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EMPLOYMENT LAW—JUST LET THEM HANDLE IT AMONGST THEMSELVES: AN ARGUMENT IN FAVOR OF ABANDONING THE APPLICATION OF THE *LYNN'S FOOD STORES* STANDARD TO FLSA SETTLEMENT AGREEMENTS

I. INTRODUCTION

> *The heavy hand of the federal government, with its gigantic bureaucracy practicing suffocating paternalism, reaches all things and all people.*[1]

The story of the American worker is one of exploitation and abuse by employers. From the birth of our country through the passing of the Thirteenth Amendment, wealthy and powerful white men held millions of people in bondage and stole the fruits of their labor, without any compensation. And even after the Emancipation Proclamation, workers were often paid wages far below the minimum needed to survive and care for one's family.[2] Not uncommonly, children were employed in unsafe conditions just so the family could afford a roof over their heads and food on the dinner table.[3]

This relentless trend of exploitation was curtailed in 1933 when President Roosevelt sent an initial draft of the Fair Labor Standards Act ("FLSA") to Congress with a message that said America should be able to give "all our able-bodied working men and women a fair day's pay for a fair day's work."[4] Congress later enacted the FLSA to further this lofty goal by ensuring all employees are paid at the rate necessary to support themselves, and that they are adequately compensated for sacrificing significant amounts of time away from their personal lives for the benefit of their employer.[5] In

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1. Brennan v. Iowa, 494 F.2d 100, 107 (8th Cir. 1974) (Gibson, J., dissenting).

2. *See* Kate Andrias, *An American Approach to Social Democracy: The Forgotten Promise of the Fair Labor Standards Act*, 128 YALE L.J. 616, 642–50 (2019) (discussing the historic backdrop preceding the enacting of the FLSA).

3. *See id.*

4. Jonathon Grossman, *Fair Labor Standards Act of 1938: Maximum Struggle for a Minimum Wage*, MONTHLY LABOR REVIEW (June 1978), https://www.dol.gov/general/aboutdol/history/flsa1938; *see also* Tenn. Coal, Iron, & R. Co. v. Muscoda, 321 U.S. 590, 606 (1944) (Roberts, J., dissenting) ("The committee reports upon the bill which became the Fair Labor Standards Act make it clear that the sole purpose was . . . to require a fair day's pay for a fair day's work[.]") (footnote omitted).

5. *See* Tenn. Coal, Iron & R.R. Co. v. Muscoda Local No. 123, 321 U.S. 590, 606–07 (Roberts, J., dissenting); *see also* Barrentine v. Ark.-Best Freight Sys., Inc., 450 U.S. 728, 739 (1981) ("[T]he FLSA was designed to give specific minimum protections to individual workers and to ensure that each employee covered by the Act would receive '[a] fair day's pay for a fair day's work' and would be protected from 'the evil of "overwork"' as well as

short, the FLSA is a remedial statute enacted to set certain minimum requirements for employers regarding how they compensate their employees.[6] Unfortunately, notwithstanding this lofty purpose, employers sometimes misread—or willfully disregard—the FLSA's requirements and cheat their employees out of their earned wages.[7] Facing a recalcitrant employer, employees generally have no other choice than to pursue litigation.

As with most civil lawsuits, the vast majority of FLSA wage-and-hour claims are resolved before ever going to trial.[8] Typically, attorneys will litigate all issues up to the point of trial and then discuss a settlement if neither party prevails on a motion for summary judgment. This is often because litigants think the costs of a trial outweigh the risk of either side losing and walking away empty-handed or incurring further financial losses in the way of damages.[9]

Unlike most causes of action, the FLSA was born of a congressional desire to remedy abuses suffered by employees at the hands of employers.[10] Due to the FLSA's remedial nature, some courts—applying the reasoning articulated in the *Lynn's Food Stores*[11] decision—have determined that any settlement resolving wage-and-hour issues under the FLSA *must* be evaluated prior to execution to ensure it is "fair and reasonable."[12] However, courts requiring prior judicial review of FLSA settlements are widely inconsistent in their fairness and reasonableness analysis.[13] This piecemeal approach to settlement review and approval has resulted in inconsistency regarding judicial reasonableness and fairness analyses and, consequently, uncertainty among parties during settlement negotiations.[14] Often, a court may approve

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'underpay.'" (second alteration in original) (emphasis omitted) (quoting Overnight Motor Trans. Co. v. Missel, 316 U.S. 572, 578 (1942)).

6. *See* 29 U.S.C. § 202 (2018).

7. *See* ADMIN. OFFICE OF THE U.S. COURTS, 2018 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS 12 tbl.C–2 (2018), https://www.uscourts.gov/sites/default/files/data_tables/jb_na_distciv_0930.2018.pdf (noting that 7,600 FLSA civil lawsuits were filed in 2018).

8. *See id.* at 57 tbl.C-4 (noting that only 1.4% of private FLSA cases were resolved by trial in 2018).

9. *See, e.g.*, McDermott, Inc. v. Amclyde*,* 511 U.S. 202, 215 (1994) ("[P]ublic policy wisely encourages settlements[.]").

10. *See Barrentine*, 450 U.S. at 739.

11. Lynn's Food Stores, Inc. v. United States, 679 F.2d 1350 (11th Cir. 1982).

12. *Id*; *see infra* Part III.

13. *See infra* Part IV.A.2.

14. Keith W. Diener, *Judicial Approval of FLSA Back Wages Settlement Agreements*, 35 HOFSTRA LAB. & EMP. L.J. 25, 40–52 (2017) (examining the several different multi-factor tests used by courts across the country in evaluating the fairness and reasonableness of FLSA settlements).

of a practice that it later condemns.[15] The end result is that a judge can render a carefully negotiated settlement that benefits all parties involved a complete waste of time.[16] The defendant's legal costs multiply as the parties continue to litigate the matter, and the plaintiff's unpaid wages remain in the employer's pocket.

This note argues that such judicial paternalism born *sua sponte* runs contrary to both the statutory text and legislative goals of the FLSA. Parties should, of course, always have the opportunity to have a court evaluate a potential settlement agreement prior to the parties committing to it, but courts should not force such a review upon them. Furthermore, this note argues that courts being asked to enforce FLSA settlements that were not subject to judicial review prior to execution should adopt a specific "construe against the employer" maxim of contract interpretation.

Part II of this note will provide an overview of the FLSA, including the public policy goals it seeks to accomplish and a brief explanation of the FLSA's protections. Part III of this note will introduce the "fairness and reasonableness" standard applied by those courts requiring judicial review of all FLSA settlement agreements and explain the split among the appellate circuits, including the basis for the two approaches being employed. Specifically, it will discuss the lay of the land across the circuits and discuss the public policy and reasoning of those circuits that have explicitly adopted or declined to adopt the review requirement. Part IV of this note will argue in favor of the "No Review Required" reasoning adopted by the U.S. Court of Appeals for the Fifth Circuit. In addition, this note will offer two additional requirements necessary to balance out the "No Review Required" approach: an open-door policy allowing, but not requiring, any party to seek judicial review of a potential FLSA settlement agreement, and a "construe against the employer" maxim of contract interpretation to be used in interpreting an FLSA settlement agreement.[17]

15. *Compare* White v. Gregory Kistler Treatment Ctr., Inc., No. 2:16-CV-02259, 2018 U.S. Dist. LEXIS 204557, at *4 (W.D. Ark. Dec. 4, 2018) (approving settlement that reduced liquidated damages), *with* Kappelmeier v. Wil-Shar, Inc., No. 5:18-CV-05181, 2019 U.S. Dist. LEXIS 111297, at *3 (W.D. Ark. July 3, 2019) (denying approval of FLSA settlement, stating that a liquidated damages award was mandatory).

16. *See, e.g.*, Bouzzi v. F&J Pine Rest., LLC, 841 F. Supp. 2d 635, 640–42 (E.D.N.Y. 2012) (refusing to allow the filing of an FLSA settlement under seal, which resulted in the settlement no longer being acceptable to the parties because confidentiality was a term the employer required as a condition of settling the matter).

17. *See infra* Part IV.

II. BACKGROUND

In the wake of the Great Depression, Congress introduced several statutes colloquially referred to as the "New Deal."[18] One of these statutes was the Fair Labor Standards Act of 1938.[19] During the decades leading up to the FLSA's enactment, employees regularly worked excessive hours for wages far below the level required to sustain a respectable standard of living.[20] Furthermore, companies gained an unfair competitive advantage in the burgeoning national marketplace by manufacturing goods in states with no minimum wage laws for sale in states with their own minimum hourly wages.[21] Congress addressed these issues through the minimum hourly wage and overtime requirements in the FLSA.[22] The FLSA also expressly disallows employees from bargaining away their rights. For example, an employer may not hire an employee at lower than the minimum wage, even if the employee were to agree to the term.[23] The FLSA allows for exemptions to its terms in specified circumstances,[24] but the risk lies entirely with the employer if it mistakenly classifies an employee as exempt.[25]

As with several other laws bestowing additional rights onto a large swath of the American citizenry, the FLSA expressly allows for private lawsuits to enforce its requirements.[26] The FLSA promotes enforcement of wage-and-hour rights by allowing a prevailing plaintiff to recover reasonable attorneys' fees, and costs as part of his or her judgment.[27] Furthermore, a prevailing employee is allowed double his or her unpaid wages in the form of liquidated damages.[28] By both allowing for recovery of attorneys' fees and inflating any judgment through liquidated damages, Congress encour-

18. *See* Andrew C. Kuettel, *A Call to Congress to Add a "Knowing and Voluntary" Waiver Provision to the Fair Labor Standards Act to Enable Private Resolution of Wage Disputes*, 30 A.B.A. J. LAB. & EMP. L. 409, 409–10 (2015) (discussing the historic backdrop behind the FLSA being enacted); Alex Lau, Note, *The FLSA Permission Slip: Determining Whether FLSA Settlements and Voluntary Dismissals Require Approval*, 86 FORDHAM L. REV. 227, 232–33 (2017) (same).

19. *See* Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 706–07 (1945) (examining the legislative history of the FLSA).

20. *See id.*

21. *See id.*; *see also* 29 U.S.C. § 202(a).

22. 29 U.S.C. § 202(b).

23. *See id.* § 206.

24. *See id.* § 213.

25. *See id.* § 216.

26. *Id.* § 216(b); *see also* Barrentine v. Ark.-Best Freight Sys., 450 U.S. 728, 740 n.16 (1981); *Brooklyn Sav. Bank*, 324 U.S. at 709.

27. 29 U.S.C. § 216(b).

28. *Id.* § 216(b); D.A. Schulte, Inc. v. Gangi, 328 U.S. 108, 110 (1946).

aged private attorneys to litigate wage-and-hour cases on behalf of wronged employees.[29]

III. The Circuit Split

Settlement of legal disputes outside the courthouse is universally encouraged.[30] Settlements and other alternative dispute resolution options minimize the strain on an already overworked judiciary, allow compromises unavailable in the all-or-nothing trial verdict, and minimize the legal costs both parties must incur to litigate their dispute. Settlement agreements are generally enforced through contract law, like any other binding agreement.[31] If the terms of a negotiated settlement agreement are against public policy, a court may invalidate a clause or the entire agreement.[32] Based on a strained interpretation of the FLSA and landmark decisions from the Supreme Court of the United States, however, some courts of appeals require prior judicial review of a settlement under the FLSA.[33] A settlement agreement that has not been reviewed and approved by a court is treated as void in those circuits requiring such a review.[34]

The U.S. Court of Appeals for the Fifth Circuit expressly does not require review so long as certain thresholds are met.[35] Most circuits are undecided.[36] District courts in those circuits often require judicial review of set-

29. *Barrentine*, 450 U.S. at 740 n.16.

30. Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932, 1968 (2015) (Thomas, J., dissenting) ("[T]he law has long encouraged and permitted private settlement of disputes . . . .").

31. *See, e.g.*, Samra v. Shaheen Bus. & Inv. Grp., Inc., 355 F. Supp. 2d 483, 495–96 (D.D.C. 2005) (applying contract law to settlement agreement between the parties).

32. *Id.* at 508; *see also* 15 Corbin on Contracts § 79.1 (2020) (discussing the impact of public policy on contract enforceability).

33. *See* Cheeks v. Freeport Pancake House, Inc., 796 F.3d 199, 206 (2d Cir. 2015); Lynn's Food Stores, Inc. v. United States, 679 F.2d 1350 (11th Cir. 1982).

34. *See Cheeks*, 796 F.3d at 206; *Lynn's Food Stores, Inc.*, 679 F.2d at 1351.

35. Martin v. Spring Break '83 Prods., L.L.C., 688 F.3d 247, 255 (5th Cir. 2012) (allowing for settlements of FLSA claims without judicial review when a bona fide dispute exists and the employee is represented by an attorney).

36. *See, e.g.*, Barbee v. Big River Steel, LLC, 927 F.3d 1024, 1026–27 (8th Cir. 2019) (acknowledging circuit split but declining to decide the issue); O'Connor v. United States, 308 F.3d 1233, 1240–44 (Fed. Cir. 2002) (acknowledging that some courts require review prior to enforceability but finding the reasoning inapplicable to public employment collective bargaining agreements); Donaldson v. MBR Cent. Ill. Pizza, LLC, No. 18-cv-3048, 2019 U.S. Dist. LEXIS 158121 (C.D. Ill. Sept. 16, 2019) (reviewing FLSA settlement in the Seventh Circuit); Johnson v. Helion Techs., Inc., Civil Action No. DKC 18-3276, 2019 U.S. Dist. LEXIS 155920 (D. Md. Sept. 12, 2019) (noting lack of guidance from the Fourth Circuit on FLSA settlement review factors and reviewing acceptance of offer of judgment in an FLSA case); Heath v. Google LLC, Case No. 15-cv-01824-BLF, 2019 U.S. Dist. LEXIS 138526, at *9 (N.D. Cal. Aug. 15, 2019) (noting lack of guidance from Ninth Circuit on

tlement agreements to protect the parties from the settlements being found unenforceable if their corresponding court of appeals decides that judicial review is a requirement under the FLSA.[37]

A. Most Courts Require a "Fairness and Reasonableness" Review for an FLSA Settlement Agreement to Be Enforceable

The review employed by district and appellate courts in evaluating an FLSA settlement agreement is a two-step test.[38] Step one is determining whether a "bona fide dispute" exists, and step two is evaluating the terms of the settlement agreement for "fair[ness] and reasonable[ness]."[39]

A bona fide dispute is any legitimate disagreement between the parties regarding whether the employer violated the FLSA.[40] Typical examples of a bona fide dispute are whether an employee worked unpaid hours, whether a worker classified as an independent contractor or volunteer was actually an employee as defined in the FLSA, or whether an employer even falls within the FLSA's authority.[41] A bona fide dispute does not exist when an employer simply seeks a general release of any potential claims, including FLSA claims.[42]

The fairness and reasonableness review district courts use at step two in evaluating FLSA settlement agreements varies so widely throughout the

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FLSA settlement approval); Batista v. Tremont Enters., CASE NO. 1:19CV361, 2019 U.S. Dist. LEXIS 121658 (N.D. Ohio July 22, 2019) (reviewing FLSA settlement in the Sixth Circuit); Wilson v. DFL Pizza, LLC, Civil Action No. 18-cv-00109-RM-MEH, 2019 U.S. Dist. LEXIS 114039, at *3–4, *3 n.2 (D. Colo. July 10, 2019) (noting that the Tenth Circuit has not yet ruled on whether FLSA settlements require judicial approval but reviewing FLSA settlement); Binienda v. Atwells Realty Corp., C.A. No. 15-253 WES, 2018 U.S. Dist. LEXIS 203019 (D.R.I. Nov. 30, 2018) (reviewing FLSA settlement in the First Circuit); Carrillo v. Dandan Inc., 51 F. Supp. 3d 124, 130–31 (D.D.C. 2014) (acknowledging the circuit split but declining to decide the issue).

37. *See, e.g.*, Pendergrass v. Bi-State Utils. Co., Case No. 4:18-CV-01092-NCC, 2019 U.S. Dist. LEXIS 129143, at *2–3 (E.D. Mo. Aug. 2, 2019) (acknowledging that the circuits are split regarding pre-approval of FLSA settlements but opting to review to protect the parties if the Eighth Circuit later rules in favor of pre-approval).

38. *See Lynn's Food Stores*, 679 F.2d. at 1355; *see also* Shepardson v. Midway Indus., CASE NO. 3:18-CV-3105, 2019 U.S. Dist. LEXIS 111839, at *4–5 (W.D. Ark. July 1, 2019) (discussing the two-part test).

39. *Shepardson*, 2019 U.S. Dist. LEXIS 111839, at *5.

40. Stainbrook v. Minn. Dep't of Pub. Safety, 239 F. Supp. 3d 1123, 1126 (D. Minn. 2017) (citing D.A. Schulte, Inc. v. Gangi, 328 U.S. 108, 115 (1946)) ("A settlement addresses a bona fide dispute when it reflects a reasonable compromise over issues that are actually in dispute.").

41. *See, e.g.*, Woll v. West Publ'g Corp., File No. 19-CV-295-KMM, 2019 U.S. Dist. LEXIS 143420, at *2–3 (D. Minn. Aug. 23, 2019) (pointing out three issues that were "bona fide disputes," including the number of overtime hours worked).

42. *See* Bodle v. TXL Mortg. Corp., 788 F.3d 159, 165 (5th Cir. 2015).

country that attempting to catalog the approaches employed would be a Herculean task and is beyond the scope of this note.[43] The factors employed can vary from district to district within a circuit,[44] from judge to judge within a district,[45] and even from decision to decision by a single judge.[46] With that said, there are some factors that are judges commonly include in their reviews.

An employee's award of attorneys' fees, costs, and expenses is often the most common and contentious factor courts evaluate.[47] District court judges meticulously scrutinize the billing records, hourly billing rate, and overall fee award in comparison to damages awarded when evaluating a settlement's award of attorneys' fees.[48] The judge may deny approval of the settlement altogether or arbitrarily reduce the attorneys' fees awarded then approve the settlement.[49]

Another factor often evaluated is whether negotiations between the parties occurred at "arms-length."[50] Judges often fear that an employee's attorney and the employer will collude to ensure the lawyers are handsomely

43. *See* Diener, *supra* note 14, at 63–64 (discussing the impact of inconsistent standards on practitioners seeking settlement of FLSA disputes).

44. *Compare* Kappelmeier v. Wil-Shar, Inc., No. 5:18-CV-05181, 2019 U.S. Dist. LEXIS 111297, at *2–3 (listing factors used in evaluating FLSA settlement agreements), *with* McCallie v. Transplace Stuttgart, LP, No. 4:19-cv-503-DPM, 2019 U.S. Dist. LEXIS 165250 (E.D. Ark. Sept. 26, 2019) (providing no reasoning for finding the FLSA settlement was "fair, reasonable, and adequate").

45. *Compare* Green v. West Foods, Inc., Case No. 2:18-cv-2170, 2019 U.S. Dist. LEXIS 179765 (W.D. Ark. Oct. 17, 2019) (citing no authority in evaluating FLSA settlement agreement), *with* Bates v. Spa City Steaks, Inc., Civil No. 6:18-cv-6019, 2019 U.S. Dist. LEXIS 183342, at *3 n.2 (W.D. Ark. Oct. 23, 2019) (citing five factors the court relied upon in evaluating an FLSA settlement agreement).

46. *Compare* Hutchinson v. Equilibrium Homes of St. Louis, LLC, Case No. 4:18-cv-02127-JAR, 2019 U.S. Dist. LEXIS 143358 (E.D. Mo. Aug. 23, 2019) (providing no standard for evaluating whether FLSA settlement agreement was fair and reasonable), *with* Kumar v. Tech Mahindra (Ams.) Inc., Case No. 4:16-cv-00905-JAR, 2019 U.S. Dist. LEXIS 168335, at *3 (E.D. Mo. Sept. 30, 2019) (providing explicit factors used when evaluating FLSA settlement agreements).

47. *See* Melgar v. OK Foods, 902 F.3d. 775, 779–80 (8th Cir. 2018) (reversing a district court decision to conduct a "line-item veto" of attorneys' fees in the name of fairness and reasonableness when evaluating an FLSA settlement agreement).

48. *See, e.g.*, Lopez v. Nights of Cabiria, LLC, 96 F. Supp. 3d 170, 181–82 (S.D.N.Y. 2015) (denying approval of an FLSA settlement because, among other problems, the plaintiff's attorneys did not provide detailed billing records for each attorney, the hours worked, and the nature of work performed).

49. *See, e.g.*, Johnson v. Thomson Reuters, Case No. 18-CV-0070 (PJS/HB), 2019 U.S. Dist. LEXIS 44397, at *15–16 (D. Minn. Mar. 19, 2019) (voicing skepticism as to the reasonableness of the plaintiff's attorneys' fees).

50. *See, e.g.*, Binissia v. ABM Indus., Case No. 13 cv 1230, 2017 U.S. Dist. LEXIS 153686, at *10–22 (N.D. Ill. Sept. 21, 2017) (evaluating whether an FLSA settlement disproportionately benefits the plaintiff's attorney at the expense of the plaintiffs).

paid while the employee is robbed of his or her wages.[51] Some judges may insist that parties separately negotiate liability and damages before negotiating attorneys' fees with little regard to the practical difficulty that separation entails.[52]

There is a grab-bag of other factors looked at by various courts. Some will not approve a settlement if it contains a confidentiality clause.[53] Other judges may deny approval if the settlement releases non-FLSA claims[54] or allows a reversion of unclaimed funds to the employer as being a deal-breaker.[55]

The common theme is that district courts take a paternalistic view regarding disputes between employers and employees when the FLSA is involved.[56] Judges will evaluate a carefully negotiated settlement agreement representing several hours of back-and-forth bargaining and deny approval because it includes an objectional clause or because the employee's attorneys' fees are too high. The end result is that the ease of settling an FLSA claim outside of the courtroom is a roll of the dice determined by which judge a plaintiff is assigned after filing a complaint within the district.

B. Courts Have, Until Recently, Required a "Fairness and Reasonableness" Analysis for All FLSA Settlement Agreements

1. *The "Fairness and Reasonableness" Standard Originated in the Eleventh Circuit in* Lynn's Food Stores, Inc. v. United States

The practice of requiring judicial review of FLSA settlements began with the U.S. Court of Appeals for the Eleventh Circuit in *Lynn's Food*

51. *See* Christopher Theodorou, Note, *A Facial Reconstruction of Settlements: Analyzing the* Cheeks *Decision on FLSA Settlements*, 35 HOFSTRA LAB. & EMP. L.J. 209, 233 (2017) ("The court's true fear reside[s] in the abuse of the employee, not by his own employer, but by his attorney.").

52. *See, e.g.*, Gamble v. Boyd Gaming Corp., Case No. 2:13-cv-01009-JCM-PAL, 2015 U.S. Dist. LEXIS 107279, at *28–31 (D. Nev. Aug. 13, 2015) (rejecting an FLSA settlement agreement in part because the motion did not specify whether the plaintiff's attorneys' fees were negotiated separately from the settlement award to the plaintiffs).

53. Crabtree v. Volkert, Inc., CIVIL ACTION 11-0529-WS-B, 2013 U.S. Dist. LEXIS 20543, at *12–13 (S.D. Ala. Feb. 14, 2013) (discussing the inclusion of confidentiality clauses in FLSA settlement agreements).

54. *See, e.g.*, Moreno v. Regions Bank, 729 F. Supp. 2d 1346 (M.D. Fla. 2010) (rejecting an FLSA settlement agreement because it included a general release of potential non-FLSA claims).

55. *See, e.g.*, Otey v. Crowdflower, Inc., Case No. 12-cv-05524-JST, 2015 U.S. Dist. LEXIS 86712, at *5, *18–19 (N.D. Cal. July 2, 2015) (approving an FLSA settlement agreement only after the removal of a reversion clause).

56. Diener, *supra* note 14, at 70–73 (arguing that judicial review is necessary because "[t]he FLSA is inherently paternalistic.").

Stores v. United States.[57] There, the DOL began investigating the plaintiff-employer and determined that the employer owed some employees back wages under the FLSA.[58] When settlement negotiations between the DOL and the employer broke down, the employer settled the matter directly with the affected employees.[59] In the course of doing so, the employer used its significant economic power to leverage a beneficial settlement that included, among several concessions, a complete waiver of back wages by some employees.[60] The employer then filed a lawsuit against the DOL for a declaratory judgment regarding the validity of the settlement.[61] The district court dismissed the case, holding that the action violated the FLSA.[62]

On appeal, the Eleventh Circuit affirmed. Relying heavily on its interpretation of two cases from the Supreme Court of the United States,[63] the Eleventh Circuit held that the FLSA required judicial approval of any settlement agreement negotiated between employer and employee to ensure it was a fair and reasonable resolution of one or more bona fide disputes.[64]

In the following decades, district courts throughout the nation adopted the *Lynn's Food Stores* approach with little to no input from the courts of appeals.[65] District courts essentially had unchecked discretion to develop their own tests, factors, and thresholds for determining whether an FLSA settlement was "fair" and "reasonable."[66] There was, however, no binding precedent *requiring* district courts to apply the *Lynn's Food Stores* two-part test outside of the Eleventh Circuit.

2. *The Fifth Circuit Rejects the "Fairness and Reasonableness" Standard in* Martin v. Spring Break '83 Productions, LLC

Thirty years after the *Lynn's Food Stores* decision set the standard across the nation requiring judicial approval for FLSA settlements, the United States Court of Appeals for the Fifth Circuit moved away from requiring

57. 679 F.2d 1350 (11th Cir. 1982); Lau, *supra* note 11, at 244–45 (discussing the rise of the *Lynn's Food Stores* standard).

58. *Lynn's Food Stores*, 679 F.2d at 1352.

59. *Id.*

60. *Id.* at 1354–55.

61. *Id.* at 1351–52.

62. *Id.* at 1352.

63. *See infra* Part IV.A for discussion of *Lynn's Food Stores* reasoning. The cases were *D.A. Schulte, Inc. v. Gangi*, 328 U.S. 108 (1946), and *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697 (1945).

64. *Lynn's Food Stores*, 679. F.2d. at 1355.

65. *See* Lau, *supra* note 18, at 244 (describing the *Lynn's Food Stores* approach as the majority approach throughout the country).

66. *See* Diener, *supra* note 14, at 40–46 (attempting to outline the three major approaches devised by district courts in the decades following the *Lynn's Food Store* decision).

a judicial stamp of approval on settlements agreements.[67] In *Martin*, several employees working on a film crew alleged that their employer failed to pay them each for all of their hours worked.[68] Because the employees were part of a union, their union representatives negotiated a settlement with the employer.[69]

Unhappy with the terms of the settlement, the employees filed a lawsuit against their employer.[70] The district court, noting that there was no Fifth Circuit authority requiring it to void an FLSA settlement agreement lacking judicial approval, granted summary judgment for the employer.[71]

On appeal, the Fifth Circuit affirmed.[72] The employees argued that the reasoning from *Lynn's Food Stores* applied and that any settlement agreement of FLSA claims between employee and employer must be judicially approved to be enforceable.[73] The Fifth Circuit rejected this argument, distinguishing *Lynn's Food Stores*.[74] The Fifth Circuit reasoned that unlike the employees in *Lynn's Food Stores*, who had no legal counsel and were unaware that the DOL determined they were owed back wages, the employees in *Martin* knew their rights under the FLSA and retained counsel long before the parties negotiated and executed the settlement agreement.[75] The court held that FLSA settlements do not require prior judicial approval to be enforceable so long as 1) a bona fide dispute exists, and 2) the negotiations occur after the employee is represented by counsel.[76]

3. *The Second Circuit Adopts the "Fairness and Reasonableness" Standard in* Cheeks v. Freeport Pancake House, Inc.

Three years after *Martin*, the United States Court of Appeals for the Second Circuit) confronted a case implicating the newly-emerged circuit split between the *Martin* and *Lynn's Food Stores* standards.[77] In *Cheeks v. Freeport Pancake House, Inc.*, Cheeks sued his employer to recover unpaid

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67. Martin v. Spring Break '83 Prods., LLC, 688 F.3d. 247 (5th Cir. 2012); *see also* Kuettel, *supra* note 18, at 415–17 (discussing the cases within the Fifth Circuit leading up to the *Martin* decision).
68. *Martin*, 688 F.3d at 249.
69. *Id.*
70. *Id.* at 249–50.
71. *Id.* at 250, 254–55.
72. *Id.* at 257.
73. *Id.* at 254, 256 n.10.
74. *Martin*, 688 F.3d at 256 n.10.
75. *Id.*
76. *See id.* at 257.
77. Cheeks v. Freeport Pancake House, Inc., 796 F.3d. 199, 201–04 (2d Cir. 2015). *See generally* Theodorou, *supra* note 51 (discussing the impact that the *Cheeks* decision had on FLSA settlement agreements).

overtime wages, liquidated damages, and attorneys' fees under the FLSA.[78] The parties then reached a settlement agreement and moved to have the lawsuit dismissed.[79] The district court denied their request, holding that Cheeks "could not agree" to a settlement agreement not submitted to the court for approval.[80] The district court ordered the parties to submit the settlement to the court for review as to whether it was "fair and reasonable"; the parties then moved to certify the question to the U.S. Court of Appeals for the Second Circuit as an interlocutory appeal. [81]

On appeal, the Second Circuit weighed the *Martin* and *Lynn's Food Stores* approaches in deciding whether prior judicial approval of an FLSA settlement agreement was required prior to dismissal.[82] Ultimately, the court found the standard adopted by the Eleventh Circuit more persuasive and held that FLSA settlements require a judicial reasonableness-and-fairness review prior to a dismissal with prejudice.[83]

IV. ARGUMENT

This note takes the position that the Fifth Circuit's standard articulated in *Martin* is the better approach to FLSA settlement agreements for three reasons. First, the reasoning employed by the *Lynn's Food Stores* court was fundamentally flawed.[84] Second, the "fair and reasonable" standard has yet to coalesce into a uniform and predictable standard.[85] Third, the "No Review Required" approach furthers the goals of the FLSA while allowing parties the freedom to resolve their issues outside of the watchful eye of district courts.[86] The *Lochner*-esque decision in *Lynn's Food Stores* and its accompanying "fairness and reasonableness" standard should be laid to rest.[87]

In its place, the standard should be that a settlement agreement that resolves a bona fide dispute between parties being represented by attorneys should be enforceable. This note argues, however, that two additional requirements should augment the Fifth Circuit's standard: the freedom of either party to request review of a settlement agreement prior to its execution

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78. 796 F.3d at 200.
79. *Id.*
80. *Id.*
81. *Id.* at 200–01.
82. *Id.* at 203–04.
83. *Id.* at 206.
84. *See* Diener, *supra* note 14, at 66–69 (noting the lack of textual support for the judicial review requirement within the text of the FLSA).
85. *Id.* at 52.
86. *See id.* at 66–69.
87. *See id.* at 65 n.244 (invoking Lochner v. New York, 198 U.S. 45 (1905), in its discussion of the lack of textual support for the *Lynn's Food Stores* judicial review requirement).

and the adoption of a "construe against the employer" doctrine of contract interpretation when a court is asked to enforce an FLSA settlement agreement.

A. The *Martin* Standard is Superior to *Lynn's Food Stores*

Congress expressly included the right for employees to pursue their minimum wage and overtime claims through private action under the FLSA.[88] In doing so, Congress must have foreseen that parties would often reach a settlement rather than risk a lengthy and expensive trial.[89] And yet there is no textual requirement within the FLSA itself requiring a court to evaluate a settlement agreement if an employer is to be able to enforce it later.[90] The only conclusion available is that Congress did not intend such a requirement.

This is the critical failure of the Eleventh Circuit's reasoning in *Lynn's Food Stores*. It is a common idiom that "hard cases make bad law."[91] In *Lynn's Food Stores*, the court faced egregious actions by an employer in procuring a settlement from employees who lacked legal counsel or any real understanding of their situation.[92] In response, the Court reasoned that such situations could only be prevented in the future by requiring prior judicial review of all FLSA settlements.[93] In protecting future employees from similar acts, the Court effectively amended the statute by creating a new requirements with no textual basis within the FLSA itself.[94]

In *Lynn's Food Stores*, the Eleventh Circuit relied heavily on the Supreme Court's decision in *D.A. Schulte, Inc. v. Gangi*[95] in creating its new law.[96] There, the Supreme Court held that an employee could not waive his or her right to liquidated damages in a subsequent agreement.[97] Such a waiver would violate the public policy as enacted in the FLSA.[98] The Court

88. 29 U.S.C. § 216(b) (2018).

89. *See* Kuettel, *supra* note 18, at 419–20 (comparing the FLSA to other employment law causes of action which do not require judicial approval).

90. *See* Diener, *supra* note 14, at 66–69.

91. *See* United States v. Rabinowitz, 339 U.S. 56, 68 (1950) (Frankfurter, J., dissenting) ("The old saw that hard cases make bad law has its basis in experience.").

92. Lynn's Food Stores v. United States, 679 F.2d 1350, 1352–54 (11th Cir. 1982); *see supra* Part III.B.1.

93. *Lynn's Food Stores*, 679 F.2d at 1354–55.

94. *See supra* Part III.A.

95. 328 U.S. 108 (1946).

96. *Lynn's Food Stores*, 679 F.2d at 1353–54.

97. *D.A. Schulte*, 328 U.S. at 114.

98. *Id.* at 116.

compared a waiver of liquidated damages to the waiver of one's right under the FLSA to overtime compensation or a minimum hourly wage.[99]

The Eleventh Circuit interpreted this decision broadly and reasoned that the FLSA does not allow employees to voluntarily waive any of their rights to minimum wage and overtime payments.[100] To reconcile its interpretation of the FLSA with the goal of encouraging the settlement of lawsuits rather than through litigation, it created an entirely new requirement for employees seeking to settle their disputes.[101] To prevent the Lynn's Food Stores of the world from wringing out settlements from their employees, the Eleventh Circuit decided to act as a super-legislature and rule that all employers were potentially as bad and could not be trusted.[102]

Between *Lynn's Food Stores* and *Martin*, courts across the nation applied the Eleventh Circuit's reasoning and required a fairness-and-reasonableness evaluation of all FLSA settlements.[103] In that time, no national standard emerged regarding what is "fair" and "reasonable" in an FLSA settlement agreement.[104] The circuits do not agree on which factors courts should evaluate.[105] Districts within an appellate circuit do not have any unified standards for evaluation.[106] Even judges within a district vary as to what will or will not render a settlement unfair or unreasonable.[107]

The only reasonable conclusion is that the standard itself is unworkable. Federal courts have been unable to apply the *Lynn's Food Stores* in a manner that protects employees, encourages settlement of employees' claims, and allows the parties to predict whether or not their hours of negotiations will amount to an expensive waste of time.[108] If it were going to

99. *Id.* at 115.

100. *Lynn's Food Stores*, 679 F.2d at 1353–55.

101. *Id.* at 1354.

102. *See* Diener, *supra* note 14, at 29–31 (discussing the egregious conduct of the defendant in *Lynn's Food Stores* and how it influenced the judicial review requirement).

103. *Id.* at 32–38 (discussing the near-uniform adoption of *Lynn's Food Stores* across the nation prior to 2012, when the Fifth Circuit split in *Martin v. Spring Break '83 Prods*).

104. *Id.* at 40–52 (discussing the myriad of approaches in applying the "fairness and reasonableness" test to FLSA settlement agreements submitted to district courts for approval).

105. *Id.*

106. *Id.*; *see also supra* Part III.A (discussing the inconsistent application of tests across circuits, across districts within a circuit, and across judges within a district).

107. Diener, *supra* note 14, at 40–52.

108. *Id.* at 52 (summarizing the divergent approaches to fairness and reasonableness evaluations as having "led to inconsistencies in the application of FLSA provisions, diminishing predictability as to the potential for enforcement of FLSA settlement agreements, and, disharmony in the application of the FLSA across the United States"); *see also* Picerni v. Bilingual Seit & Preschool, Inc., 925 F. Supp. 2d 368, 376–77 (E.D.N.Y. 2013) (discussing the practical ramifications of hindering private settlement of FLSA disputes).

happen, it would have happened in the forty-odd years since the *Lynn's Food Stores* decision.

Since diverging from the *Lynn's Food Stores* approach, the standard articulated in *Martin* has proved to be a workable standard in evaluating FLSA settlements.[109] Parties are now entering into settlement agreements away from the watchful eye of the court. Employers seeking to enforce their agreements still run into public policy issues, such as whether confidentiality clauses are against public policy[110] and the effect that arbitration has on substantive FLSA rights.[111] When parties voluntarily ask a court to review their settlement agreement, the district court continues to do so.[112] Dockets within the Fifth Circuit are no longer clogged with lawsuits going through several rounds of renegotiations simply because a settlement agreement includes a term which a district judge finds objectionable such as, for example, the enhancement fees given to key employees who came forward or the amount in attorneys' fees awarded to plaintiffs' counsel are too high.[113]

B. The *Martin* Standard Should Be Augmented with Two Pro-Employee Protections

The Fifth Circuit's approach is superior to the *Lynn's Food Stores* standard, but this note argues that the pendulum swings a little too far in favor of the employer as articulated in *Martin*.[114] Courts should adopt two additional protections for employees: (1) the parties should be able to voluntarily submit a proposed settlement agreement for evaluation by a district court, and (2) courts should adopt a "construe against the employer" maxim of contractual interpretation when one party seeks to enforce a private FLSA settlement agreement.

109. *See, e.g.*, Cunningham v. Kitchen Collection, LLC, Civil Action No.: 4:17-cv-770-ALM-KPJ, 2019 U.S. Dist. LEXIS 111894, at *3 (E.D. Tex. June 25, 2019).

110. *See* Elizabeth Wilkins, *Silent Workers, Disappearing Rights: Confidential Settlements and the Fair Labor Standards Act*, 34 BERKELEY J. EMP. & LAB. L. 109 (2013) (discussing the public policy against the FLSA being stymied by allowing employers to include confidentiality clauses in settlement agreements).

111. *See* Hope Brinn, Note, *Improving Employer Accountability in a World of Private Dispute Resolution*, 118 MICH. L. REV. 285 (2019) (discussing the unique challenges arbitration and alternative dispute resolution pose in resolving employment discrimination claims).

112. *See infra* Part IV.B.1.

113. *See* Kuettel, *supra* note 18, at 422–26 (discussing the advantages reaped when employees and employers can privately resolve FLSA claims).

114. *See infra* Part IV.B.2.

1. *Parties Should Be Free to Seek Judicial Evaluation of a Proposed Settlement Agreement*

Due to the unique nature of the public policy considerations involved in any FLSA dispute, there will be limitations on what terms may and may not be enforceable in a private settlement.[115] Some courts have held that confidentiality clauses are impermissible in FLSA settlements.[116] Others have held that any clauses allowing for the reversion of unclaimed funds to an employer are against public policy.[117] These uncertainties may result in employees bargaining for the exclusion of terms that simply would not be enforceable if allowed to remain.

Because of this possibility, courts should allow parties to submit their private settlements for review as they have done under the *Lynn's Food Stores* standard for the past thirty years. District courts within the Fifth Circuit have already allowed parties to do so since the *Martin* decision.[118] Partly, this is due to the uncertainty among the circuits as to whether judicial review of all FLSA settlements is required.[119] This note simply argues that courts should adopt a uniform standard of allowing, but not requiring, any party negotiating an FLSA settlement to submit settlements for review prior to execution to avoid the district-to-district variance present among the decisions applying the *Lynn's Food Stores* standard.[120]

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115. *See generally* Barrentine v. Ark.-Best Freight Sys., 450 U.S. 728, 737 (1981); D.A. Schulte, Inc. v. Gangi, 328 U.S. 108, 110 (1946); Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 709–10 (1945).

116. *See supra* Part II.A (discussing varied holdings on unique FLSA clauses across the nation).

117. *See supra* Part II.A.

118. *See, e.g.*, Zamalloa v. Thompson Landscape Servs., Case No. 4:17-cv-00519-ALM-KPJ, 2018 U.S. Dist. LEXIS 155472, at *1–2 (E.D. Tex. Aug. 27, 2018) (discussing the uncertainty that the Fifth Circuit's split has created); Espinosa v. Stevens Tanker Div., LLC, Civil Action No. SA-15-CV-879-XR, 2018 U.S. Dist. LEXIS 228333, at *2–3 (W.D. Tex. Jan. 19, 2018).

119. *See, e.g.*, Hamilton v. Enersafe, Inc., Civil Action No. 5:17-CV-965-JKP, 2019 U.S. Dist. LEXIS 184036, at *8–9 (W.D. Tex. Oct. 23, 2019) (discussing the lack of a requirement of judicial approval of a settlement but reviewing settlement at the request of the parties).

120. *See supra* Part II.

2. *When Reviewing Private FLSA Settlement Agreements, Courts Should Apply a "Construe Against the Employer" Maxim of Contract Interpretation When a Party Later Attempts to Enforce Its Terms*

Settlement agreements are interpreted and enforced under contract law.[121] As first-year law students learn, courts employ several maxims of contract interpretation when one party seeks to enforce its terms against another and a term or clause is susceptible to two or more meanings offered by the parties.[122] One such maxim is "construe against the drafter."[123] If a court determines that an ambiguity exists within a contract, a factfinder faced with two equally plausible interpretations must rule in favor of the non-drafting party.[124] *Contra proferentem* acts as a tiebreaker because the court must adopt one party's interpretation in the end.[125] The reasoning is that the party who drafted the contract had control over the process and could have eliminated the ambiguity.[126]

The FLSA's requirements and penalties apply exclusively to employers.[127] Employees face no risk if they voluntarily work for below minimum wage or waive their right to overtime compensation.[128] Such an employee could later sue its employer under the FLSA without worry.[129] As a matter of public policy, then, any risk associated with non-enforceability of a private settlement agreement should similarly fall exclusively on employers.

When a party seeks to enforce an otherwise valid private settlement agreement and an ambiguity exists, "construe against the employer" should effectively replace "construe against the drafter" as the tie-breaking maxim of contract interpretation regardless of who actually drafted the settlement agreement. *Contra dominus* would ensure the FLSA's public policy determination that the employer bears the risk of failing to pay its employees correctly would be carried forth from the beginning of the employment rela-

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121. *See, e.g.*, Samra v. Shaheen Bus. & Inv. Grp., Inc., 355 F. Supp. 2d 483, 493 (D.D.C. 2005) (applying contract law to settlement agreement between the parties).

122. *See generally* 9 JAY E. GRENIG, LABOR AND EMPLOYMENT LAW § 226.02 (2019) (generally discussing the various maxims of contract interpretation).

123. RESTATEMENT (SECOND) OF CONTRACTS § 206 (AM. LAW. INST. 1981).

124. *Id.*

125. *See* 5 CORBIN ON CONTRACTS § 24.27 (2019).

126. *Id.*

127. *See generally* 29 U.S.C. § 216 (2018) (containing no provisions under the FLSA for sanctions, fines, penalties, or other negative effects levied against employees).

128. *See, e.g.*, *In re* Food Lion Effective Scheduling Litig., 861 F. Supp. 1263, 1277 (E.D.N.C. 1994) (holding employer accountable for not preventing employees from working off-the-clock).

129. *See id.*

tionship all the way through litigation and eventual enforcement of a settlement agreement.

V. CONCLUSION

The fundamental goals of an employee wishing to settle an FLSA claim against an employer are to mitigate the risk of continued litigation, to minimize the mounting legal fees incurred by all involved, and to get stolen wages into the employee's pocket where they rightfully belong. Requiring prior judicial review of all FLSA settlements runs contrary to these goals and those articulated by Congress in enacting the FLSA. The FLSA does not explicitly require judicial review of private settlement agreements to be enforceable, and courts should not judicially amend the FLSA to require such a review, as articulated in *Lynn's Food Stores*.

Courts should adopt the Fifth Circuit's reasoning in *Martin v. Spring Break '83 Productions, LLC*. The Martin standard should be paired with the express allowance for either party to obtain prior approval of a settlement agreement and the adoption of a "construe against the employer" maxim of contractual interpretation when evaluating an unapproved FLSA settlement agreement that was not previously subject to judicial evaluation. Under this framework, employees will be able to resolve their claims without needlessly crowding judicial dockets, obtain their earned wages more quickly, and, most importantly, allow parties to amicably resolve their differences without costly litigation.

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