that would permit judgment in a state law class action to extinguish related FLSA claims of absent class members who did not opt out of the action. We argue here that this strained interpretation of the statute is insupportable.

A. *Section 216's Explicit Conditions*1. *Section 216's Explicit Conditions For Vindicating FLSA Rights Do Not Permit Those FLSA Rights To Be Resolved Through An Opt-Out Class Action Procedure*

As originally enacted, section 216(b) authorized an action to recover for an employer's violation of the FLSA to be brought

by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated.¹³⁴

In 1947, Congress amended section 216(b) by striking some of the language (as shown below) and adding an additional sentence to the section (shown in italics):

by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, ~~or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated.~~ *No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.*¹³⁵

As a result of these amendments, to privately enforce FLSA violations, employees must meet three conditions.

The first condition that section 216, as amended, imposes merely extends a requirement from the original statute. One or more employees may

134. Fair Labor Standards Act of 1938, Pub. L. No. 75-718, § 16(b), 52 Stat. 1060, 1069 (codified as amended at 29 U.S.C. § 216(b) (2012)).

135. Portal-to-Portal Act of 1947, Pub. L. No. 80-49, § 5(a), 61 Stat. 84, 87 (1947) (codified as amended at 29 U.S.C. § 216(b)).

join together in a group action on behalf of other employees only on condition that those employees are “similarly situated.” This commonality of interest requirement is the same condition that the original 1938 version of the statute imposed on employees who wished to join together in a single action to privately enforce an employer’s FLSA violations.¹³⁶

Beyond extending the “similarly situated” requirement, section 216, as amended, also imposes two new conditions on private enforcement actions. Under the amended statute, a private action to recover under the statute can only be brought directly by one or more employees; actions by a third party “agent or representative” are no longer permitted.¹³⁷ By repealing the provision in the original statute that previously allowed representative actions to be brought on behalf of affected employees, Congress did away with the only authority permitting a private party to remedy FLSA violations through non-direct litigation. The only representative action the statute now authorizes is a public enforcement action by the Secretary of Labor under section 216(c).¹³⁸

It follows from this textual change that section 216(b), on its face, does not permit an employee’s FLSA rights to be resolved through a class action procedure which, by definition, is a representative form of action.¹³⁹ And section 216 draws no distinction between resolving disputes by judicial verdicts or by voluntary settlements.¹⁴⁰ By categorically repealing the original statutory authority that allowed representatives or agents to sue on an employee’s behalf, Congress evinced its intent to disallow private remediation of FLSA rights through any proceeding that the employee does not personally bring or affirmatively join.

The third and last express condition imposed by amended section 216 is that employees may join together to recover for an employer’s statutory violations only by filing their written consent to participate in the group action.¹⁴¹ The third requirement works in tandem with the first: with representative actions prohibited, FLSA violations may only be remedied by an employee who directly participates in an action, either by bringing an individual action (“An action . . . may be maintained against any employer . . . by any one or more employees for and in behalf of himself or themselves”) or by affirmatively joining an action filed by another employee

136. See Fair Labor Standards Act of 1938 § 16(b).

137. See 29 U.S.C. § 216(b).

138. See *id.* § 216(c).

139. See *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 832 (1999) (“Although representative suits have been recognized in various forms since the earliest days of English law, class actions as we recognize them today developed as an exception to the formal rigidity of the necessary parties rule in equity.” (citations omitted)).

140. See 29 U.S.C. § 216(b).

141. See *id.*

(when the employee “gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought”).¹⁴²

Cases that conclude that FLSA rights can be resolved through an opt-out procedure, like the Fifth Circuit’s recent decision in *Richardson*, overlook or misapprehend the significance of the textual changes Congress enacted to section 216. The plain text of the statute provides that FLSA rights may not be remedied unless the express conditions of the section have been met. And those explicit conditions make it unmistakably clear that FLSA rights cannot be resolved through an opt-out class action procedure. That procedural vehicle is doubly-flawed under section 216 because (i) a class action is a private representative suit, a form of action that the statute no longer permits; and (ii) an opt-out class, in particular, is incompatible with the requirement that the FLSA claims of employees may be aggregated together to remedy an employer’s statutory violations only if each employee directly and affirmatively participates in the group action.

As the prior Part of this paper discussed, almost every lower court to have considered the question has construed section 216(b) to not permit the FLSA rights of absent class members to be extinguished on the ground that they did not opt out of the class.¹⁴³ That our reading of the statutory text is supported by most courts does not make it correct, of course, but we certainly do not mind the company.

2. *Because Section 216 is the Exclusive Means for Enforcing FLSA Violations, Its Conditions Cannot be Sidestepped by Using Other Procedural Means*

To avoid the explicit statutory requirements of section 216, some have argued that those requirements only apply to actions brought pursuant to the section.¹⁴⁴ In support, they point to the language earlier in the paragraph, “[a]n action . . . may be maintained against any employer,” and link it to the later provision that “[n]o employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party”¹⁴⁵ So, they argue, the opt-in requirement should be read to only apply to “an action” explicitly brought under section 216, not to all legal actions.¹⁴⁶

This interpretation is without textual support in the statutory language and, if applied consistently, would gut the statute’s express requirements and Congress’s clearly expressed intent. In section 216(b), Congress has set forth special claim vindication procedures for remedying an employer’s FLSA

142. *Id.*

143. *See supra* part I(B)(2).

144. *See, e.g.*, Appellees’ Brief at 38-39, 41-42, *Richardson v. Wells Fargo Bank, N.A.*, 839 F.3d 442 (5th Cir. 2016) (No. 15-20711).

145. *See id.* at 41 (some emphasis omitted).

146. *See id.*

violations that cannot be circumvented on the ground that FLSA rights were resolved through settlement of a state law action to which the express requirements of §216(b) do not apply.¹⁴⁷

Moreover, the problem with this interpretation of the text is that it treats section 216's requirements like optional guidelines, applicable only if an employee finds it convenient to use the statute to enforce FLSA rights. If this reading were correct, then what stops an employee from bringing an opt-out class action to recover for an employer's FLSA violations on behalf of all fellow employees? After all, if the opt-in requirement only applies to "an action" brought pursuant to section 216, then it seems to follow that an employee is free to bring a group action outside of section 216, such as an opt-out class action under Rule 23 or comparable state law. For that matter, if Congress did not intend section 216 to be the exclusive means for privately enforcing FLSA violations, then section 216's "similarly situated" requirement would also only apply to an action brought pursuant to the section. This would mean that an employee could look to a more liberal joinder rule to aggregate the claims of other employees, including those not "similarly situated" to each other, despite the decision Congress made to impose a very specific kind of commonality of interest requirement on employees wishing to join together. And, if section 216 is not an exclusive means for privately enforcing FLSA violations, what stops a third party from bringing an action on behalf of employees if such a representative suit would be permitted by state or other federal law?

There is a single answer to all of these questions: just as only employees can bring an action to enforce FLSA violations, and employees can only join together when they are "similarly situated," the opt-in requirement Congress imposed mandates that statutory violations may only be remedied by employees who take some affirmative step to assert their rights. These are all the explicit conditions that section 216 commands, and section 216 is the sole authority for privately enforcing FLSA violations. An employee does not get to choose between suing under section 216 or another available procedural form of action because there is no other source of authority for privately remedying an employer's FLSA violations. Decades of judicial decisions have found section 216 incompatible with opt-out class action rules on this exact ground. Because section 216 is the exclusive means for privately enforcing FLSA violations, its conditions cannot be avoided by looking to other procedural means.¹⁴⁸

147. See 29 U.S.C. § 216(b).

148. See *Kakani v. Oracle Corp.*, No. C 06-06493 WHA, 2007 WL 1793774, at *7 (N.D. Cal. June 19, 2007) ("The FLSA prohibits traditional class actions and authorizes only an opt-in collective action."); *La Parne v. Monex Deposit Co.*, No. SACV 08-0302 DOC (MLGx), 2010 WL 4916606, at *3 (C.D. Cal. Nov. 29, 2010) ("[I]t would be contrary to the statute to bind class members who do not affirmatively elect, through opt-in procedures, to participate in the FLSA suit."); *Thompson v. Sawyer*, 678 F.2d 257, 269 (D.C. Cir. 1982) (noting that suits under the Equal Pay Act, which also is governed by section 216(b),

Additionally, reading the words “[n]o employee shall be a party plaintiff to any such action” to mean that the opt-in requirement applies only to an action brought under section 216 also ignores how those words fit in context. This is made clear by reading the entire statutory section:

Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages.¹⁴⁹

Or, more succinctly put, an employer is liable to its employees for not paying them properly (under section 206 or 207) or for retaliating against them (section 215). These opening lines are important because they are the necessary predicate to what follows in the rest of the section. Thus, when section 216(b)’s next sentence authorizes one or more employees to bring an action for an employer’s FLSA violations on behalf of other employees, the action they may bring is “[a]n action to recover the liability prescribed in either of the preceding sentences[.]”¹⁵⁰ In other words, the language and organizing structure Congress used in section 216 makes it clear that affected employees must follow the requirements of the section to remedy an employer’s statutory violations.

One final point bears making. Court rulings allowing arbitration of FLSA claims do not bear on whether an employee’s federal statutory rights can be extinguished by an opt-out class action judgment. Allowing arbitration of FLSA claims does not alter or in any way obviate section 216(b)’s express conditions: representative actions are still prohibited in arbitration, and the opt-in requirement remains equally applicable.¹⁵¹ Moreover, prior views expressed by several Supreme Court Justices, in non-FLSA cases, further demonstrate that an employee would not be bound to an arbitral judgment that purported to extinguish FLSA rights unless the employee affirmatively opted in under section 216(b).¹⁵² Thus, to the extent arbitration cases have

“differ from the mainstream of class actions,” and that class members “who do not ‘opt in’ to the Equal Pay Act class will not be bound by a decision as to other plaintiffs”).

149. 29 U.S.C. § 216(b).

150. *Id.*

151. *See, e.g.,* Rossi v. SCI Funeral Servs. of N.Y., Inc., No. 15 CV 473 (ERK) (VMS), 2016 WL 524253, at *14 n.5 (E.D.N.Y. Jan. 28, 2016) (noting, in arbitral action involving state and FLSA claims, that “if an arbitrator were to determine that collective and class actions claims were permissible, and certify same, the absentee members in the FLSA collective action would be required to affirmatively ‘opt-in’ if they wished to be part of the class”).

152. *See, e.g.,* Oxford Health Plans LLC v. Sutter, 133 S. Ct. 2064, 2071-72 (2013) (Alito, J., concurring) (“[W]here absent class members have not been required to opt *in*, it is difficult to see how an

any relevance to the problem, they support the conclusion that an employee is not a party to any proceeding—judicial or arbitral—that purports to extinguish FLSA rights unless the employee has directly brought the legal action himself or consented to join an action brought by another employee.

3. *Section 216 Must be Construed in Light of Its Unique Policy Considerations, Including the Strict Approach Taken With Regard to Compromises of FLSA Claims*

The last point to be made with regard to the explicit conditions section 216 imposes on vindicating FLSA rights is that the statutory text must be read in light of “the unique policy considerations underlying the FLSA” and the strict approach the Court has taken with regard to voluntary compromises of FLSA claims.¹⁵³ Those policy considerations include the “unequal bargaining power as between employer and employee,” that “certain segments of the population required federal compulsory legislation to prevent private contracts on their part which endangered national health and efficiency,”¹⁵⁴ the “private-public character” of the rights that the statute protects,¹⁵⁵ and the deterrent effects that the statute was intended to ensure.¹⁵⁶

The danger that employees will have bargained away the Act’s basic minimum wage and hour guarantees, including the right to recover liquidated damages, is particularly acute when it comes to settlements of pure state law class suits or hybrid state law class action/FLSA collective actions. The problem is not lack of judicial supervision. Under Rule 23 and comparable state class action law, a court must approve a proposed settlement.¹⁵⁷ But a court exercising its responsibility to confirm that a settlement is “fair, reasonable and adequate” for Rule 23 purposes may not necessarily be scrutinizing the proposed settlement to ensure that FLSA statutory rights are being fully compensated.¹⁵⁸ Thus, if there is not any doubt

arbitrator’s decision to conduct class proceedings could bind absent class members who have not authorized the arbitrator to decide on a classwide basis which arbitration procedures are to be used.”) (emphasis in original).

153. *Cheeks v. Freeport Pancake House, Inc.*, 796 F.3d 199, 206 (2d. Cir. 2015).

154. *Brooklyn Sav. Bank v. O’Neil*, 324 U.S. 697, 706 (1945).

155. *Id.* at 709.

156. *Id.* at 709-10 (“To permit an employer to secure a release from the worker who needs his wages promptly will tend to nullify the deterrent effect which Congress plainly intended that Section 16(b) should have. Knowledge on the part of the employer that he cannot escape liability for liquidated damages by taking advantage of the needs of his employees tends to insure compliance in the first place. . . . [C]ontracts tending to encourage violation of laws are void as contrary to public policy.”).

157. *See* FED. R. CIV. P. 23(e).

158. *See* FED. R. CIV. P. 23(e)(2). Class action settlements may also contain provisions that would pass muster under Rule 23 but not the FLSA. For example, it is not uncommon for a class action settlement to contain a reversionary clause allowing any unclaimed monies to revert back to the defendant. *See, e.g., Khanna v. Inter-Con Sec. Sys., Inc.*, No. CIV S-09-2214 KJM GGH, 2012 WL 4465558, at *2, *8 (E.D. Cal. Sept. 25, 2012) (including, in proposed settlement of hybrid state wage-and-hour class action and FLSA collective action, provision allowing reversion to defendant of portion of settlement earmarked for

that employees are entitled to compensation under the FLSA, including all liquidated damages, then any proposed settlement that compromised their claims would effectively permit the employees to bargain away the statute's mandatory requirements.¹⁵⁹ Yet, some courts have approved settlements that did not take these statutory considerations into account.¹⁶⁰

There are other concerns triggered by proposed settlements of hybrid state law class action/FLSA collective action cases, as well as of pure state law actions. Proposed settlements often do a poor job of clearly describing what claims are being released, or the benefits and disadvantages of the proposal.¹⁶¹ Even the only published decision approving the release of FLSA rights in an opt-out class action settlement emphasized that the notice and claim forms had to adequately describe the different claims being released and the amount of compensation workers would receive.¹⁶²

Moreover, when the class complaint does not even assert a claim for relief under the FLSA, a subsequently negotiated deal between the class representatives and defendant that bargains away the class's rights under state and federal law is even more troublesome because there is usually little or no advance notice to the class—or the court—that the terms of the deal include a comprehensive release of state and federal claims.¹⁶³ Finally, in a hybrid case (or a pure state law class action), it can be especially difficult for a court to ensure that workers' federal statutory rights are fully compensated by settlement. When the class counsel and defendants propose a settlement, the terms are unlikely to value the state and federal claims separately, and the court (to say nothing of those in the class) may not have enough information to evaluate whether the compromise—even assuming that there is a bona fide

FLSA). Yet, while reversionary clauses may be permissible in settlements of other kinds of cases, *see, e.g.,* Van Gemert v. Boeing Co., 739 F.2d 730, 737 (2d. Cir. 1984) (upholding decision allowing reversion of unclaimed funds to the defendant where deterrence not a goal of the statute), when Congress's objectives in passing a statute include deterrence or disgorgement, as is true with the FLSA, "it would contradict these goals to permit the defendant to retain unclaimed funds." *Six Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1308 (9th Cir. 1990).

159. *See* *Collins v. Sanderson Farms, Inc.*, 568 F. Supp. 2d 714, 719 (E.D. La. 2008) ("The primary focus of the Court's inquiry in determining whether to approve the settlement of a FLSA collective action is not, as it would be for a Rule 23 class action, on due process concerns, but rather on ensuring that an employer does not take advantage of its employees in settling their claim for wages." (citations omitted)).

160. *See supra* text accompanying notes 89-133.

161. *See, e.g.,* *Kakani v. Oracle Corp.*, No. C 06-06493 WHA, 2007 WL 1793774, at *10 (N.D. Cal. June 19, 2007) (rejecting proposed settlement of hybrid action and noting, *inter alia*, that would break workers down into as many as eight subclasses, a "convoluted tangle" and "contrived structure [that] is simply too hard to understand"); *Stokes v. Interline Brands, Inc.*, No. 12-cv-05527-JD, 2014 WL 5826335, at *4 (N.D. Cal. Nov. 10, 2014) (refusing to approve agreed-upon settlement and noting, *inter alia*, that "[t]he proposed agreement is also at times incomprehensible about the scope of released claims").

162. *See supra* text accompanying notes 77-79.

163. *See, e.g.,* *Stokes*, 2014 WL 5826335, at *4 (rejecting the proposed settlement and noting that "[t]he complaint says nothing at all about FLSA claims and yet the release purports to give away class members' rights under the statute").

dispute over compensation owed—is reasonable, relative to the potential value of the claims being released.¹⁶⁴

In sum, a strong argument can be made for reading section 216’s express mandatory conditions as not allowing FLSA claims to be settled merely because an employee did not opt out of the class. Congress designed the statute with special claim vindication procedures and the explicit conditions that section 216 mandates must be satisfied to privately enforce statutory violations. And those explicit conditions should not permit FLSA rights to be resolved through an earlier opt-out class action procedure, a representative form of action that the statute does not authorize. Additionally, the Court has consistently held that the policy purposes of the FLSA must inform how the statute is interpreted, which means that the lower courts should take a strict approach to FLSA settlements so as not to permit the named plaintiffs and defendant to bargain away the FLSA claims of absent class members who did not opt in to the action.

B. Under Section 216, Opt-Out Class Members Are Not Parties For FLSA Purposes

1. Use of “Party Plaintiff” Reveals Congress’s Understanding That Employees are Bound Only by Judgments in Cases in Which They Directly Participate

Beyond the explicit conditions for vindicating FLSA rights that section 216 lays out, there is an additional and important point to be made about the statutory text. In deciding whether the statute permits settlement of FLSA

164. See *Grove v. ZW Tech, Inc.*, No. 11-2445-KHV, 2012 WL 1789100, at *5-6 (D. Kan. May 17, 2012) (rejecting proposed settlement of hybrid action where court could not determine if it was a fair and reasonable compromise of claims consistent with the standards set forth in *Lynn’s Foods*); *Khanna v. Inter-Con Sec. Sys., Inc.*, No. CIV S-09-2214 KJM GGH, 2012 WL 4465558, at *11 (E.D. Cal., Sept. 25, 2012) (refusing to approve proposed settlement of hybrid action because, *inter alia*, court had not been provided the potential range of recovery and thus could not evaluate whether “the amounts proposed as settlement are proportionate to the damages Plaintiffs could have obtained if they proceeded to trial” (internal quotation marks omitted) (quoting *Lewis v. Vision Value, LLC*, No. 1:11-cv-01-055-LJO-BAM, 2012 WL 2930867, at *2 (E.D. Cal. July 18, 2012))). In *Kakani*, the court rejected the proposed settlement in part because the average settlement would yield about a 12% recovery—which is to say that employees would forfeit almost 88% of their maximum potential recovery—but counsel had not provided an adequate reason for such a “steep discount.” *Kakani*, 2007 WL 1793774, at *7. Courts have also noted the confusion often inherent in sending notice to employees of both their opt-in and opt-out rights and responsibilities. See *Edwards v. City of Long Beach*, 467 F. Supp. 2d 986, 992 (C.D. Cal. 2006) (refusing to exercise supplemental jurisdiction over a hybrid action and noting that “[i]f both a § 216(b) collective action and a Rule 23 class action were allowed to proceed, confusion would result from requiring potential plaintiffs to both opt-in and opt-out of the claims in the suit”). See generally Craig Becker & Paul Strauss, *Representing Low-Wage Workers in the Absence of a Class: The Peculiar Case of Section 16 of the Fair Labor Standards Act and the Underenforcement of Minimum Labor Standards*, 92 MINN. L. REV. 1317, 1327 (2008) (noting that, in general, the typically working-class recipients of FLSA collective action notices, if they read the notices at all rather than throwing them away, “are likely to find the language confusing, intimidating, or threatening”).

rights through an opt-out procedure, it is significant that Congress chose in section 216 to use the words “party plaintiff” to refer to an employee who participates in a collective action. That deliberate word choice is significant because it reveals Congress’s understanding that, as is true of all non-parties, an employee will not be bound to any judgment from a case that the employee did not bring individually or affirmatively join.

Congress’s decision to describe an employee who opts-in to a collective action as a “party plaintiff” comports with longstanding and familiar procedural law that one is not bound to a judgment unless they are a party to the case. “It is a principle of general application in Anglo-American jurisprudence,” the Court in *Hansberry v. Lee* famously instructed, “that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process.”¹⁶⁵ Indeed, in discussing the exception to the general rule, *Hansberry*’s account for why class or representative suits can have preclusive effect on non-parties underlines the inapplicability of that rationale as to FLSA claims. Writing before the 1947 amendments to the original statute, Justice Stone explained that “members of a class not present as parties to the litigation may be bound by the judgment where they are in fact adequately represented by parties who are present . . . or where for any other reason the relationship between the parties present and those who are absent is such as legally to entitle the former to stand in judgment for the latter.”¹⁶⁶ Or, as the Supreme Court later put it in *Martin v. Wilks*, the general rule against nonparty preclusion is that “[a] judgment or decree among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to those proceedings.”¹⁶⁷

Even before 1947, the principle against nonparty preclusion was firmly established for FLSA collective actions. The prevailing understanding equated Section 216(b) with the spurious class suit authorized by the 1938 version of Rule 23.¹⁶⁸ A spurious class was similar to a permissive joinder

165. 311 U.S. 32, 40 (1940).

166. *Id.* at 42-43.

167. *Martin v. Wilks*, 490 U.S. 755, 762 (1989); *see also* *Richards v. Jefferson County*, 517 U.S. 793, 798 (1996) (also noting the longstanding “general consensus” that judgments ordinarily do not bind non-parties).

168. *See, e.g.*, *Pentland v. Dravo Corp.*, 152 F.2d 851, 853-56 (3d Cir. 1945) (comprehensively summarizing the case law). The analogy drawn between pre-1947 section 216(b) actions and spurious class suits has been well recognized. *See, e.g.*, *Knepper v. Rite Aid Corp.*, 675 F.3d 249, 254-55 (3d Cir. 2012); *LaChapelle v. Owens-Ill., Inc.*, 513 F.2d 286, 287 n.6 (5th Cir. 1975) (*per curiam*). Indeed, only one decision from the period seems to have held an employee bound by the outcome of a case—as it turns out, by way of voluntary settlement—to which he was not a party. *See Cissell v. Great Atl. & Pac. Tea Co.*, 37 F. Supp. 913, 914 (W.D. Ky. 1941). *But see* *Shain v. Armour & Co.*, 40 F. Supp. 488, 490 (W.D. Ky. 1941) (permitting, in a later decision by the same judge, collective action, but reminding that judgment in the action would have *res judicata* effect only as to other employees who “join with the plaintiff as parties to the action, intervene in the action, or have the record show that the plaintiff has been designated by them as the agent or representative to maintain such action in their behalf” because “[s]uch affirmative

mechanism that allowed multiple people to join together as plaintiffs in the same action if their claims raised common questions of law or fact. The critical feature of the spurious class was that it only bound those who affirmatively joined the case.¹⁶⁹

Because courts in the pre-1947 period treated employees as not bound by the outcome of an FLSA collective action until they joined it, that left open the possibility—dubbed “one-way intervention”—that an employee could sit on the sideline awaiting a case’s outcome: if favorable, the employee could intervene into the case and reap the benefits; if unfavorable, the employee could just stay out of it and not be bound by the adverse result. While the unwelcome possibility of one-way intervention in general class action practice was eventually eliminated when Rule 23 was revised in 1966,¹⁷⁰ Congress first abolished it specifically for FLSA collective actions in 1947.¹⁷¹ It should be clear, then, that by amending Section 216(b) to require written consent and identifying as a “party plaintiff” only those employees who thereby opt in to a collective FLSA action, Congress ensured that the benefits and burdens of FLSA collective action litigation would be in line with one another. Under the amended section 216(b), employees who do not directly bring or join an action before judgment are treated as non-parties who can neither benefit from nor be bound by the action’s outcome. Consequently, a class action judgment cannot extinguish the FLSA rights of employees merely because they did not opt out of the case.

Congress occasionally creates remedial schemes that expressly bind nonparties to the outcome of proceedings in which they did not participate.¹⁷² The preclusive effect of these proceedings on nonparties has been upheld when the legislative enactment “is otherwise consistent with due process.”¹⁷³ For instance, under the Bankruptcy Code, Congress has provided that a bankruptcy reorganization plan will bind nonparty creditors.¹⁷⁴ State legislatures have, on occasion, acted similarly by enacting nonclaim provisions in a state probate code that bar creditors’ claims against an estate if not presented within a certain period of time.¹⁷⁵ By contrast, in section

action on their part is necessary in order to show knowledge of the litigation in their behalf, their willingness to participate therein and to be so represented, and to bind them by the final judgment”). For a discussion of *Cissell* and *Shain*, see Linder, *supra* note 44, at 167-68.

169. Linder, *supra* note 44, at 167-68.

170. FED. R. CIV. P. 23 Advisory Committee’s Note, 39 F.R.D. 98 (1966).

171. *E.g.*, Linder, *supra* note 44, at 174.

172. See *Taylor v. Sturgell*, 553 U.S. 880, 895 (2008) (“[I]n certain circumstances a special statutory scheme may ‘expressly foreclos[e] successive litigation by nonlitigants’” (quoting *Wilks*, 490 U.S. at 762 n.2)).

173. *Wilks*, 490 U.S. at 762 n.2.

174. See *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 529 (1984) (citing 11 U.S.C. §§ 501, 502, 1141 (2012)).

175. See *Tulsa Prof’l Collection Servs., Inc. v. Pope*, 485 U.S. 478, 480-81 (1988) (discussing Oklahoma’s nonclaim provision).

216(b) Congress has done the exact opposite: it has created a special remedial scheme that expressly requires affirmative participation by employees with regard to their FLSA rights—that is, it treats employees as nonparties who will not be bound to the outcome of any action that they did not personally bring or consent to join. Accordingly, courts have recognized “that in a collective action unnamed plaintiffs need to opt in to be bound, rather than, as in a class action, opt out not to be bound.”¹⁷⁶

Finally, this interpretation of “party plaintiff” is consistent with the judicial understanding that the FLSA “[is] remedial and humanitarian in purpose” and “must not be interpreted or applied in a narrow, grudging manner.”¹⁷⁷ This ensures that an employee’s FLSA rights will be effectuated to the fullest extent and will not be involuntarily lost merely because of failure to opt out of a class notice.¹⁷⁸

2. *Preclusion Law Does Not Bind Non-Parties to a Judgment Purporting to Resolve Their FLSA Rights*

The legislative choice to identify only an affirmatively participating employee as a “party plaintiff” is important to understanding why an opt-out class action judgment should not be given preclusive effect as to the FLSA claims of absent class members. In particular, the affirmative opt-in requirement for party status in an FLSA action is what distinguishes the FLSA context from other contexts in which a prior class action judgment may be preclusive for claims that could not have been adjudicated in the prior action. If employees do not become party plaintiffs to an action through the procedure mandated for maintaining an FLSA claim, then the “substantial identity of the parties” element of a *res judicata* determination is not satisfied.¹⁷⁹ This is not truly an exception to the general rule that absent class members may be bound as parties to a class action judgment; it stems from the fact that Congress does not permit employees ever to be made parties to an action asserting FLSA claims on an opt-out basis. It is not that it is impossible to litigate FLSA claims in state court. Congress permits an FLSA action “in any Federal or State court of competent jurisdiction.” The issue is that the procedure followed in a purely opt-out class action proceeding does

176. *Espenscheid v. DirectSat USA, LLC*, 688 F.3d 872, 877 (7th Cir. 2012).

177. *Tenn. Coal, Iron & R.R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 597 (1944); *accord Johnston v. Spacefone Corp.*, 706 F.2d 1178, 1182 (11th Cir. 1983) (“[FLSA] has been construed liberally to apply to the further reaches consistent with congressional direction.” (internal quotation marks omitted) (quoting *Mitchell v. Lublin, McGaughy & Assocs.*, 358 U.S. 207, 211)); *Allen v. McWane, Inc.*, 593 F.3d 449, 452 (5th Cir. 2010) (directing district courts to “construe the FLSA liberally in favor of employees . . .” (internal quotation marks omitted) (quoting *McGavock v. City of Water Valley*, 452 F.3d 423, 424 (5th Cir. 2006))).

178. *See supra* text accompanying notes 72-76.

179. *Richards v. Jefferson County*, 517 U.S. 793, 796, (1996) (internal quotation marks omitted) (quoting *Jefferson County v. Richards*, 662 So. 2d 1127, 1128 (Ala. 1995)).

not comply with the mandatory process for joining employees as FLSA plaintiffs.

Contrast the question of whether absent class members can be deemed to have joined a prior action purported to have resolved their FLSA claims with the different question that is presented when the claims in the prior action were dismissed for lack of jurisdiction. The Supreme Court addressed the latter situation in *Matsushita Electric Industrial Co., Ltd. v. Epstein*,¹⁸⁰ in the context of securities law. *Matsushita* addressed whether a state-court class action settlement may preclude federal claims over which federal courts have exclusive jurisdiction. Specifically, *Matsushita* considered whether the Full Faith and Credit Act may require federal courts to give preclusive effect to a Delaware state court judgment even as to claims that could not have been adjudicated in the state court.¹⁸¹ A class action asserting only state law claims had been settled.¹⁸² Part of the settlement included a release of all claims against the defendant, including release of federal securities claims that could not have been brought in the state court action because there was exclusive federal question jurisdiction over them.¹⁸³ Plaintiffs who had not opted out of the class subsequently sought to avoid the preclusive effect of the state court judgment approving the settlement,¹⁸⁴ but the Supreme Court held that the state court judgment was preclusive even as to the exclusively federal claims.¹⁸⁵

In *Matsushita* there was no question as to identity of parties. There was no federal policy forbidding litigation or settlement of securities claims in the context of an opt-out class action. And there was no question that the *Matsushita* plaintiffs had been members of the duly constituted opt-out class bound by the state-court judgment.

Further, to the extent Congress sought “to serve at least the general purposes underlying most grants of exclusive jurisdiction: ‘to achieve greater uniformity of construction and more effective and expert application of that law,’”¹⁸⁶ those purposes were not disserved by giving preclusive effect to the release of Exchange Act claims. The state court’s approval of the settlement did not involve any construction or application of the Act by the state-court judge.¹⁸⁷

In a couple of ways, *Matsushita* is instructive for understanding why section 216’s opt-in requirement means that a prior opt-out class judgment

180. *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367 (1996).

181. *Id.* at 369.

182. *Id.* at 370-71.

183. *Id.* at 371-72.

184. *See id.* at 372.

185. *Id.* at 385.

186. *Id.* at 383 (quoting *Murphy v. Gallagher*, 761 F.2d 878, 885 (2d Cir. 1985)).

187. *Id.*

resolving wage-and-hour claims should not be preclusive as to FLSA claims. For one, *Matsushita* illustrates that it is possible that a prior judgment might preclude one set of claims arising from the same facts but not others. It was undisputed that the *Matsushita* plaintiffs' state-law claims were precluded, but it took a (non-unanimous) Supreme Court opinion to determine that the federal claims were precluded as well. In the wage-and-hour context, the analogous inquiry would be whether a prior class action judgment that plainly precludes the employees' state-law claims may nevertheless not preclude their federal FLSA claims.

Matsushita also illustrates how the issue of preclusion law on federal claims may turn on federal policy, as embodied in Congress's legislative enactments. In the FLSA, by insisting on an opt-in remedial scheme, and by specifically identifying only an employee who elects to opt-in as a "party plaintiff," Congress has directed that employees cannot be bound to the outcome of a suit in which they did not affirmatively participate. When a later court adjudicating FLSA claims gives preclusive effect to a prior judgment rendered in a purely opt-out class action proceeding, it violates that policy. This is because such a determination deems absent class members to have become party plaintiffs to the prior action without having given their affirmative consent to join it.

Identity of parties is a standard element of preclusion analysis in perhaps all U.S. jurisdictions. That *res judicata* element was not disputed in *Matsushita*. And if section 216 and its "party plaintiff" language means that employees may never become parties to an adjudication of their FLSA rights without opting in, then finding preclusion based on a prior opt-out judgment is the exceptional application of *res judicata*. Finding that employees are not precluded by the judgment in a case to which they were never properly joined as parties through the congressionally mandated procedure would be the unexceptional application of standard preclusion rules.

The effect of reading section 216 to disallow private enforcement of the statute except on terms consistent with section 216 is not to say that FLSA claims can never be finally settled. What it does mean is that they can only be settled as to those employees who affirmatively participate in a suit to enforce their rights. This tracks current practice and understanding of the scope of the preclusive effect of settlements of collective action cases, which recognizes that only those employees who opt in to a collective action are bound by a subsequent judgment rendered in the case.¹⁸⁸

188. See *Akins v. Worley Catastrophe Response, LLC*, 921 F. Supp. 2d 593, 603 (E.D. La. 2013) (finding settlement of a prior FLSA collective action preclusive only as to those employees who opted in to the case and participated in the settlement, noting "the opt-in provision of section [216] provides for no legal effect on those parties who choose not to participate" (alteration in original) (emphasis omitted)); *Yates v. Wal-Mart Stores, Inc.*, 58 F. Supp. 2d 1217, 1218 (D. Colo. 1999) ("Unlike Rule 23, the opt-in provision of section 213 provides for no legal effect on those parties who choose not to participate.").

C. *Our Reading of Section 216 Does Not Categorically Prohibit FLSA Settlements*

It bears emphasizing that our reading of the text of section 216 would not preclude compromises of FLSA claims through the vehicle of a state law class action. However, to honor Congress's special treatment of an employee's statutory rights, compromises of FLSA claims as part of an opt-out settlement must adhere to the statute's express conditions and restrictions. This means that, as a result of their failure to opt out, class members can have only their state law claims resolved. But as to the FLSA, only those who file written consent to affirmatively join the case can benefit or be bound by any determination of their federal statutory rights; any employees who do not opt in cannot be held to surrender their rights to later sue to remedy an employer's FLSA violations. When asked to approve proposed settlements that seek to resolve both state and federal rights, the most conscientious courts take this approach.¹⁸⁹

Submission of a claim form as part of the settlement structure can be used as a substitute for the written consent typically filed at the outset of an FLSA collective action, though this should not be the preferred approach. In any settlement structure that bases opt-in on submission of a claim form, the court should insist that the form "is filed in the court in which such action is brought" and that it clearly express "consent in writing to become" a party to the suit, as section 216 directs. It should also adequately explain that both federal and state claims are being settled, the amount of compensation workers will receive for each, and the benefits and disadvantages of accepting the settlement terms.¹⁹⁰ In *La Parne v. Monex Deposit Co.*, for instance, the

189. See *Myles v. AlliedBarton Sec. Servs.*, No. 12-cv-05761-JD, 2014 WL 6065602, at *3 (N.D. Cal. Nov. 12, 2014) (rejecting proposed settlement that would extinguish the state and federal claims of all class members who fail to opt out, but provide compensation only to those who submit a claim form, noting that this structure sets the defendant's liability on a "'claims made' basis but applies the release universally to the putative class"); *La Parne v. Monex Deposit Co.*, No. SACV 08-0302 DOC (MLGx), 2010 WL 4916606, at *3 (C.D. Cal. Nov. 29, 2010) (accepting proposed settlement structure by which class members who fail to opt out release state law claims and "only class members who affirmatively 'opt-in' to the Settlement should be bound by the Settlement's release of FLSA liability"). The court in *La Parne* was also careful to make sure that the release of claims provision clearly explained the difference between the federal and state claims and adequately stated what federal rights were being released in exchange for receiving compensation. See Notice of Proposed Class Action Settlement at 6, *La Parne v. Monex Deposit Co.*, No. 08-cv-00302-DOC-MLG (C.D. Cal. Nov. 22, 2010), ECF No. 183.

190. See *Kakani v. Oracle Corp.*, No. C 06-06493 WHA, 2007 WL 1793774, at *7 (June 19, 2007) (rejecting the proposed settlement and noting that "[w]orkers who voluntarily send in a claim form and affirmatively join in the action, of course, can be bound to a full release of all federal and state rights. But [it] is unconscionable to try to take away the FLSA rights of all workers, whether or not they choose to join in affirmatively."); *McClellan v. Health Sys., Inc.*, No. 11-03037-CV-S-DGK, 2014 WL 3907794, at *6 (W.D. Mo. Aug. 11, 2014) (scrutinizing proposed settlement and emphasizing importance of ensuring that "the notice and claim forms conspicuously stated what federal rights the claimants released by returning the claim form"); *Sharobeim v. CVS Pharmacy, Inc.*, No. CV 13-9426-GHK (FFMx), 2015 WL 10791914, at *3 (C.D. Cal. Sept. 2, 2015) (refusing to approve settlement whose structure provided that "if a Class Member chooses not to opt-into the FLSA collective action by not filing a claim form, he or

court was careful to make sure that the release of claims provision clearly described the difference between the federal and state claims and explained what federal rights were being released, and for how much.¹⁹¹ It is also important that half-hearted, belated attempts to satisfy the formal statutory requirements not be accepted. Thus, a court should reject any process that would link merely cashing a settlement check to satisfaction of the opt-in requirement. One district court wisely found such an approach clearly deficient and inconsistent with the plain language of section 216 since no effort at informed consent had been made, and the checks had never been filed with the court.¹⁹² Of course, with any proposed FLSA settlement, the court must assure itself that employees are receiving the full compensation they are owed under the statute or, if there is a bona fide dispute over the amount of compensation, that the deal is a fair compromise of the claims being released.¹⁹³

IV. CONCLUSION

Normally, a case can be settled on terms that release all related claims. For the parties to the action, the ability to compromise multiple claims in a single settlement offer is desirable because it offers the possibility of reaching an efficient and comprehensive peace. However, as the important example of the FLSA illustrates, a law sometimes contains special claim vindication procedures. Whenever a legislature enacts such provisions, the hard question is whether the special statutory requirements justify departure from the normal rule favoring multiple claim settlements. It is a hard question, in large part, because the legislature likely was not thinking about these procedural niceties when enacting the law. That leaves us with having to interpret statutory text and a legislative record that may not expressly answer whether the normal presumption for broad preclusion should apply to a statute containing special claim vindication procedures.

As we look back today on the legislative choices made with regard to the FLSA nearly seventy years ago, it is clear that section 216's explicit conditions do not allow FLSA rights to be determined on an opt-out basis.

she would have released all state law claims for no compensation at all," and noting that "[i]n essence, Class Members are assessed a penalty (in the full amount of their share of the settlement) for not opting-into the FLSA class. We question the legality of imposing such a penalty on the exercise of a federal right to not opt-in under the FLSA.").

191. See Notice of Proposed Class Action Settlement at 6, *La Parne v. Monex Deposit Co.*, No. 08-cv-00302-DOC-MLG (C.D. Cal. Nov. 22, 2010), ECF No. 183.

192. See *Kempen v. Matheson Tri-Gas, Inc.*, No. 15-cv-00660-HSG, 2016 WL 4073336, at *9 (N.D. Cal. Aug. 1, 2016) (noting that the FLSA "specifies how a putative class member must opt-in" and that "having class members sign, then cash, checks with purported opt-in language printed on the back" does not comply "with the plain-language requirements of § 216(b)").

193. See *Sharobeim*, 2015 WL 10791914, at *3 (rejecting proposed settlement and noting that "no separate value is being paid for the release of the FLSA claims").

Moreover, by also expressly describing as a “party plaintiff” only an employee who affirmatively opts-in to a collective action, section 216 makes even clearer that employees are not bound to the outcome of any FLSA case unless they directly participate in the case. Finally, layered on top of the statutory text is the Court’s directive that the policy purposes of the FLSA must inform how the statute is interpreted. In light of those unique considerations, the best reading of section 216 is that it does not permit FLSA rights to be compromised through an opt-out class procedure.

This is not to say that the statute categorically prohibits compromises of FLSA claims through state law class action suits. But FLSA claims may only be compromised by strictly following the statute’s express conditions. This means that, as a result of their failure to opt-out, class members can only have their state law claims resolved. Only those who file written consent to affirmatively join the case can benefit or be bound by any determination of their federal statutory rights. This construction of section 216 honors Congress’s special treatment of worker’s statutory rights.