

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34

In the
United States Court of Appeals
For the Second Circuit

AUGUST TERM, 2018

ARGUED: OCTOBER 10, 2018

DECIDED: DECEMBER 6, 2019

No. 17-3388-cv

MEI XING YU, individual, on behalf of all other employees similarly
situated,
Plaintiff-Appellee,

v.

HASAKI RESTAURANT, INC., SHUJI YAGI, KUNITSUGA NAKATA,
HASHIMOTO GEN,
Defendants-Appellants,

JANE DOE AND JOHN DOE #1-10,
Defendants.

Appeal from the United States District Court
for the Southern District of New York.
No. 16 Civ. 6094 – Jesse M. Furman, *Judge.*

Before: WALKER, CALABRESI, AND LIVINGSTON, *Circuit Judges.*

1
2 Mei Xing Yu, an employee of Hasaki Restaurant, filed a claim
3 alleging violations of the Fair Labor Standards Act's ("FLSA" or the
4 "Act") overtime provisions. Soon thereafter, Hasaki Restaurant sent
5 Mei Xing Yu an offer of judgment, pursuant to Federal Rule of Civil
6 Procedure 68(a), for \$20,000 plus reasonable attorneys' fees. After Mei
7 Xing Yu accepted the offer, the parties filed the offer and notice of
8 acceptance with the district court. Before the Clerk of the Court could
9 enter the judgment, however, the district court *sua sponte* ordered the
10 parties to submit the settlement agreement to the court for a fairness
11 review and judicial approval, which the district court believed was
12 required under the Second Circuit's decision in *Cheeks v. Freeport*
13 *Pancake House, Inc.*, 796 F.3d 199 (2d Cir. 2015). Both parties disputed
14 the district court's interpretation of the FLSA, Rule 68, and *Cheeks*, and
15 filed an interlocutory appeal. Upon review of the text of the Act and
16 judicial precedents interpreting the Act, we hold that judicial
17 approval is not required of Rule 68(a) offers of judgment settling
18 FLSA claims. Accordingly, we REVERSE and VACATE the district
19 court's order and REMAND with instructions to direct the Clerk of
20 the Court to enter the judgment as stipulated in the accepted Rule
21 68(a) offer. Judge Calabresi dissents in a separate opinion.

22

23 KELI LUI, WILLIAM M. BROWN, Hang and
24 Associates, PLLC, Flushing, NY, *for Plaintiff-*
25 *Appellee.*

26 LILLIAN M. MARQUEZ (Louis Pechman, Laura
27 Rodriguez, *on the brief*), Pechman Law Group
28 PLLC, New York, NY, *for Defendants-Appellants.*

29

1 ADINA H. ROSENBAUM (Sean M. Sherman, Adam
2 R. Pulver, *on the brief*), Public Citizen Litigation
3 Group, *for Court-Appointed Amicus Curiae*.

4
5 JOHN M. WALKER, JR., *Circuit Judge*:

6 Mei Xing Yu, an employee of Hasaki Restaurant, filed a claim
7 alleging violations of the Fair Labor Standards Act's ("FLSA" or the
8 "Act") overtime provisions. Soon thereafter, Hasaki Restaurant sent
9 Mei Xing Yu an offer of judgment, pursuant to Federal Rule of Civil
10 Procedure 68(a), for \$20,000 plus reasonable attorneys' fees. After Mei
11 Xing Yu accepted the offer, the parties filed the offer and notice of
12 acceptance with the district court. Before the Clerk of the Court could
13 enter the judgment, however, the district court *sua sponte* ordered the
14 parties to submit the settlement agreement to the court for a fairness
15 review and judicial approval, which the district court believed was
16 required under the Second Circuit's decision in *Cheeks v. Freeport*
17 *Pancake House, Inc.*, 796 F.3d 199 (2d Cir. 2015). Both parties disputed
18 the district court's interpretation of the FLSA, Rule 68, and *Cheeks*, and
19 filed an interlocutory appeal. Upon review of the text of the Act and
20 judicial precedents interpreting the Act, we hold that judicial
21 approval is not required of Rule 68(a) offers of judgment settling
22 FLSA claims. Accordingly, we REVERSE and VACATE the district
23 court's order and REMAND with instructions to direct the Clerk of
24 the Court to enter the judgment as stipulated in the accepted Rule
25 68(a) offer. Judge Calabresi dissents in a separate opinion.

26 **BACKGROUND**

27 Plaintiff-appellee Mei Xing Yu worked as a sushi chef at a
28 restaurant owned and operated by appellant Hasaki Restaurant, Inc.
29 On August 1, 2016, Mei Xing Yu filed a complaint against Hasaki

1 Restaurant and various individual owners and managers of Hasaki
2 Restaurant (collectively “Hasaki”) in the Southern District of New
3 York on behalf of himself and all other employees similarly situated,
4 alleging violations of the overtime provisions of the Fair Labor
5 Standards Act and New York labor laws.

6 On November 23, 2016, Hasaki mailed Mei Xing Yu a Rule 68
7 offer of judgment for \$20,000 plus reasonable attorneys’ fees, costs,
8 and expenses through the date of the offer. Mei Xing Yu timely
9 accepted the offer of judgment, and on December 8, 2016, Mei Xing
10 Yu filed a letter with the district court (Furman, J.) notifying the court
11 of his acceptance.

12 On December 9, 2016, Judge Furman ordered the parties to
13 submit their settlement agreement to the district court along with a
14 joint letter explaining why the settlement should be approved as fair
15 and reasonable. Judge Furman explained that he believed our
16 decision in *Cheeks v. Freeport Pancake House, Inc.*¹ required him to
17 scrutinize the parties’ settlement to ensure it was fair and reasonable.
18 *Cheeks* held that stipulated dismissals settling FLSA claims with
19 prejudice pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(ii)
20 require the approval of either the district court or the Department of
21 Labor (“DOL”). Alternatively, the district court offered the parties
22 the opportunity to argue why they did not believe that judicial
23 approval of the Rule 68(a) offer of judgment was required.

24 The parties then submitted a joint letter on December 22, 2016,
25 arguing that they did not need judicial approval of their Rule 68(a)
26 offer of judgment to settle Mei Xing Yu’s FLSA claims. On January
27 13, 2017, the Secretary of Labor filed an amicus brief in a separate case
28 in the Southern District of New York, *Sanchez v. Burgers & Cupcakes*

¹ 796 F.3d 199 (2d Cir. 2015).

1 LLC,² arguing that judicial approval is required when a Rule 68(a)
2 offer of judgment is accepted by a plaintiff raising FLSA claims.
3 Pursuant to a district court order, the parties filed supplemental briefs
4 in response to the Secretary's amicus brief in *Sanchez*, in which the
5 parties maintained their position that judicial approval was not
6 required.

7 On March 20, 2017, the district court issued a brief order
8 concluding that "judicial approval of the parties' settlement is
9 required, notwithstanding the fact that it was reached pursuant to
10 Rule 68(a) of the Federal Rules of Civil Procedure."³ Shortly
11 thereafter, the district court issued a follow-up opinion.⁴ The district
12 court reasoned that although Rule 68(a) is phrased in mandatory
13 terms—requiring the clerk of the court to enter judgment of an
14 accepted offer of judgment without any reference to judicial
15 approval—there are exceptions to the Rule's mandatory terms, such
16 as class action and bankruptcy settlements, which require judicial
17 approval.⁵ Accepting the fact that there are exceptions to Rule 68(a)'s
18 mandatory language, the district court concluded that FLSA claims
19 "fall within the narrow class of claims that cannot be settled under
20 Rule 68 without approval by the court (or the DOL)."⁶ Relying on our
21 opinion in *Cheeks*, the district court concluded that while "*Cheeks* may
22 not apply *a fortiori* to a Rule 68 FLSA settlement given its reliance on
23 the language of Rule 41, its reasoning—combined with the fact that

² Amicus Br., *Sanchez v. Burgers & Cupcakes LLC*, No. 16-cv-3862 (S.D.N.Y. Jan 13., 2017), ECF No. 43.

³ Order, *Mei Xing Yu v. Hasaki Rest., Inc.*, 16-cv-6094 (S.D.N.Y. Mar. 20, 2017), ECF No. 24.

⁴ Opinion and Order, *Hasaki Rest., Inc.*, ECF No. 27; *see also Mei Xing Yu v. Hasaki Rest., Inc.*, 319 F.R.D 111 (S.D.N.Y. 2017).

⁵ *Hasaki Rest., Inc.*, 319 F.R.D. at 113–14.

⁶ *Id.* at 114.

1 Rule 68 is not always . . . mandatory—compels the conclusion that
2 parties may not evade the requirement for judicial (or DOL) approval
3 by way of Rule 68.”⁷

4 Noting the existence of “substantial ground for difference of
5 opinion” on the issue, and that the lower courts were divided on the
6 question, the district court certified its order for interlocutory appeal
7 under 28 U.S.C. § 1292(b).⁸ The parties filed a timely notice of appeal
8 in the district court, but did not file a timely § 1292(b) petition for
9 permission to take an interlocutory appeal in this court. Nonetheless,
10 on October 23, 2017, a panel of our court granted the parties’ motion
11 to file a late § 1292(b) petition and then granted the petition.⁹ In
12 addition, because both Mei Xing Yu and Hasaki took the same
13 position before the district court, a panel of our court granted the
14 Public Citizen Litigation Group’s (“PCLG”) motion to be appointed
15 amicus curiae in order to defend the district court’s ruling.¹⁰ We also
16 invited and received an amicus brief from the Secretary of Labor.¹¹

17 DISCUSSION

18 The question before us is straightforward: whether acceptance
19 of a Rule 68(a) offer of judgment that disposes of an FLSA claim in
20 litigation needs to be reviewed by a district court or the DOL for
21 fairness before the clerk of the court can enter the judgment. The
22 question is one of statutory interpretation. Therefore, “we begin, as
23 we must, with a careful examination of the statutory text” of both
24 Rule 68(a) and the FLSA.¹²

⁷ *Id.* at 116.

⁸ *Id.* at 117.

⁹ See No. 17-1067, ECF No. 56 (Oct. 23, 2017).

¹⁰ See No. 17-3388, ECF No. 38 (Nov. 28, 2017). We thank PCLG for their service as court-appointed amicus.

¹¹ *Id.*

¹² See *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1721 (2017).

1 **I. Federal Rule of Civil Procedure 68**

2 Rule 68(a) states:

3 At least 14 days before the date set for trial, a party
4 defending against a claim may serve on an opposing
5 party an offer to allow judgment on specified terms, with
6 the costs then accrued. If, within 14 days after being
7 served, the opposing party serves written notice
8 accepting the offer, either party may then file the offer
9 and notice of acceptance, plus proof of service. The clerk
10 must then enter judgment.¹³

11 Rule 68(d) provides that “[i]f the judgment that the offeree finally
12 obtains is not more favorable than the unaccepted offer, the offeree
13 must pay the costs incurred after the offer was made,”¹⁴ which
14 includes attorney’s fees.¹⁵ Rule 68(b) discusses the effect of an
15 unaccepted offer, and Rule 68(c) provides a mechanism for making
16 an offer after a party’s liability has been determined but the extent of
17 liability remains to be determined.¹⁶

18 “The plain purpose of Rule 68 is to encourage settlement and
19 avoid litigation. . . . The Rule prompts both parties to a suit to evaluate
20 the risks and costs of litigation, and to balance them against the
21 likelihood of success upon trial on the merits.”¹⁷

22 On its face, Rule 68(a)’s command that the clerk *must* enter
23 judgment is mandatory and absolute.¹⁸ The Sixth Circuit has

¹³ Fed. R. Civ. P. 68(a).

¹⁴ Fed. R. Civ. P. 68(d).

¹⁵ *Marek v. Chesney*, 473 U.S. 1, 9 (1985).

¹⁶ Fed. R. Civ. P. 68(b), (c).

¹⁷ *Marek*, 473 U.S. at 5.

¹⁸ See 12 Charles A. Wright, Arthur R. Miller, et al., *Federal Practice and Procedure* § 3005 (3d ed.) (“Except for . . . rare situations . . . courts are directed by Rule 68 to enter judgment if an offer has been accepted.”).

1 described a district court's role in entering a Rule 68(a) judgment as
2 "ministerial rather than discretionary," because the plain language of
3 the Rule "leaves no discretion in the district court to do anything but
4 enter judgment once an offer has been accepted."¹⁹ Other circuits
5 have said substantially the same thing,²⁰ as has this circuit, though in
6 less obvious terms.²¹ Both the common usage of the word "must" and
7 the dictionary definition of that word support this understanding of
8 Rule 68(a)'s mandatory nature.²² There is also no doubt that Rule
9 68(a) applies in this case: Rule 1 provides that the Federal Rules of
10 Civil Procedure "govern the procedure in *all* civil actions and
11 proceedings in the United States district courts"²³

12 Despite the mandatory language, however, amici and the
13 district court contend that there are "rare situations" in which a
14 district court must approve the proposed resolution of the pending
15 litigation before the stipulated judgment can take legal effect.²⁴ They

¹⁹ *Mallory v. Eyrich*, 922 F.2d 1273, 1278–79 (6th Cir. 1991).

²⁰ See *Ramming v. Nat. Gas Pipeline Co. of Am.*, 390 F.3d 366, 370 (5th Cir. 2004) ("A Rule 68 Offer of Judgment is usually considered self-executing."); *Perkins v. U.S. W. Comm'cns*, 138 F.3d 336, 338 (8th Cir. 1998) ("Rule 68 leaves no discretion in the district court to do anything other than enter judgment once an offer of judgment has been accepted."); *Webb v. James*, 147 F.3d 617, 621 (7th Cir. 1998) ("Because of this mandatory directive, the district court has no discretion to alter or modify the parties' agreement."); cf. *Jordan v. Time, Inc.*, 111 F.3d 102, 105 (11th Cir. 1997) (determining that the standard of review for a district court's construction of Rule 68 is *de novo* because "the mandatory language of the rule leaves no room for district court discretion").

²¹ See *Bowles v. J.J. Schmitt & Co.*, 170 F.2d 617, 620 (2d Cir. 1948) (stating that one of the "only two occasions under the rules when the clerk may enter final judgment without action of the judge or jury . . . [is] upon notice of acceptance of an offer of judgment under rule 68").

²² See *Must*, *Webster's New International Dictionary* (3d ed. 1999) (1a: "is commanded or requested to"; 1b: "is urged to: ought by all means to"; 4: "is required by law, custom, or moral conscience to").

²³ Fed. R. Civ. P. 1 (emphasis added).

²⁴ *Wright & Miller*, § 3005.

1 point to various examples in support of their argument that Rule
2 68(a)'s facially mandatory nature is riddled with "a host of situations
3 in which parties may not, without approval of either or both a
4 government agency and a court, enter into a settlement."²⁵

5 The first category of examples involves proceedings that are
6 governed by federal rules that explicitly require judicial approval
7 before settlement. For instance, Federal Rule of Bankruptcy
8 Procedure 9019 specifically requires judicial approval of settlements,
9 and the D.C. Circuit has held that Rule 68(a) offers of judgment
10 settling bankruptcy proceedings must be approved by the
11 bankruptcy court to become effective.²⁶ Other circuits have required
12 Rule 68(a) offers of judgment settling class action suits to be approved
13 by the district court before the judgment can be entered.²⁷ These
14 circuits have relied on Federal Rule of Civil Procedure 23, which
15 plainly states that "[t]he claims, issues, or defenses of a certified
16 class—or a class proposed to be certified for purposes of settlement—
17 may be settled, voluntarily dismissed, or compromised *only* with the
18 court's approval . . . after a hearing and only on finding that it is fair,
19 reasonable, and adequate"²⁸

20 Amici and the district court also refer to substantive statutes
21 that specifically require the district court's consent before cases
22 involving those statutory causes of action may be settled. For
23 instance, New York law requires court approval to settle any action
24 "commenced by or on behalf of [an] infant, incompetent or

²⁵ *Hasaki Rest., Inc.*, 319 F.R.D. at 113; *see also* PCLG Br. at 19–20; Sec'y of Labor Br. at 25–26.

²⁶ *Gordon v. Gouline*, 81 F.3d 235, 239 (D.C. Cir. 1996).

²⁷ *See id.* at 239–40 (collecting cases).

²⁸ Fed. R. Civ. P. 23(e), (e)(2) (emphasis added).

1 conservatee.”²⁹ And the False Claims Act (“FCA”) unambiguously
2 states that a *qui tam* action “may be dismissed only if the court and
3 the Attorney General give written consent to the dismissal and their
4 reasons for consenting.”³⁰

5 Our circuit has yet to endorse any of these asserted exceptions
6 to Rule 68(a)’s mandatory command that the clerk of the court enter
7 judgment once an offer has been accepted and filed with the court.³¹
8 There is no need for us to consider the validity of these exceptions
9 because they are not at issue here. But, assuming for the sake of
10 argument that Rule 68(a) offers of judgment are susceptible to judicial
11 review in certain situations, we agree with the district court that the

²⁹ N.Y. C.P.L.R. § 1207; *see also id.* at § 1208.

³⁰ 31 U.S.C. § 3730(b)(1).

³¹ The Dissent and amici suggest that illegal acts and injunctive relief may be further exceptions to Rule 68. *See Hasaki Rest., Inc.*, 319 F.R.D. at 114. While neither of these situations are at issue here, we note that requiring courts to scrutinize *all* Rule 68 offers for illegality would transform Rule 68’s ministerial act into a searching inquiry, a judicial modification of the Rule’s plain text which we are reluctant to endorse. In the event an illegal judgment was entered pursuant to Rule 68, the defendant in a subsequent enforcement action could raise illegality as a defense. *See infra* note 101 and accompanying text. Alternatively, either party could challenge the judgment via a Rule 60 motion. *See, e.g., Laskowski v. Buhay*, 192 F.R.D. 480, 484 (M.D. Pa. 2000) (considering and denying a defendant’s motion seeking to void a Rule 68 judgment through Rule 60); *see also infra* note 102 and accompanying text. As to injunctive relief, it seems that *Marek* itself involved the use of Rule 68 in a suit where the plaintiff requested some injunctive relief. *See Roy D. Simon, Jr., The New Meaning of Rule 68: Marek v. Chesny and Beyond*, 14 N.Y.U. REV. L. & SOC. CHANGE 475, 485 (1986) (discussing the complaint in *Marek*). At any rate, we need not address the Rule’s application in this context. Even assuming *arguendo* that judgments providing for injunctive relief issue only upon a judge’s review, given that such relief involves the exercise of the court’s discretion, *see Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944) (“An appeal to the equity jurisdiction conferred on federal district courts is an appeal to the sound discretion which guides the determinations of courts of equity.”) (internal quotation marks omitted), this point is simply not germane to Rule 68’s scope outside of this context.

1 proper inquiry is “whether FLSA claims fall within the narrow class
2 of claims that cannot be settled under Rule 68 without approval by
3 the court (or the DOL).”³² In other words, we must determine, as the
4 Supreme Court in *Marek v. Chesney* explained, whether the FLSA
5 contains “the necessary clear expression of congressional intent’
6 required ‘to exempt the statute from the operation of’ Rule 68.”³³ We
7 think the answer is no for the reasons that follow.

8 II. The FLSA

9 The FLSA contains two primary worker protections: first, it
10 guarantees covered employees a federal minimum wage;³⁴ and
11 second, it provides covered employees the right to overtime pay at a
12 rate of one-and-a-half their regular rate for hours worked above forty
13 hours a week.³⁵ “The principal congressional purpose in enacting the
14 [FLSA] was to protect all covered workers from substandard wages
15 and oppressive working hours, ‘labor conditions [that are]
16 detrimental to the maintenance of the minimum standard of living
17 necessary for health, efficiency and general well-being of workers.’”³⁶

18 Ever since the FLSA was enacted in 1938, it has allowed for a
19 private right of action by a covered employee against any employer
20 who violates the Act’s minimum wage and overtime pay provisions
21 to recover unpaid wages, together with “an additional equal amount
22 as liquidated damages.”³⁷ In 1949, Congress amended the FLSA and

³² *Hasaki Rest., Inc.*, 319 F.R.D. at 114.

³³ *Marek*, 473 U.S. at 11–12 (quoting *Califano v. Yamasaki*, 422 U.S. 682, 700 (1979) (modifications incorporated)).

³⁴ See 29 U.S.C. § 206.

³⁵ See 29 U.S.C. § 207.

³⁶ *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 739 (1981) (quoting 29 U.S.C. § 202(a) (captioned “Congressional finding and declaration of policy)).

³⁷ Fair Labor Standards Act of 1938, Pub. L. No. 75-718, 52 Stat. 1069 (codified as amended at 29 U.S.C § 216(b) (2018)).

1 authorized the Administrator of the Wage and Hours Division of the
2 DOL to “supervise payment of the unpaid minimum wages or the
3 unpaid overtime compensation owing to any employee or
4 employees.”³⁸ Congress also authorized the Administrator to bring
5 an action on behalf of, and upon the written request of, a covered
6 employee to recover unpaid minimum wages or overtime
7 compensation.³⁹

8 These provisions providing a private right of action, DOL-
9 supervised payment, or DOL action on behalf of covered employees
10 all remain in effect today and are contained in § 216 of the Act, with
11 minor amendments not material here.⁴⁰ Nowhere in the text of the
12 current or prior versions of § 216, however, is there a command that
13 FLSA actions cannot be settled or otherwise dismissed without
14 approval from a court. The provisions of § 216 simply set forth
15 different ways in which covered employees (or the DOL on behalf of
16 covered employees) may assert the substantive rights afforded to
17 them by the Act. The lack of any explicit requirement for judicial
18 approval before a settlement or dismissal can be entered under § 216
19 is what distinguishes the FLSA from the statutory examples the
20 district court and amici have cited as evidence of exceptions to Rule
21 68(a)’s mandatory character. Each of those statutes contains an
22 explicit requirement that the court must approve the dismissal or
23 settlement before it can be entered; the FLSA contains no similar

³⁸ Fair Labor Standards Act of 1938, Pub. L. No. 81-393, 63 Stat. 919 (1949) (codified as amended at 29 U.S.C. § 216(c) (2018)).

³⁹ *Id.* This provision has since been amended, such that this power is now vested in the Secretary of Labor, rather than the Administrator. Furthermore, it is no longer necessary for the Secretary to receive the written request of an employee for the Secretary to initiate an action on behalf of a covered employee. *See* 29 U.S.C. § 216(c) (2018).

⁴⁰ *See* 29 U.S.C. §§ 216(b), (c) (2018).

1 command.

2 Ordinarily, the lack of any textual requirement for judicial
3 approval would be the end of the analysis because “the first canon of
4 statutory construction is that ‘a legislature says in a statute what it
5 means and means in a statute what it says there.’ Indeed, ‘when the
6 words of a statute are unambiguous . . . this first canon is also the last:
7 judicial inquiry is complete.’”⁴¹ Nonetheless, amici and the Dissent
8 argue that we should read a judicial review requirement into the
9 FLSA for four reasons: (1) Supreme Court precedents interpreting
10 FLSA rights as nonwaivable require it; (2) the statutory history of the
11 FLSA demonstrates a Congressional intent to only permit judicially
12 or DOL-approved settlements; (3) this circuit’s decision in *Cheeks*,
13 which explained the need for judicial review of Rule 41(a)(1)(A)(ii)
14 dismissals with prejudice of FLSA claims, compels a similar result
15 with respect to Rule 68 offers of judgment; and (4) it would further
16 “the underlying purpose of the FLSA, which is a uniquely protective
17 statute.”⁴² We address each of these points in turn.

18 a. Supreme Court Precedent

19 Amici’s argument for why we must read a judicial approval
20 requirement into the FLSA rests upon a few decisions by the Supreme
21 Court beginning in 1945. Amici asserts that these decisions stand for
22 the proposition that “there are only two ways in which FLSA claims
23 can be settled or compromised by employees”: either through a DOL-
24 supervised payment of unpaid wages by the employer under § 216(c),
25 or a stipulated judgment approved by a district court in a private

⁴¹ *United States v. Pierovinanzi*, 23 F.3d 670, 677 (2d Cir. 1994) (internal citation and alteration omitted) (quoting *Connecticut Nat’l Bank v. Germain*, 503 U.S. 249, 253–54 (1992)).

⁴² Sec’y of Labor Br. at 6.

1 action for unpaid wages under § 216(b).⁴³ We disagree.

2 In *Brooklyn Savings Bank v. O'Neil*, the Supreme Court
3 considered “whether in the absence of a bona fide dispute between
4 the parties as to liability, [an employee’s] written waiver of his right
5 to liquidated damages under [the FLSA] bars a subsequent action to
6 recover liquidated damages.”⁴⁴ The Court acknowledged that
7 nothing in “the statutory language, the legislative reports nor the
8 debates indicates that the question at issue was specifically
9 considered and resolved by Congress.”⁴⁵ The Court believed,
10 however, that the Congressional intent “to protect certain groups of
11 the population from substandard wages and excessive hours”⁴⁶
12 counseled in favor of concluding that Congress did not intend for the
13 FLSA’s minimum wage, overtime, and liquidated damages rights to
14 be capable of waiver by employees. It reasoned that “waiver of
15 statutory wages by agreement would nullify the purpose of the Act,”
16 as would “waiver of the employee’s right to liquidated damages.”⁴⁷
17 Thus, it concluded that “contracts for waiver of liquidated damages .
18 . . are void as contrary to public policy,” and will not be entertained
19 by courts as an employer’s affirmative defense in a subsequent action
20 by an employee to recover liquidated damages.⁴⁸

21 In the two consolidated cases⁴⁹ under consideration in *Brooklyn*
22 *Savings*, the employees released their FLSA rights not as part of a

⁴³ PCLG Br. at 12 (quoting *Hasaki Rest., Inc.*, 319 F.R.D. at 112).

⁴⁴ 324 U.S. 697, 704 (1945).

⁴⁵ *Id.* at 705–06.

⁴⁶ *Id.* at 706–07.

⁴⁷ *Id.* at 707.

⁴⁸ *Id.* at 710.

⁴⁹ *Brooklyn Savings* actually dealt with three consolidated cases, but the third case dealt with a separate issue of whether an employee suing to collect unpaid wages under FLSA is also entitled to interest.

1 settlement of a bona fide dispute between the employers and
2 employees, but as a “mere waiver.”⁵⁰ The Court stressed this
3 distinction.⁵¹ *Brooklyn Savings’* holding that mere waivers of an
4 employee’s right to liquidated damages are unenforceable expressly
5 left open the question of “what limitation, if any, [§ 216(b)] of the Act
6 places on the validity of agreements between an employer and
7 employee to settle claims arising under the Act if the settlement is
8 made as the result of a bona fide dispute between the two parties, in
9 consideration of a bona fide compromise and settlement.”⁵²

10 That unresolved question was partially addressed the
11 following year in *D.A. Schulte, Inc. v. Gangi*.⁵³ Unlike in *Brooklyn*
12 *Savings*, the employees in *Gangi* did not simply sign away their rights.
13 Under threat of suit by the employees, the employer paid the full
14 amount of back pay and, in return, obtained a release of the
15 employees’ statutory right to liquidated damages, notwithstanding
16 the employer’s sincere belief that the employees were not covered by
17 the FLSA because the interstate commerce nexus was minimal.⁵⁴ “The
18 primary issue presented [was] whether the [FLSA] precludes a bona
19 fide settlement of a bona fide dispute over the coverage of the Act on
20 a claim for overtime compensation and liquidated damages where the
21 employees receive the overtime compensation in full.”⁵⁵

22 The Supreme Court sided with the employees. The Court
23 acknowledged that the releases were obtained in settlement of a bona
24 fide dispute as to coverage, but, adopting the reasoning from *Brooklyn*

⁵⁰ 324 U.S. at 703–04, 713–14.

⁵¹ *Id.* at 713–14.

⁵² *Id.* at 714.

⁵³ 328 U.S. 108 (1946).

⁵⁴ *Id.* at 111–12.

⁵⁵ *Id.* at 110.

1 *Savings*, it held that “the remedy of liquidated damages cannot be
2 bargained away by bona fide settlements of disputes over
3 coverage.”⁵⁶ The Court, however, expressly reserved the question of
4 whether waiver or compromise of FLSA rights is permissible “in
5 other situations which may arise, such as a dispute over the number
6 of hours worked or the regular rate of employment.”⁵⁷

7 Relevant to our analysis, the Court, in dicta in a footnote, also
8 seemed to indicate that the reasons behind not permitting waivers in
9 private settlements might not hold for stipulated judgments in
10 judicial actions brought by employees pursuant to § 216(b).⁵⁸ In
11 pertinent part, the Court stated:

12 Petitioner draws the inference that bona fide stipulated
13 judgments on alleged Wage-Hour violations for less than
14 the amounts actually due stand in no better position than
15 bona fide settlements. Even though stipulated
16 judgments may be obtained, where settlements are
17 proposed in controversies between employers and
18 employees over violations of the Act, by the simple
19 device of filing suits and entering agreed judgments, we
20 think the requirements of pleading the issues and
21 submitting the judgment to judicial scrutiny may
22 differentiate stipulated judgments from compromises by
23 the parties. At any rate the suggestion of petitioner is
24 argumentative only as no judgment was entered in this
25 case.⁵⁹

26 In the intervening seven decades since *Gangi*, the Supreme
27 Court has never resolved these lingering questions about when and
28 how employees can release their FLSA rights. In 1981, the Court

⁵⁶ *Id.* at 114–15.

⁵⁷ *Id.*

⁵⁸ *Id.* at 113 n.8.

⁵⁹ *Id.*

1 reiterated in passing its holdings in *Brooklyn Savings* and *O'Neil* in
2 *Barrentine v. Arkansas-Best Freight Systems, Inc.*, but did not expand the
3 holdings from those earlier decisions or otherwise consider the
4 questions those decisions left open.⁶⁰

5 Notably absent from any of these Supreme Court
6 interpretations of the FLSA is any discussion on whether a settlement
7 or dismissal of an action to vindicate FLSA rights under § 216(b) is
8 conditioned on court approval. Even the dicta in the footnote in *Gangi*
9 did not discuss whether judicial approval was actually necessary
10 before parties could enter a stipulated judgment resolving FLSA
11 claims. The Supreme Court never said, as the Dissent suggests, that
12 “court-supervised settlements might be valid under the FLSA.”⁶¹
13 Rather, the Court stated that “by the simple device of filing suits and
14 entering agreed judgments, we think the requirement of pleading the
15 issues and submitting the judgment to judicial scrutiny may
16 *differentiate* stipulated judgments from compromises by the parties.”⁶²
17 In other words, the act of filing the suit, airing the parties’ dirty
18 laundry in public and before a judge, *and then* coming to an agreement
19 distinguishes stipulated judgments from private, back-room
20 compromises that could easily result in exploitation of the worker and
21 the release of his or her rights. Indeed, the Supreme Court itself has
22 at least on one occasion ordered a district court to enter a stipulated
23 judgment in a FLSA action for only two-thirds the amount due in
24 statutory wages and liquidated damages while the case was on appeal

⁶⁰ 450 U.S. 728, 740 (1981). *Barrentine* addressed the unrelated question of whether employees could bring an action alleging an FLSA violation after they had unsuccessfully submitted a claim based on the same underlying facts to a joint grievance committee pursuant to their union’s collective-bargaining agreement, answering the question in the negative.

⁶¹ Diss. Op. at 10 (emphasis added).

⁶² *Gangi*, 328 U.S. at 114 n.8 (emphasis added).

1 apparently without reviewing the stipulation for fairness.⁶³ Rule 68(a)
2 judgments are one such form of stipulated judgment and, by that
3 Rule's plain terms, do not require court-supervision. Nothing the
4 Supreme Court has said suggests a different rule, much less amounts
5 to "'the necessary clear expression of congressional intent' required
6 'to exempt the statute from the application of Rule 68.'"⁶⁴

7 For this reason, we cannot accept the Dissent's characterization
8 of our opinion as creating a "third, implied method of resolving"
9 FLSA claims.⁶⁵ The Dissent refers to the settling of FLSA claims
10 through Rule 68(a) judgments as "private settlements" like those
11 prohibited by the Supreme Court in *Brooklyn Savings* and *Gangi*.⁶⁶ But
12 Rule 68(a) judgments are not at all like those private settlements; they
13 are publicly-filed, stipulated judgments between parties to an action
14 brought in a court of competent jurisdiction after litigation has been
15 commenced pursuant to § 216(b) of the FLSA. Nothing in the
16 Supreme Court's decisions prohibit settling FLSA claims through
17 such stipulated judgments. To the contrary, as conceded by the
18 Dissent, these decisions allow that settlements in the context of

⁶³ See *North Shore Corp. v. Barnett*, 323 U.S. 679 (1944) ("The judgment of the Circuit Court of Appeals is vacated, the judgment of the District Court is modified in accordance with the stipulations signed by counsel for the parties and the case is remanded to the District Court for the Southern District of Florida with directions to enter the judgment as modified."); see also *Gangi*, 328 U.S. at 144 n.8 (referencing *Barnett* as an example of a settlement of a FLSA claim by stipulated judgment ordered to be entered by the Supreme Court); Reply Br. for the Pet'r, *Brooklyn Savings Bank v. O'Neil*, 1945 WL 48260, at *19 (U.S. Jan. 1945) (describing the terms of the stipulated judgment as recovery to two-thirds of the statutory wages and liquidated damages owed).

⁶⁴ See *Marek*, 473 U.S. at 11–12 (quoting *Califano*, 422 U.S. at 700 (modifications incorporated)).

⁶⁵ See Diss. Op. at 1–2.

⁶⁶ See, e.g., *id.* at 2, 3, 4, 6, 13, 14.

1 ongoing FLSA litigation may be permissible.⁶⁷ Nor, contrary to the
2 Dissent's intimation, have any other circuits held that FLSA claims
3 cannot be settled pursuant to a Rule 68(a) stipulated judgment
4 without judicial approval.⁶⁸ The laundry list of courts and cases
5 referenced by the Dissent hold only that purely private settlements of
6 FLSA claims, independent of any litigation, are prohibited without
7 judicial approval or DOL supervision; this is a holding that is
8 compelled by *Gangi* and with which we take no issue. None of those
9 courts or cases addressed a Rule 68(a) stipulated judgment, the type
10 of settlement at issue in this case.

11 In *Brooklyn Savings* and *Gangi*, the Supreme Court held that
12 private contractual waivers of worker's FLSA rights were against
13 public policy. This is a very different thing from holding that judicial
14 approval is required before parties, usually represented by counsel,
15 may settle a litigated FLSA dispute pursuant to Rule 68(a).

16 Despite the absence of any discussion by the Supreme Court in
17 *Brooklyn Savings*, *Gangi*, or *Barrentine* as to whether judicial approval
18 is required to settle actions raising FLSA claims, amici assert that
19 these cases laid "the foundation" for such a requirement, and from
20 that unsure foundation, make the leap that Rule 68(a) offers of
21 judgment settling FLSA claims must be approved by a judge before
22 the clerk may enter the judgment.⁶⁹ We are not prepared to make that
23 interpretive leap in the context of Rule 68(a) offers of judgment absent
24 any indication from Congress or the Supreme Court that the FLSA
25 requires such judicial approval.⁷⁰ This is especially so when the

⁶⁷ See *Gangi*, 328 U.S. at 114 n.8; see also Diss. Op. at 9–10.

⁶⁸ See Diss. Op. at 17.

⁶⁹ Sec'y of Labor Br. at 13; see also PCLG Br. at 11–13.

⁷⁰ Our circuit has made that leap with respect to voluntary dismissals with prejudice under Rule 41(a)(1)(A)(ii) in *Cheeks*. We decline to do the same with

1 language of the Act itself fails to provide a scintilla of textual support
2 for such a requirement, in the face of Rule 68(a)'s explicit textual
3 command that the clerk of the court "*must*" enter stipulated
4 judgments.⁷¹

5 Amici also point to the fact that the Supreme Court concluded
6 that FLSA rights are not waivable despite the absence of any "specific
7 provisions prohibiting waiver of rights . . . or providing means by
8 which compromises and settlements can be approved."⁷² To be sure,
9 there is nothing in the text of the FLSA specifically declaring that the
10 minimum wage, overtime pay, and liquidated damages rights created
11 by the Act cannot be waived. Those cases, however, did not address
12 the question of prior judicial approval of § 216 settlements under Rule
13 68(a), and we discern from them no requirement that a court must
14 make the same sort of purposive interpretive leap in resolving a
15 question they did not address.

16 b. Extrinsic Evidence and Statutory History⁷³

17 Appointed amicus contends that the lack of any judicial
18 approval requirement in the text of the FLSA is not dispositive,

respect to Rule 68(a) offers of judgment, as will be discussed. *See infra*, Section II(a).

⁷¹ *See Califano*, 442 U.S. at 700 (requiring a "necessary clear expression of congressional intent to exempt" a statutorily-created cause of action "from the operation of the Federal Rules of Civil Procedure," since Rule 1 provides that the Rules govern the procedure in the United States district courts in *all* suits of a civil nature (internal quotation marks omitted)).

⁷² *Id.* at 15–16 (brackets omitted) (quoting *Brooklyn Savings*, 324 U.S. at 713).

⁷³ The dissent accuses the majority of "ignoring completely" the statutory history in this case and of confusing statutory history with legislative history. This is a misreading of the opinion. While we consider extrinsic evidence, including legislative history, as unhelpful when the statutory text is unambiguous, we do not "ignore" the statutory history. Indeed, we fully address it in this section in discussing the 1949 Amendment that added § 216(c), but we simply reach a different conclusion than that of the dissent.

1 because “a statute’s requirements . . . also include judicial
2 interpretations of the statute, which are reached through application
3 of traditional tools of statutory construction, including examination
4 of the statute’s text, legislative history, structure, and purpose.”⁷⁴ We
5 find this argument unpersuasive. A statute’s requirements are not so
6 holistically determined.

7 As we stated above, the first “cardinal canon” of statutory
8 interpretation is to look at the text.⁷⁵ It is only when a statute’s text is
9 ambiguous that we turn to other tools of statutory interpretation to
10 help clarify the ambiguity.⁷⁶ In this case, there is nothing ambiguous
11 about whether the FLSA requires judicial approval of offers of
12 judgment before actions brought under § 216(b) can be settled or
13 dismissed, because the text of the FLSA is devoid of any such
14 requirement, even as it details, in § 216(b), the precise contours of how
15 employees can file suit to vindicate their FLSA rights.

16 Section 216(b) states that an employer is liable for unpaid wages
17 and an equal amount in liquidated damages; that such an action may
18 be maintained in any federal or state court of competent jurisdiction;
19 that such an action may be commenced by an individual employee or
20 by an employee on behalf of other employees similarly situated; that
21 no employee shall be considered a party plaintiff to any such
22 collective action unless he gives his consent in writing to become a
23 party, and such consent is filed with the court; that in such an action,

⁷⁴ PCLG Br. at 15 (internal quotation marks omitted).

⁷⁵ *Germain*, 503 U.S. at 253.

⁷⁶ See *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005) (“As we have repeatedly held, the authoritative statement is the statutory text, not the legislative history or any other extrinsic material. Extrinsic materials have a role in statutory interpretation only to the extent they shed a reliable light on the enacting Legislature’s understanding of otherwise *ambiguous* terms.” (emphasis added)).

1 reasonable attorney’s fees and costs are to be paid by the defendant;
2 and that an employee’s private right of action terminates if the
3 Secretary of Labor decides to initiate an action on behalf of
4 employees.⁷⁷ In this context of painstaking attention to procedural
5 requirements, “[w]e do not lightly assume that Congress has omitted
6 from its adopted text requirements that it nonetheless intends to
7 apply.” *Jama Immigration & Customs Enforcement*, 543 U.S. 335, 341
8 (2005). Given that “Congress has shown elsewhere in the same
9 statute” how to require supervision of settlements, *id.* § 216(b)’s
10 silence as to whether judicial approval is required before an action
11 initiated by employees under the provision can be settled via Rule
12 68(a) (or any other procedure) speaks volumes. Finding not even
13 arguable ambiguity⁷⁸ as to this question in the statute’s text, there is
14 no need to turn to extrinsic evidence to help decipher the statute.⁷⁹

⁷⁷ See 29 U.S.C. § 216(b).

⁷⁸ The Dissent takes issue with our characterization of the text as unambiguous because it is absolutely silent as to any judicial review requirement. We agree that ambiguity usually goes to the meaning of words. See Diss. Op. at 4. But this is because parties seldom make the argument that a statute requires something despite the absence of any statutory hint of such a requirement. Ambiguity usually comes into play when the parties disagree about what a statute says because parties can reasonably differ over how to interpret the words of a statute. See, e.g., *MCI Telecommunications Corp. v. AT&T Co.*, 512 U.S. 218, 227 (debating the scope of the FCC’s authority to “modify” any requirement of § 203 of the Communications Act and noting that “most cases of verbal ambiguity in statutes involve . . . a selection between accepted alternative meanings shown as such by many dictionaries”). A statute that is utterly silent as to an alleged requirement is equally unambiguous. Our allegedly “unusual” use of the term unambiguous, according to the Dissent, is the product of Amici and the Dissent’s even more unusual argument that silence can breed ambiguity. Judicial insertion of a positive command into a statute that is silent on the point goes beyond interpretation; it is an usurpation of the legislative function.

⁷⁹ Even if we were to consider legislative history, nothing in that history indicates Congress intended for judicial approval to be required before actions raising FLSA claims could be settled or dismissed, and amici have pointed none.

1 The Dissent points to the 1949 amendment of the FLSA, in
2 which Congress added § 216(c) and authorized the DOL to supervise
3 private settlements of FLSA claims, as evidence that Congress
4 intended to prohibit the private settlement of all FLSA claims unless
5 supervised by the DOL or a court.⁸⁰ This amendment does not affect
6 our understanding of whether the FLSA requires *judicial* approval of
7 a Rule 68(a) stipulated judgment. The amendment only grants *the*
8 *DOL* authority to supervise private FLSA settlements with finality; it
9 says nothing about whether courts must approve stipulated
10 judgments or other settlements or dismissals. Furthermore, and as
11 discussed, there is a critical distinction between purely private
12 settlements between parties and stipulated judgments between
13 parties, the latter of which occur in the context of publicly-filed,
14 ongoing litigation subject to judicial scrutiny.⁸¹ The ability of parties
15 to enter stipulated judgments once a case has been publicly filed,
16 pleaded, and submitted to judicial scrutiny does not, as the Dissent
17 contends,⁸² render § 216(c) superfluous, because that section
18 continues to apply to private settlements outside the context of
19 litigation.⁸³ At bottom, we do not believe it is reasonable to interpret

⁸⁰ See Diss. Op. at 11–13.

⁸¹ See *supra* Section II(a).; see also *Gangi*, 328 U.S. at 113 n.8.

⁸² See Diss. Op. at 6–7.

⁸³ Far from being superfluous, the statutory history relied on by the Dissent supports the view that Congress enacted Section 216(c) in order to provide employers with an efficient and expert *non-judicial* alternative for resolving FLSA liability. Indeed, the Dissent notes that Section 216(c) was enacted in response to a new reluctance among employers to voluntarily remit back pay in cooperation with the DOL without a need for court proceedings. See Diss Op. at 11–12. This reluctance was due to fears that DOL supervision was insufficient to protect employers from later suits in the aftermath of *Brooklyn Savings* and *Gangi*. See *id.* (citing Fair Labor Standards Amendments of 1949, S. Rep. No. 81-640, 81st Cong., 1st Sess., reprinted in 1949 U.S.C.C.A.N. 2241, 2248). As noted above, Rule 68(a)'s filing and pleading requirements impose burdens on employers and employees looking to resolve FLSA disputes. Voluntary and DOL-supervised settlements do

1 Congress' amendment authorizing the DOL to supervise private
2 FLSA settlements as prohibiting Rule 68(a) stipulated judgments
3 settling FLSA claims in the context of ongoing litigation when the
4 amendment does not pertain to judicial actions.⁸⁴ Congress does not
5 "hide elephants in mouseholes."⁸⁵

not impose these same (or equivalent) burdens. Section 216(c) is thus fairly understood as a distinct provision which is nonetheless fully compatible with the goals of Rule 68 in encouraging efficient settlement of claims.

⁸⁴ Indeed, interpreting Congress' amendment adding § 216(c) in the way the Dissent does would seemingly prohibit *all* other forms of settling FLSA claims, including judicially-approved settlements, because Congress only authorized the DOL to settle FLSA claims. Nonetheless, the Dissent, and to our knowledge, every circuit to address the issue, accepts that courts may approve FLSA settlements and dismissals—even if there is disagreement as to whether such approval is *required*—despite the fact that § 216(c) only grants supervisory authority to the DOL. The consistency of Rule 68 and the 1949 amendments is all the more evident considering that Rule 68 had been in existence for approximately ten years by the time § 216(c) was adopted. *See Marek*, 473 U.S. at 8–9 (discussing the history of Rule 68 and noting that the rules were adopted in 1938).

⁸⁵ *See Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 468 (2001). The Dissent also suggests that the Portal-to-Portal Act of 1947 reflects Congressional endorsement of its broad reading of *Brooklyn Savings* and *Gangi*. Diss. Op. at 12 n.5. However, the Dissent's discussion omits the express congressional disapproval of the Supreme Court's FLSA jurisprudence embodied in the Congressional Findings attached to the Portal-to-Portal Act. *See* 29 U.S.C. § 251(a). Those findings open with an express statement that "the Fair Labor Standards Act of 1938 . . . has been interpreted judicially in disregard of long-established customs, practices, and contracts between employers and employees" and warned that if these interpretations "were permitted to stand . . . the courts of the country would be burdened with excessive and needless litigation . . ." *Id.* This language echoed that of Justice Jackson, citing to *Brooklyn Savings* and *Gangi* and writing in the same year as the Portal-to-Portal Act, that the Court's FLSA jurisprudence had caused "interminable litigation[]stimulated by a contingent reward to attorneys." *Walling v. Portland Terminal Co.*, 330 U.S. 148, 155 (1947) (Jackson, J., concurring). Taken together, this language suggests that Congress was more concerned with protecting employers from the excessive litigation caused by the Supreme Court's FLSA jurisprudence than with restricting the means by which parties could settle. In line with these contemporary views of *Brooklyn Savings* and *Gangi*, we decline to use the "rubric of 'unequal bargaining power'" to "promulgate social values"

1 In light of the unambiguously mandatory command of Rule
2 68(a) for the clerk of the court to enter offers of judgment when they
3 are accepted, and because we find no indication by Congress or the
4 Supreme Court that the FLSA requires judicial approval of stipulated
5 judgments concerning FLSA claims in the context of ongoing
6 litigation, we decline to pull such a requirement out of thin air with
7 respect to Rule 68(a) offers of judgment settling FLSA claims. Neither
8 amici nor the Dissent has identified a reliable source in the statutory
9 history that demonstrates “the necessary clear expression of
10 congressional intent required to exempt the statute from the
11 operation of Rule 68.”⁸⁶

12 c. *Cheeks v. Freeport Pancake House, Inc.*

13 Amici also contend that a prior decision from our circuit—
14 *Cheeks v. Freeport Pancake House, Inc.*—is determinative of whether
15 Rule 68(a) offers of judgment involving FLSA claims must be
16 approved by a court before they may be entered. While we
17 acknowledge the similarities between the two cases, we decline to
18 extend *Cheeks*’s holding requiring judicial approval for stipulated
19 dismissals settling FLSA claims with prejudice under Rule
20 41(a)(1)(A)(ii) to the context of Rule 68(a) offers of judgment.

21 The question in *Cheeks* was whether parties could enter a
22 “stipulated dismissal of FLSA claims with prejudice, without the
23 involvement of the district court or DOL, that may be enforceable,”
24 pursuant to Rule 41(a)(1)(A)(ii).⁸⁷ Rule 41(a)(1)(A)(ii) states that
25 “[s]ubject to Rules 23(e), 23.1(c), 23.2, and 66 and *any applicable federal*

which “intrude upon the legislative sphere” and “reflect imprecise apprehensions of economics and desirable public policy.” *United States v. Allegheny-Ludlum Indus., Inc.*, 517 F.2d 826, 861 (5th Cir. 1975); *see also id.* at 162.

⁸⁶ *Marek*, 473 U.S. at 11–12 (internal quotation marks and modifications omitted).

⁸⁷ *Cheeks*, 796 F.3d at 204.

1 *statute*, the plaintiff may dismiss an action without a court order by
2 filing . . . a stipulation of dismissal signed by all parties who have
3 appeared.”⁸⁸ *Cheeks* thus turned on whether the FLSA was an
4 “applicable federal statute,” without narrowing that reference to the
5 text of the statute, such that court approval was necessary before
6 FLSA claims could be dismissed with prejudice by stipulation of the
7 parties.⁸⁹ The *Cheeks* Court concluded that the FLSA met the
8 “applicable federal statute” exception to Rule 41(a)(1)(A)(ii) because
9 of “the unique policy considerations underlying the FLSA” and the
10 “underlying purpose” of the Act.⁹⁰ Therefore, it held that stipulated
11 dismissals settling FLSA claims with prejudice pursuant to Rule
12 41(a)(1)(A)(ii) require approval of either the district court or the DOL
13 to take effect.⁹¹

14 The holding in *Cheeks* was limited to Rule 41(a)(1)(A)(ii)
15 dismissals with prejudice. The court did not consider “whether
16 parties may settle such cases without court approval or DOL
17 supervision by entering into a Rule 41(a)(1)(A) stipulation *without*
18 prejudice.” Nor did it address other avenues for dismissal or
19 settlement of claims, including Rule 68(a) offers of judgment.⁹² The
20 district court and amici concede that “the question addressed in
21 *Cheeks* was limited to Rule [41(a)(1)(A)(ii)] stipulations dismissing
22 FLSA claims with prejudice.”⁹³ Thus, while *Cheeks* may provide some
23 support for the proposition that Rule 68(a) offers of judgment also

⁸⁸ Fed. R. Civ. P. 41(a)(1)(A)(ii) (emphasis added).

⁸⁹ *Cheeks*, 796 F.3d at 204.

⁹⁰ *Id.* at 206.

⁹¹ *Id.*

⁹² *Id.* at 201 n.2.

⁹³ Sec’y of Labor Br. at 28; *see also Hasaki Rest., Inc.*, 319 F.R.D. at 116 (“*Cheeks* may not apply *a fortiori* to a Rule 68 FLSA settlement given its reliance on the language of Rule 41 . . .”).

1 require judicial approval, it is not directly controlling, and we are not
2 required to adopt its reasoning.⁹⁴

3 For the reasons discussed in the preceding section for our
4 conclusion, that the FLSA does not require judicial approval of Rule
5 68(a) offers of judgment, we decline to extend *Cheeks*' judicial
6 approval requirement to that context. Moreover, we do not believe
7 that all of the reasons supporting the decision in *Cheeks* comfortably
8 apply in the Rule 68(a) context. For one, Rule 41(a)(1)(A) contains an
9 explicit command that judicial approval of a stipulated dismissal is
10 necessary if a federal statute so requires, but as discussed, Rule 68(a)
11 does not contain a similar, explicit exception. Also, the *Cheeks* opinion
12 expressed concern that Rule 41(a)(1)(A)(ii) stipulated dismissals are
13 not filed publicly on the docket, and therefore, are akin to the private,
14 secret settlements and waivers of an employee's FLSA rights that the
15 Supreme Court refused to enforce in *Brooklyn Savings* and *Gangi*.⁹⁵
16 Rule 68(a) avoids any secret settlement problem because offers of
17 judgment are publicly filed on the court's docket, as required by the
18 Rule.⁹⁶

19 Nor are we alone in confining *Cheeks* to Rule 41(a)(1)(A)(ii)
20 stipulated dismissals with prejudice; the majority of district court
21 judges to consider the issue in our circuit have also held that *Cheeks*
22 should not be extended to apply to Rule 68(a) offers of judgment.⁹⁷

⁹⁴ See generally, Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. Rev. 1249, 1259 (2006) ("Stare Decisis requires a court to adhere only to its decisions—its holdings—not to any utterance the court may make.").

⁹⁵ *Cheeks*, 796 F.3d at 201 (describing the issue as "whether judicial approval of, and public access to, FLSA settlements is required" (emphasis added)).

⁹⁶ See Fed. R. Civ. P. 68(a) (requiring the parties to file the offer and notice of acceptance, plus proof of service, with the district court before the clerk can enter the judgment).

⁹⁷ See *Anwar v. Stephens*, No. 15-CV-4493 (JS) (GRB), 2017 WL 455416, at *1 (E.D.N.Y. Feb. 2, 2017) ("The majority of district courts in this Circuit have held that judicial

1 Accordingly, we decline to extend *Cheeks'* holding.

2 d. The FLSA as a Uniquely Protective Statute

3 Finally, the district court and amici refer to the FLSA's "unique
4 features and policies," or the Act's "remedial and humanitarian
5 goals" as justification for requiring judicial approval of Rule 68(a)
6 offers of judgment settling FLSA claims and it is not difficult to view
7 the Dissent as similarly motivated. We take issue with this line of
8 reasoning for various reasons.

9 "Congressional intent is discerned primarily from the statutory
10 text."⁹⁸ Appeals to broad remedial goals and congressional purpose
11 are not a substitute for the actual text of the statute when it is clear.⁹⁹
12 In accordance with the Constitution's separation of powers, courts are
13 charged with interpreting the actual text of the laws Congress enacts,
14 and not with rewriting or expanding the scope of the laws in the
15 absence of statutory text, no matter how much one may think it may
16 advance purported remedial goals or represent congressional
17 intent.¹⁰⁰ Indeed, the Supreme Court very recently emphasized the

approval is not required for Rule 68 offers of judgment This Court concurs with the majority and declines to ignore the mandatory language of Rule 68." (internal quotation marks omitted)).

⁹⁸ *CTS Corp. v. Waldburger*, 573 U.S. 1, 12 (2014).

⁹⁹ See *Magwood v. Patterson*, 561 U.S. 320, 334 (2010) ("We cannot replace the actual text with speculation as to Congress' intent."); cf. *C.I.R. v. Asphalt Prods. Co., Inc.*, 482 U.S. 117, 121 (1987) ("Judicial perception that a particular result would be unreasonable may enter into the construction of ambiguous provisions, but cannot justify disregard of what Congress has plainly and intentionally provided.").

¹⁰⁰ See *Baker Botts L.L.P. v. ASARCO LLC*, 135 S. Ct. 2158, 2169 (2015) ("Our job is to follow the text even if doing so will supposedly undercut a basic objective of the statute." (internal quotation marks omitted)); see also *Henson*, 137 S. Ct. at 1725 ("[W]hile it is of course our job to apply faithfully the law Congress has written, it is never our job to rewrite a constitutionally valid statutory text under the banner of speculation about what Congress might have done had it faced a question that, on everyone's account, it never faced.").

1 importance of giving the FLSA nothing more than a “fair reading”
2 when it rejected the argument that the FLSA’s *statutory* exceptions
3 should be narrowly-construed and characterized the premise that
4 “the FLSA pursues its remedial purpose at all costs” as “flawed.”¹⁰¹

5 While interpreting the FLSA to require judicial approval of
6 Rule 68(a) offers of judgment settling FLSA claims might be consistent
7 with some of the policy goals of Congress when it enacted the FLSA
8 in 1938, we also agree with Hasaki that the Congressional policy of
9 timely entry of judgment upon acceptance of a Rule 68(a) offer would
10 be frustrated by a judicial approval requirement. Moreover, the fact
11 that a Rule 68(a) stipulated judgment must be entered by the clerk of
12 the court does not mean that the judgment cannot later be challenged
13 as deficient under the common law of contract¹⁰² or under Rule 60(b)
14 for fraud, misrepresentation, misconduct, or “any other reason that
15 justifies relief.”¹⁰³ In any event, we do not see our role as weighing
16 these policy considerations and determining which policy to
17 prioritize when the statute is unambiguous. That is the job of
18 Congress.¹⁰⁴

19 Moreover, the fact that a judicial approval requirement might
20 further the broad, remedial policy goals of the FLSA does not
21 necessarily mean that Congress would have enacted such a

¹⁰¹ *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1142 (2018).

¹⁰² See *Goodheart Clothing v. Laura Goodman Ent.*, 962 F.2d 268, 272 (2d Cir. 1992) (offers of judgment are contracts treated according to ordinary contract principles).

¹⁰³ Fed. R. Civ. P. 60(b).

¹⁰⁴ See *Rodriguez v. United States*, 480 U.S. 522, 525–26 (1987) (“[N]o legislation pursues its purpose at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute’s primary objective must be the law.”).

1 requirement if it had considered the question, for “it is quite mistaken
2 to assume, as [amici] would have us, that ‘whatever’ might appear to
3 ‘further the statute’s primary objective must be the law.’”¹⁰⁵ Were that
4 the case, we would be a short step away from requiring judicial
5 approval of a variety of settlements that involve vulnerable citizens,
6 such as discrimination suits under Title VII of the Civil Rights Act and
7 § 1983 claims of serious police misconduct.¹⁰⁶

8 With respect, the Dissent also disregards the costs imposed by
9 the requirement that it would read into FLSA and thus into Rule 68.
10 A frequently cited district court case in this Circuit on the conduct of
11 fairness reviews cites no fewer than nine factors (as well as the well-
12 worn “totality of the circumstances” standard) to guide the fairness
13 inquiry. *See Wolinsky v. Scholastic Inc.*, 900 F. Supp. 2d 332, 335–36
14 (S.D.N.Y. 2012) (listing such factors as “the presence of other
15 employees situated similarly to the claimant,” the “likelihood that the
16 claimant’s circumstance will recur,” and “a history of FLSA non-
17 compliance by the same employer or others in the same industry or
18 geographic region”). But information regarding these factors may be
19 unavailable in the early stages of litigation during which many Rule
20 68 offers occur. Often there will not even be basic information
21 concerning the claimed hours worked or rate of pay, leaving courts
22 ill-equipped to conduct a fairness review. *Cf. Mamani v. Licetti*, No.
23 13-CV-7002 (KMW)(JCF), 2014 WL 2971050, at *2 (S.D.N.Y. July 2,
24 2014) (finding insufficient information to adjudicate the fairness of a
25 proposed FLSA settlement where the parties failed to provide their
26 estimate of the hours worked or the applicable wage). The reviewing
27 court may thus be required to order the parties to come forward with
28 more information, expending time and resources, and unnecessarily

¹⁰⁵ *Henson*, 137 S. Ct. at 1725 (brackets omitted) (quoting *Rodriguez*, 480 U.S. at 526).

¹⁰⁶ *See* Appellant’s Br. at 18–19.

1 increasing attorney's fees. See *Picerni v. Bilingual Seit & Preschool Inc.*,
2 925 F. Supp. 2d 368, 377 (E.D.N.Y. 2013) (noting that "the vast majority
3 of FLSA cases" involve claims that "are simply too small, and the
4 employer's finances too marginal, to have the parties take further
5 action if the Court is not satisfied with the settlement"), *abrogated by*
6 *Cheeks*, 796 F.3d 199 (2d Cir. 2015). And this means delay. As
7 represented at oral argument, a fairness hearing could impose a delay
8 of more than six months on the recovery due to plaintiffs.

9 We do not dwell here on policy considerations given that it is
10 not possible on this record to perform a cost-benefit analysis as to the
11 requirement of fairness hearings in Rule 68 settlements of the
12 thousands of FLSA cases filed in this Circuit each year. And even if
13 such an analysis were possible, that is not our job. As the Dissent
14 would have it, this court should insert a paternalistic judicial fairness
15 proceeding into Rule 68(a) settlements of FLSA claims that Congress
16 does not require and the parties, represented by counsel, do not want.
17 Our holding to the contrary, and our reasoning supporting it, is
18 dismissed as "simplistic" by the Dissent, to which our answer is that
19 there are frequently times when "less is more,"¹⁰⁷ and this is one of
20 them. Congress knows how to require judicial approval of
21 settlements and dismissals when it wants to.¹⁰⁸ Appeals to the broad
22 remedial goals and uniquely protective qualities of the FLSA do not
23 authorize us to write a judicial approval requirement into the FLSA,
24 and thereby into Rule 68(a), when the text of both provisions is silent
25 as to such a requirement.

26

¹⁰⁷ See generally Phillip C. Johnson, *Miles van der Rohe* 49 (1947) (ascribing the phrase "less is more" to the minimalist architect, Miles van der Rohe).

¹⁰⁸ See *supra* Section I.

1 **CONCLUSION**

2 We have considered amici's other arguments and find them to
3 be without merit.¹⁰⁹ For the reasons we have stated, we hold that
4 judicial approval is not required of Rule 68(a) offers of judgment
5 settling FLSA claims. We therefore REVERSE and VACATE the
6 district court's order to the contrary and REMAND to the district
7 court with instructions that the Clerk of the Court enter the judgment
8 as stipulated in the parties' accepted Rule 68(a) offer.

¹⁰⁹ Appointed amicus also makes the argument that because Rule 68(a) offers of judgment are "contracts to be interpreted according to ordinary contract principles," *Steiner v. Lewmar, Inc.*, 816 F.3d 26, 31 (2d Cir. 2016), and because "employees cannot waive their rights under the FLSA, they cannot validly accept offers to settle their claims unless the offers are approved by the court or DOL," PCLG Br. at 21–22. This argument confuses the concepts of capacity to enter a contract with enforceability of a contract. In *Brooklyn Savings* and *Gangi*, the Supreme Court described the question as whether waivers and releases of FLSA liability were enforceable as an affirmative defense for liquidated damages. At no time did the Court discuss, or did the parties argue, that the employees' agreements to waive or release their rights to liquidated damages under FLSA were invalid for lack of contractual capacity. Indeed, if employees had no contractual capacity to settle or dismiss their FLSA claims, then there would have been no need for the Court to expressly reserve the question of whether an employee's release of his right to liquidated damages as part of a bona fide settlement of a bona fide dispute over the number of hours worked or the regular rate of pay would be enforceable. *See Gangi*, 328 U.S. at 114–15.

1 CALABRESI, *Circuit Judge*, dissenting:

2 This is a simple case of statutory misinterpretation. I believe the
3 majority misreads the language, the history, and the design of the Fair
4 Labor Standards Act (“FLSA”). It also ignores the longstanding
5 position of the Supreme Court of the United States, the Department
6 of Labor, and seven Courts of Appeals—including our own. I
7 therefore respectfully, but strongly, dissent.

8 INTRODUCTION

9 The Plaintiff in this case alleged, on behalf of himself and all
10 other similarly situated employees, that Defendants-Appellants failed
11 to pay him overtime in violation of the FLSA. *See* 29 U.S.C. § 207(a).
12 The FLSA states that any employer who commits such a violation
13 “shall be liable to the employee or employees affected in the amount
14 of . . . their unpaid overtime compensation . . . and in an additional
15 equal amount as liquidated damages.” *Id.* § 216(b). The statute in its
16 terms provides two, and only two, methods for resolving such
17 liability:

- 18 1. “An action to recover the liability prescribed in the preceding
19 sentence[] may be maintained against any employer . . . in any
20 Federal or State court of competent jurisdiction” by the
21 employee(s) or by the Secretary of Labor. *Id.* § 216(b)-(c); or
- 22 2. The Secretary of Labor “is authorized to supervise the payment
23 of the . . . unpaid overtime compensation owing to any
24 employee,” and “the agreement of any employee to accept such
25 payment shall upon payment in full constitute a waiver by such

1 employee of any right he may have . . . to such . . . unpaid
2 overtime compensation and an additional equal amount as
3 liquidated damages.” *Id.* § 216(c).

4 The majority, however, finds a third, implied method of
5 resolving such claims of FLSA overtime liability: a private Rule 68(a)
6 settlement agreement negotiated only by the employer and employee,
7 without oversight by any third party. *See* Fed. R. Civ. P. 68(a).

8 The reasoning of the majority is easily enough stated. Rule
9 68(a), as written, makes settlement agreements under that rule
10 mandatorily applicable. And the majority asserts that, if that meant
11 that no Rule 68(a) settlements could be challenged and all were
12 untouchable, that would be the end of this case. But, as the majority
13 is willing to accept for its analysis, Rule 68(a)’s seemingly absolute
14 language is not in fact absolute. Rather, it allows exceptions where a
15 settlement violates another statute or rule. *See* Maj. Op. 9-10; *see also*
16 *Gordon v. Gouline*, 81 F.3d 235 (D.C. Cir. 1996); *White v. Alabama*, 74
17 F.3d 1058 (11th Cir. 1996); *Blair v. Shanahan*, 38 F.3d 1514 (9th Cir.
18 1994); *Cotton v. Hinton*, 559 F.2d 1326 (5th Cir. 1977); 31 U.S.C. §
19 3730(b)(1); N.Y. C.P.L.R. §§ 1207, 1208. In such instances, the Rule
20 68(a) settlement yields to the other statute or rule.

21 The majority does not, however, read subsection 216(c) of the
22 FLSA as superseding Rule 68(a)’s mandatory language. It reaches this
23 conclusion because it fails to find in subsection 216(c) an express
24 “textual requirement for judicial approval.” Maj. Op. 13; *see also id.* at
25 12, 17-20.

1 But this is an incorrect reading of both subsection 216(c) and
2 the FLSA as a whole. In fact, subsection 216(c) amounts to such a
3 command, though no robotic words to that effect are used. And the
4 FLSA, as a whole, prohibits the kind of unsupervised private
5 settlement agreements that the application of Rule 68(a) to FLSA
6 claims would bring about. Thus, the FLSA contains just the kind of
7 “clear expression of congressional intent” that the majority seems to
8 require. Maj. Op. 11, 18 (selectively quoting *Marek v. Chesny*, 473 U.S.
9 1, 11-12 (1985)).¹ It therefore supersedes Rule 68(a)’s mandatory
10 language.

11 The bulk of the majority opinion is spent seeking to distinguish
12 cases that run against it. It repeatedly tries to explain why—though
13 those cases are obviously in tension with the majority’s result—the
14 majority is not absolutely bound by them. And so distinctions without
15 differences are, again and again, propounded, as are occasional
16 distinctions with only slight differences.

17 Yet, in the end, the majority always returns to its one simple
18 and simplistic argument: Rule 68(a) settlements are mandatory and

¹ Actually, the requirement in *Marek* is not as strict as the majority makes it out to be. For *Marek* says both that a “clear expression of congressional intent” is needed for a statute to supersede a federal rule of procedure, and that the test is whether “applying Rule 68 in the context of [the statute] is consistent with the policies and objectives of [the statute].” 473 U.S. at 11. The Court in *Marek* does not clarify the relationship between these two (potentially) different standards. Nevertheless, even assuming *Marek* requires just what the majority says, subsection 216(c) and the FLSA as a whole easily satisfy that standard.

1 subject to no controls, unless a statute precludes such absolute
2 applicability, and the FLSA has no words precisely to that effect.
3 Reading the FLSA to permit such settlements, however, violates all
4 rules of statutory interpretation, the decisions of all relevant courts,
5 and common sense as well. The FLSA, in fact, is paradigmatically a
6 statute that prohibits unsupervised private settlement agreements,
7 including those made under Rule 68(a).

8 **I. The Meaning of Subsection 216(c) of the FLSA**

9 The majority says that its reading of subsection 216(c) of the
10 FLSA as not superseding Rule 68(a) is “unambiguous.” Maj. Op. 13.
11 This is a most unusual use of the term. Normally, “unambiguous”
12 goes to the plain meaning of words. Here, the majority applies it to
13 what it considers to be the absence of words. And the majority does
14 this for a simple reason: it believes that, if the absence of words can
15 be deemed unambiguous, then they can disregard all “other tools of
16 statutory interpretation.” *Id.* at 21. But, in fact, the FLSA does not
17 “unambiguously” state what the majority claims—quite the opposite.
18 It *manifestly* requires the rejection of the majority’s approach. The
19 majority’s reading of the FLSA violates at least three rules of statutory
20 interpretation.

21 **A. The Whole Act Rule**

22 First, in its reading of subsection 216(c), the majority fails to
23 consider the statute as a whole, which makes clear that subsection
24 216(c)—the provision that carves out a specific set of supervised
25 settlement agreements as valid under the FLSA—prohibits

1 unsupervised private settlement agreements. It is, of course, a
2 “fundamental canon of statutory construction that the words of a
3 statute must be read in their context and with a view to their place in
4 the overall statutory scheme.” *Food and Drug Admin. v. Brown &*
5 *Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (quoting *Davis v.*
6 *Michigan Dep’t of Treasury*, 489 U.S. 803, 809 (1989)). In particular, “[i]n
7 determining whether Congress has specifically addressed the
8 question at issue, a reviewing court should not confine itself to
9 examining a particular statutory provision in isolation. The
10 meaning—or ambiguity—of certain words or phrases may only
11 become evident when placed in context.” *Id.* at 132; *see also Jacobs v.*
12 *N.Y. Foundling Hosp.*, 577 F.3d 93, 98-100 (2d Cir. 2009) (per curiam).

13 Even a cursory review of the FLSA reveals several provisions
14 that indicate that subsection 216(c) limits the mechanisms by which
15 employers and employees can settle FLSA wage/hour claims. *First*,
16 the statute sets a mandatory floor for wages (and a mandatory ceiling
17 for standard workweek hours) for virtually all employees in the
18 United States. *See* 29 U.S.C. §§ 206, 207. *Second*, the statute makes it a
19 federal crime for an employer willfully to violate those wage
20 requirements. *See id.* § 215(a)(2). *Third*, the statute gives district courts
21 the authority to issue injunctions against employers who “withhold[]
22 payment of minimum wages or overtime compensation found by the
23 court to be due to employees.” *Id.* § 217. *Fourth*, in the event that an
24 employer violates the wage requirements, the statute *specifically*
25 defines the damages for which employers “*shall* be liable to the
26 employee” to be the full amount of their unpaid wages and “an

1 additional equal amount as liquidated damages.” *Id.* § 216(b)
2 (emphasis added).

3 These statutory requirements set minimum levels of wages that
4 must be given to employees. They also establish the minimum that an
5 employer who violated these requirements is obligated to pay. *They*
6 *are mandatory*. As such, they represent a clear expression of
7 congressional intent to prohibit private settlements that go below the
8 statutory mandates.

9 Subsection 216(c) permits settlement agreements that are
10 supervised by the Department of Labor (and, as we shall see *infra*,
11 courts) because such supervision assures that the core statutory
12 obligations will be met. Rule 68(a) settlement agreements, instead,
13 privately determine what the employer must pay, regardless of the
14 statutory requirements. Therefore, the majority’s conclusion that
15 subsection 216(c) allows unsupervised Rule 68(a) private settlements
16 is in obvious conflict with the text of the statute as a whole.

17 ***B. Statutory Language Should Not Be Rendered Superfluous or***
18 ***Meaningless***

19 Second, the majority overlooks the fact that its reading makes
20 the existence of subsection 216(c) meaningless. It is a basic principle
21 of statutory interpretation that, where Congress “explicitly
22 enumerates certain exceptions” within a statute, “additional
23 exceptions are not to be implied, in the absence of evidence of a
24 contrary legislative intent.” *TRW Inc. v. Andrews*, 534 U.S. 19, 28
25 (2001) (quoting *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-17

1 (1980)). That is especially true where the additional exception “would
2 not merely supplement the explicit exception,” but “would in
3 practical effect render that exception entirely superfluous.” *Id.* at 29.

4 Here, subsection 216(c) says that private settlement agreements
5 resolving FLSA wage/hour liability constitute valid waivers of FLSA
6 plaintiffs’ claims *when they are supervised by the Secretary of Labor*. But
7 subsection 216(c) is rendered superfluous by the majority’s
8 interpretation. Why specify that settlements supervised by the Labor
9 Secretary are valid if, as the majority maintains, private settlement
10 agreements—such as those under Rule 68(a)—are *always* allowed
11 under the statute? *Cf., e.g., Jacobs*, 577 F.3d at 100 (observing that,
12 when “Congress singled out specific non-profits” to be deemed
13 subject to the FLSA’s requirements, it implicitly excluded all other
14 non-profits).

15 C. *The Statutory History*

16 Third, and perhaps most important, the majority ignores
17 completely the significance of the statutory history of subsection
18 216(c). The majority repeatedly argues that “extrinsic evidence” and
19 *legislative* history should not be consulted unless a statute is
20 ambiguous. *See* Maj. Op. 20-21 & n.75. Putting aside the fact that the
21 FLSA certainly does not unambiguously permit the majority’s result,
22 the majority confuses legislative history for statutory history. In doing
23 that, it takes the unprecedented position that statutory history is
24 irrelevant in understanding the meaning of a statute.

1 It is true that the Supreme Court has said that legislative history
2 generally does not come into play when the statute is unambiguous.
3 *See, e.g., Matal v. Tam*, 137 S. Ct. 1744, 1756 (2017). But no such rule
4 applies to statutory history. *See, e.g., BNSF Ry. Co. v. Loos*, 139 S. Ct.
5 893, 906 (2019) (Gorsuch, J., dissenting) (“To be clear, the statutory
6 history I have in mind here isn’t the sort of unenacted legislative
7 history that often is neither truly legislative . . . nor truly historical
8 Instead, I mean here the record of *enacted* changes Congress made
9 to the relevant statutory text over time, the sort of textual evidence
10 everyone agrees can sometimes shed light on meaning.”).

11 Statutory history—especially of the kind delineating changes
12 made to the statute by Congress in response to decisions by the
13 federal courts—is relevant regardless of whether the statute is
14 ambiguous, and, indeed, is commonplace in the opinions of the High
15 Court. *See, e.g., Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 693-96
16 (2014); *Hinck v. United States*, 550 U.S. 501, 503-07 (2007); *Booth v.*
17 *Churner*, 532 U.S. 731, 739-41 (2001). Statutory history is not a kind of
18 “extrinsic evidence” as the majority suggests. Maj. Op. 20-22. It is an
19 accepted and uncontroversial tool in the interpretation of statutory
20 texts. *See, e.g., Antonin Scalia & Bryan A. Garner, Reading Law: The*
21 *Interpretation of Legal Texts* 256 (2012) (“If the legislature amends or
22 reenacts a provision other than by way of a consolidating statute or
23 restyling project, a significant change in language is presumed to
24 entail a change in meaning.”).

25 The statutory history of subsection 216(c) of the FLSA makes
26 crystal clear that, as the text of the statute itself indicates, the FLSA

1 does not, as a general matter, allow unsupervised private settlement
2 of wage/hour claims.

3 The original FLSA did not contain subsection 216(c). *See* Fair
4 Labor Standards Act of 1938, Pub. L. No. 75-718, 52 Stat. 1060 (1938).
5 Not surprisingly, almost immediately, some employers sought to
6 resolve their statutory liability for FLSA wage/hour claims through
7 private settlement agreements negotiated between the employer and
8 employee. In most such cases, the employer remitted to the
9 employees some portion of their unpaid backpay; the employees then
10 signed a contract waiving their rights to bring suit to recover any
11 additional unpaid backpay and/or liquidated damages owed under
12 the statute.²

13 The Supreme Court, in a pair of cases—*Brooklyn Savings Bank v.*
14 *O’Neil*, 324 U.S. 697 (1945), and *D.A. Schulte, Inc. v. Gangi*, 328 U.S. 108
15 (1946)—held that, despite the lack of any specific prohibiting
16 language, the FLSA banned almost all such settlements. Thus, in
17 *Brooklyn Savings Bank*, the Court held that private settlement
18 agreements in which the employer pays the employee less than the
19 employer’s statutory liability (in the amount of unpaid backpay
20 and/or liquidated damages) in return for the employee’s waiver of
21 their rights violated the FLSA. 324 U.S. at 707-09 (liquidated
22 damages); *id.* at 713-14 (backpay). Then, in *Gangi*, the Court extended

² The lower courts that then addressed the issue almost uniformly held that the private agreements violated the FLSA. *See Brooklyn Savs. Bank v. O’Neil*, 324 U.S. 697, 708 n.21 (1945) (collecting cases from the lower courts).

1 *Brooklyn Savings Bank*, and held that such agreements are invalid even
2 if they are entered into for the purpose of settling a bona fide dispute
3 as to whether the employer is covered under the FLSA. 328 U.S. at
4 114.

5 The Court did leave open the possibility that some limited
6 private settlement agreements involving FLSA wage/hour claims
7 might be acceptable.

8 *First*, in *Gangi*, the Court observed in dicta that settlement
9 agreements arrived at through stipulated judgments may be valid
10 because “the requirement of pleading the issues and submitting the
11 judgment to judicial scrutiny may differentiate stipulated judgments
12 from compromises by the parties.” 328 U.S. at 114 n.8. In other words,
13 *it indicated that court-supervised settlements might be valid under the*
14 *FLSA.*³

15 *Second*, in both *Brooklyn Savings Bank* and *Gangi*, the Court—
16 because the issue was not squarely presented—declined to address
17 whether private settlement agreements might be valid when they are

³ In Footnote 8, the *Gangi* Court was reacting to the petitioner’s argument that private compromises between the parties are permitted under the FLSA in light of *North Shore Corporation v. Barnett*, 323 U.S. 679 (1944). But, as explained *infra* at 15-16, *North Shore Corp.* involved a stipulated judgment filed with the Supreme Court for its review and thus, as *Gangi* noted, subjected to “judicial scrutiny.” It was this difference between judicially scrutinized and private settlements that the Court in *Gangi* wanted to emphasize.

1 the product of bona fide disputes as to the number of hours worked
2 or the regular rate of employment. 324 U.S. at 714; 328 U.S. at 114-15.⁴

3 But apart from these two possibilities—neither of which are
4 relied on by the majority in the instant case—the Court made clear
5 that the FLSA did not permit private settlements.⁵

6 The breadth of these holdings created problems for the
7 Department of Labor. The Department had adopted a policy of
8 encouraging employers to make voluntary restitution of unpaid
9 backpay to their employees in cases where litigation seemed
10 unnecessary. Fair Labor Standards Amendments of 1949, S. Rep. No.
11 81-640, 81st Cong., 1st Sess., *reprinted in* 1949 U.S.C.C.A.N. 2241, 2248.
12 But employers declined to cooperate with the Department of Labor.
13 They feared that, despite the Department of Labor’s supervision, such

⁴ In doing so, the Court was leaving open the possibility that bona fide disputes as to the number of hours worked or the regular rate of employment were valid under the FLSA, as some lower courts had concluded. *See Gangi*, 328 U.S. at 115 n.10 (citing *Strand v. Garden Valley Telephone Co.*, 51 F. Supp. 898, 904-05 (D. Minn. 1943) (characterizing such bona fide disputes as “fact” disputes as opposed to “legal” ones and therefore potentially subject to compromise)).

⁵ Defendants-Appellants alleged at oral argument that their case involves a bona fide factual dispute. But they do not point to any evidence in the record to support that allegation, nor is it ascertainable from the face of their Rule 68(a) settlement agreement. Court supervision of the proposed settlement is, of course, what the District Court judgment, that the majority reverses today, ordered.

1 settlements were not valid under *Brooklyn Savings Bank* and *Gangi*. *Id.*
2 at 2249.

3 To solve this problem, the Secretary of Labor requested, in
4 testimony before the Senate, that the Department of Labor be given
5 the power to supervise the private settlement of FLSA wage/hour
6 claims, with such supervised settlements fully resolving the
7 employer's statutory liability. *Id.* at 2247-48. And that is precisely
8 what happened: in 1949, Congress amended the FLSA, inserting
9 subsection 216(c). *See* Fair Labor Standards Amendments of 1949,
10 Pub. L. No. 81-393, 63 Stat. 910, 919 (1949). In other words, Congress,
11 at the request of the Department of Labor, added "Department of
12 Labor-supervised settlements" to "court-supervised settlements" as
13 exceptions to the FLSA's general prohibition against private
14 settlement agreements.

15 Two things are clear from this statutory history. *First*, Congress
16 was fully aware that the FLSA was being interpreted to prohibit
17 private settlements of FLSA wage/hour claims. *Second*, in response to
18 this interpretation, Congress, far from overturning *Brooklyn Savings*
19 *Bank* and *Gangi* or otherwise authorizing private settlements more

1 generally, amended the FLSA to allow such settlements *if and when*
2 *they were supervised* by the Department of Labor.⁶

⁶ Congress' approval of the Supreme Court's interpretation of the FLSA in *Brooklyn Savings Bank* and *Gangi* can also be seen in its passage of the Portal-to-Portal Act of 1947. Congress inserted a provision into that Act which amended the FLSA to permit private settlements of FLSA wage/hour claims for causes of action which accrued prior to May 14, 1947. See Portal-to-Portal Act of 1947, Pub. L. No. 80-49, 61 Stat. 84, 86 (codified at 29 U.S.C. § 253 (enacted May 14, 1947)). But Congress limited such settlements to those involving "a bona fide dispute as to the amount payable by the employer." 29 U.S.C. § 253(a). Congress also prohibited such settlements from "be[ing] so compromised to the extent that such compromise is based on an hourly wage rate less than the minimum required under [the FLSA], or on a payment for overtime at a rate less than one and one-half times such minimum hourly wage rate." *Id.* In essence, then, Congress confirmed the existence of the bona fide dispute exception that the Supreme Court had left open in *Brooklyn Savings Bank* and *Gangi*, but only for those FLSA wage/hour claims that had accrued prior to May 14, 1947.

To the extent the majority claims that the Portal-to-Portal Act signals Congress's *disapproval* of the Supreme Court's decisions in *Brooklyn Savings Bank* and *Gangi*, the majority patently ignores the text of that statute. Through the Portal-to-Portal Act, Congress was simply abrogating three Supreme Court decisions that made employers liable for their employees' "portal-to-portal" activities, such as time spent walking on the employer's premises from the time clock to the work bench. See *Tennessee Coal, Iron & R.R. Co. v. Muscoda Local No. 123*, 321 U.S. 590 (1944); *Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers of Am.*, 325 U.S. 161 (1945); *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946). "Many employers . . . did not have a custom or practice of paying their employees for such preliminary activities. Consequently, they faced a flood of FLSA suits." *Sepulveda v. Allen Family Foods, Inc.*, 591 F.3d 209, 217 (4th Cir. 2009). This specific line of Supreme Court decisions—and manifestly not the core FLSA jurisprudence that required supervision of settlements—is what occasioned "the express congressional disapproval" that the majority cites. Maj.

1 Thus, as interpreted by the Supreme Court in *Brooklyn Savings*
2 *Bank* and *Gangi*, and as amended by Congress in 1949, subsection
3 216(c) of the FLSA prohibits private settlements as a general matter,
4 and—at most—allows three forms of settlement agreements: (1) a
5 settlement supervised by the Department of Labor; (2) a settlement
6 subjected to judicial scrutiny; and (3) perhaps, a settlement negotiated
7 pursuant to a bona fide dispute as to hours worked or the rate of
8 employment.⁷

9 Significantly, and unlike the settlements permitted by the High
10 Court and Congress, Rule 68 settlements are entirely at the will of
11 private parties and subject to none of the above-mentioned validity
12 controls. It follows that the majority’s position permitting
13 uncontrolled Rule 68 settlements flies in the face of the FLSA, and thus
14 cannot be correct.

Op. 24 n.84. See also *Addison v. Huron Stevedoring Corp.*, 204 F.2d 88, 96 (2d Cir. 1953) (L. Hand, J., concurring) (quoting the critical congressional language on which the majority relies and explaining how it refers to *Tennessee Coal, Jewell Ridge*, and *Mt. Clemens*).

⁷ As mentioned earlier, this third exception is not relevant to the instant case. Our Circuit has since said that FLSA claims are arbitrable. See *Rodriguez-Depena v. Parts Authority, Inc.*, 877 F.3d 122 (2d Cir. 2017). But that is because the kind of third-party supervision that arbitration affords was deemed to be sufficiently similar to court (or Department of Labor) approval to be valid under the FLSA. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) (“By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.”).

1 **II. The Universal Understanding of the FLSA’s Requirements**

2 Quite apart from the majority’s incorrect understanding of the
3 text and statutory history of subsection 216(c) specifically, the
4 majority’s holding today, in its reading of the FLSA, goes against
5 Supreme Court precedent, the decisions of six Courts of Appeals, the
6 longstanding position of the Department of Labor, and our own
7 Court’s case law.

8 **A. *The Supreme Court***

9 The Supreme Court has, again and again, read the FLSA to
10 prohibit private settlement agreements. *See, e.g., Brooklyn Savs. Bank,*
11 *324 U.S. at 706-07; Gangi, 328 U.S. at 116; Barrentine v. Arkansas-Best*
12 *Freight System, Inc., 450 U.S. 728, 740 (1981); Tony & Susan Alamo*
13 *Found. v. Sec’y of Labor, 471 U.S. 290, 302 (1985); United States v.*
14 *Mezzanatto, 513 U.S. 196, 206 n.4 (1995).*

15 The majority attempts to distinguish these cases as not directly
16 addressing the question at issue here. *See* Maj. Op. 13-20. It is true that
17 none of these cases involve the application of Rule 68(a) to FLSA
18 claims. But that does not mean that these cases—Supreme Court
19 decisions interpreting the design of the FLSA and its relationship to
20 private settlement agreements—are not directly relevant to our case.
21 For they all say that, as a general rule, FLSA wage/hour claims cannot
22 be resolved through private settlement agreements (which Rule 68(a)
23 settlements manifestly are). In other words, the distinctions the
24 majority makes are typically distinctions that make no difference to
25 the issue before us.

1 Perhaps uncomfortable with the distinctions it makes, the
2 majority tries to shield its unprecedented ruling by a
3 mischaracterization of a one-paragraph summary order of the
4 Supreme Court. *See* Maj. Op. 18 & n.63 (discussing *North Shore Corp.*
5 *v. Barnett*, 323 U.S. 679 (1944)). Despite what the majority suggests,
6 there is no indication whatever that the Supreme Court ordered the
7 lower court in that case to enter a stipulated judgment without
8 “reviewing the [parties’] stipulation for fairness.” Quite the contrary.
9 For the Supreme Court reviewed the dispute in *North Shore Corp.*
10 twice—as the Fifth Circuit and the district court had previously done.⁸
11 The stipulated judgment was submitted to the Court in the form of a
12 joint motion, which the justices certainly reviewed before putting to
13 one side the quite separate issue on which they had granted certiorari.
14 It is because of this procedural history—which details extensive

⁸ *Overstreet v. N. Shore Corp.*, 43 F. Supp. 445 (S.D. Fla. 1941) (granting motion to dismiss on claim that toll road employees are engaged in interstate commerce and thus entitled to alleged unpaid minimum wages and overtime under the FLSA), *aff’d*, 128 F.2d 450 (5th Cir. 1942), *rev’d*, 318 U.S. 125, 129–30 (1943) (“If [roads and bridges] are used by persons and goods passing between the various States, they are instrumentalities of interstate commerce. Those persons who are engaged in maintaining and repairing such facilities should be considered as ‘engaged in commerce’ . . .” (internal citation omitted)); *see also Overstreet v. N. Shore Corp.*, 52 F. Supp. 503 (S.D. Fla. 1943) (after a bench trial, holding that the employees are entitled to compensation under the FLSA for the full time they worked and awarding specific unpaid wages, overtime compensation, penalties, and attorney’s fees), *aff’d sub nom., N. Shore Corp. v. Barnett*, 143 F.2d 172 (5th Cir. 1944) (affirming on the grounds that the time spent by the toll collectors and ticket sellers in exempt activity and in non-exempt activity cannot be segregated), *cert. granted*, 323 U.S. 691, *vacated and modified on stipulations*, 323 U.S. 679 (1944).

1 “judicial scrutiny” over the course of six distinct proceedings—that
2 *Gangi* cited *North Shore Corp.* as an example of a stipulated judgment
3 subjected to judicial scrutiny and thus permissible under the FLSA.
4 *Gangi*, 328 U.S. at 113.

5 Finally, perhaps because of the weakness of their attempts to
6 distinguish the relevant Supreme Court authorities, the majority may
7 be trying to avoid the Supreme Court’s precedents in an additional
8 way. It is a way, however, that cannot be correct. The majority may
9 be implying that the holdings of the two leading High Court cases—
10 *Brooklyn Savings Bank* and *Gangi*—are doubtful because the cases were
11 decided “seven decades” ago. Maj. Op. 16. Insofar as the majority is
12 suggesting that the Supreme Court, if presented with the issue today,
13 would reach a different conclusion, this is always a possibility. But of
14 course, unless and until that happens, we are bound by its decisions
15 on the books. See *Agostini v. Felton*, 521 U.S. 203, 237-38 (1997).
16 Whether we agree with them or not, the Supreme Court’s precedents
17 on the FLSA govern us. And they expressly tell us that the FLSA was
18 passed in order to “prevent private contracts” between employers
19 and their employees that, “due to the unequal bargaining power as
20 between employer and employee,” result in employees accepting
21 substandard wages and excessive hours. *Brooklyn Savs. Bank*, 324 U.S.
22 at 706; see also 29 U.S.C. § 202.

23 The Court in *Brooklyn Savings Bank* explained that the FLSA
24 achieves this goal in two ways: at the front end, by setting mandatory,
25 federal “standards of minimum wages and maximum hours,”
26 *Brooklyn Savs. Bank*, 324 U.S. at 707; and at the back end, by requiring

1 “that an employer who gambles on evading the Act will be liable for
2 payment not only of the basic minimum originally due but also
3 damages equal to the sum left unpaid.” *Id.* at 709; *see also* 29 U.S.C. §
4 216(b). To allow “waiver” of either provision by private contract
5 would, the Supreme Court emphasized, “nullify” the Act. *Brooklyn*
6 *Savs. Bank*, 324 U.S. at 707.

7 The majority dismisses references to these readings of the FLSA
8 as irrelevant appeals to public policy and to humanitarian goals. *See*
9 *Maj. Op.* 28; *see also id.* at 28-30. But the majority misses the point: these
10 are not abstract references to public policy considerations; they are
11 binding explanations of how the FLSA works. As the Supreme Court
12 said, the FLSA “forbids employee waiver of the minimum statutory
13 rate because of inequality of bargaining power,” and this same
14 statutory principle “prohibits these same employees from bargaining
15 with their employer in determining whether so little damage was
16 suffered that waiver of [statutory backpay or] liquidated damage is
17 called for.” *Brooklyn Savs. Bank*, 324 U.S. at 708; *see also Gangi*, 328 U.S.
18 at 115-16. The FLSA’s general prohibition against private settlement
19 agreements is not an ideologically-based interpretation, but rather,
20 according to the Supreme Court, an essential part of the design of the
21 statute.

22 ***B. The Other Circuits and the Department of Labor***

23 The majority fails to mention entirely the decisions of six other
24 Courts of Appeals and the longstanding position of the Department

1 of Labor, whose readings of the FLSA unequivocally run counter to
2 the majority's position.

3 The Courts of Appeals have uniformly adopted the position
4 that the FLSA prohibits private settlement of wage/hour claims as a
5 general rule. That includes the Fourth Circuit, *Taylor v. Progress*
6 *Energy, Inc.*, 493 F.3d 454, 460 (4th Cir. 2007), *superseded by regulation*
7 *on other grounds as recognized in, Whiting v. Johns Hopkins Hosp.*, 416 F.
8 App'x 312 (4th Cir. 2011); the Fifth Circuit, *Bodle v. TXL Mortg. Corp.*,
9 788 F.3d 159, 161, 164-65 (5th Cir. 2015); the Sixth Circuit, *Boaz v. FedEx*
10 *Customer Information Servs., Inc.*, 725 F.3d 603, 606 (6th Cir. 2013); *see*
11 *also Runyan v. Nat'l Cash Register Corp.*, 787 F.2d 1039, 1041-42 (6th Cir.
12 1986) (en banc) (discussing the FLSA, *Brooklyn Savings Bank*, and
13 *Gangi* at length)); the Seventh Circuit, *Walton v. United Consumers*
14 *Club, Inc.*, 786 F.2d 303, 306 (7th Cir. 1986); the Eighth Circuit, *Copeland*
15 *v. ABB, Inc.*, 521 F.3d 1010, 1014 (8th Cir. 2008); and the Eleventh
16 Circuit, *Lynn's Food Stores, Inc. v. U.S. Dep't of Labor*, 679 F.2d 1350,
17 1353-54 (11th Cir. 1982). The Ninth Circuit, in an unpublished
18 opinion, has also endorsed the general rule prohibiting purely private
19 settlement agreements. *See Seminiano v. Xyris Enter., Inc.*, 602 F. App'x
20 682, 683 (9th Cir. 2015).

21 Moreover, several district courts in those circuits that have not
22 yet addressed the issue have also followed the general prohibition
23 against private settlement of FLSA claims. *See, e.g., Kraus v. PA Fit II,*
24 *LLC*, 155 F. Supp. 3d 516, 524-29 (E.D. Pa. 2016) (following the general
25 prohibition and citing additional district court cases in the Third

1 Circuit); *Sarceno v. Choi*, 66 F. Supp. 3d 157, 167-70 (D.D.C. 2014)
2 (doing the same for the D.C. Circuit).⁹

3 Likewise, the Department of Labor—in amicus briefs,
4 congressional testimony, and agency rulemakings—has regularly
5 maintained that FLSA wage/hour claims can be settled by private
6 agreements only if they are supervised by a court or by the

⁹ The circuits differ among themselves only on what, if any, exceptions—not relevant to the instant case—may apply to that general prohibition. The Eleventh Circuit, for instance, has held that the bona fide dispute exception does *not* apply; that circuit maintains that “[t]here are only two ways in which back wage claims arising under the FLSA can be settled or compromised by employees”—those approved by a court and those supervised by the Department of Labor. *Lynn’s Food*, 679 F.2d at 1352; *see also McBride v. Legacy Components, LLC*, -- F. App’x --, No. 18-14105, 2019 WL 2538019, at *1 n.1 (11th Cir. June 20, 2019). Several circuits have cited approvingly to the Eleventh Circuit’s rule. *See, e.g., Walton v. United Consumers Club, Inc.*, 786 F.2d 303, 306 (7th Cir. 1986); *Seminiano v. Xyris Enter., Inc.*, 602 F. App’x 682, 683 (9th Cir. 2015).

The Fifth Circuit, on the other hand, has held that the bona fide dispute exception *is* valid under the FLSA. *Martin v. Spring Break ’83 Productions, L.L.C.*, 688 F.3d 247, 257 (5th Cir. 2012). But the circuit has confined that exception to circumstances where there has been sufficient “factual development of the number of unpaid overtime hours []or of compensation due for unpaid overtime” such that a court can be “assured . . . that the release resulted from a bona fide dispute.” *Bodle v. TXL Mortg. Corp.*, 788 F.3d 159, 161, 165 (5th Cir. 2015). Other circuits have signaled some agreement with the Fifth Circuit’s approach. *See, e.g., Barbee v. Big River Steel, LLC*, 927 F.3d 1024, 1026-27 (8th Cir. 2019) (leaving open the possibility that private settlement agreements resolving bona fide disputes may be valid under the FLSA).

1 Department of Labor. See Brief of Sec’y of Labor as Amicus Curiae In
2 Support of the District Court’s Decision at 19-20.¹⁰ Significantly, it has
3 consistently held this position for some forty years. *Id.*

4 The majority tries to ignore this “laundry list of courts and
5 cases,” Maj. Op. 19, by making a meaningless distinction between
6 “private settlements” and “stipulated judgments.” According to the
7 majority, those cases are silent on the issue of stipulated judgments
8 and “hold only that purely private settlements of FLSA claims,
9 independent of any litigation, are prohibited without judicial
10 approval or DOL supervision.” *Id.* But even this meaningless
11 difference is not in fact there, for the majority mischaracterizes those
12 precedents. See, e.g., *Lynn’s Food*, 679 F.2d at 1353 (“When employees
13 bring a private action for back wages under the FLSA, and present to
14 the district court a proposed settlement, the district court may enter a
15 stipulated judgment *after scrutinizing the settlement for fairness.*”).

16 **C. Our Circuit’s Precedent in Cheeks**

17 Our Court in *Cheeks v. Freeport Pancake House, Inc.*, 796 F.3d 199
18 (2d Cir. 2015), also said that FLSA claims generally cannot be settled
19 through purely private agreements. And *Cheeks* cannot comfortably
20 be reconciled with the majority’s opinion today.

¹⁰ The Department of Labor has taken the Eleventh Circuit position that no exception exists for bona fide disputes. Brief of Sec’y of Labor as Amicus Curiae In Support of the District Court’s Decision at 19-20.

1 The question in *Cheeks* was “whether the FLSA is an ‘applicable
2 federal statute’ within the meaning of Rule 41(a)(1)(A)(ii).” *Id.* at 204.
3 Rule 41(a)(1)(A)(ii) governs voluntary, stipulated dismissals of
4 actions in federal court. It states that, “[s]ubject to . . . any applicable
5 federal statute,” “[a] plaintiff may dismiss an action without a court
6 order by filing . . . a stipulation of dismissal signed by all parties.”
7 Fed. R. Civ. Pro. 41(a)(1)(A) & (A)(ii).

8 Our Court in *Cheeks* stated that “in light of the unique policy
9 considerations underlying the FLSA,” the FLSA falls “within Rule
10 41’s ‘applicable federal statute’ exception.” 796 F.3d at 206. We
11 therefore held that “Rule 41(a)(1)(A)(ii) stipulated dismissals settling
12 FLSA claims with prejudice require the approval of the district court
13 or the [Department of Labor] to take effect.” *Id.*

14 The majority, correctly, notes that the *Cheeks* Court did not deal
15 with Rule 68. But the *Cheeks* Court could not have prohibited the
16 unsupervised Rule 41 stipulated dismissals without first answering
17 in the negative the question of whether the FLSA—the “applicable
18 federal statute”—generally allows private settlement agreements.
19 And because that question is precisely the question that we are facing
20 here, *Cheeks* inevitably decided the key issue presented in the instant
21 case, and did so in the opposite way from the majority.

22 The majority’s decision today holds that, while the FLSA does
23 *not* allow purely private settlement agreements in the context of Rule
24 41(a)(1)(A)(ii) stipulated dismissals with prejudice, the FLSA *does*
25 allow purely private settlement agreements in the context of Rule

1 68(a) judgments. I fail to see any support for that distinction in the
2 text of the FLSA or anywhere else.

3 The majority seeks to locate the distinction within the Federal
4 Rules. *See* Maj. Op. 22-23. But that attempt is unconvincing. The
5 majority notes that Rule 41 contains language stating that plaintiffs
6 may voluntarily dismiss their cases subject to “any applicable federal
7 statute,” while Rule 68 does not. But as the majority reluctantly
8 recognizes, Rule 68 has, again and again, been interpreted to be
9 subject to an analogous exception. *See, e.g., Gordon v. Gouline*, 81 F.3d
10 235, 239-40 (D.C. Cir. 1996) (collecting cases); *see also* Maj. Op. 9-10.
11 Moreover, if Rule 68 conflicts with the FLSA, then the FLSA—a
12 statute—trumps Rule 68—a federal procedural rule—regardless of
13 whether Rule 68 gives the statute the permission to do so. *See Marek*
14 *v. Chesny*, 473 U.S. 1, 7-11 (1985) (citing *Califano v. Yamasaki*, 442 U.S.
15 682, 700 (1979)); *see also Am. Pipe & Const. Co. v. Utah*, 414 U.S. 538,
16 557-59 (1974) (the “proper test” for reconciling a federal statute and a
17 Federal Rule is to determine “whether [applying the Rule] in a given
18 context is consonant with the legislative scheme”).

19 Significantly, the majority’s ruling undermines *Cheeks* in one
20 additional, important way. As the District Court in the instant case
21 pointed out, if unsupervised Rule 68(a) settlement agreements are
22 permitted, there would be no reason for employers to try to do what
23 *Cheeks* prohibited through Rule 41(a)(1)(A)(ii). Employers would
24 simply use Rule 68(a) as an “end run” to accomplish what *Cheeks*
25 forbade. *Mei Xing Yu v. Hasaki Rest., Inc.*, 319 F.R.D. 111, 111 (S.D.N.Y.
26 2017).

1 **III. Rule 68 Settlements**

2 How then does the majority reach the conclusion that Rule
3 68(a) settlements are valid under the FLSA?

4 The majority points out that Rule 68(a) judgments are publicly
5 filed on the court docket. Through a leap of logic, it suggests that this
6 public filing amounts to judicial scrutiny. Maj. Op. 17, 27. And this
7 public filing, apparently, assuages any concern that the private
8 settlement agreement violates the FLSA in the manner prohibited by
9 the Supreme Court in *Brooklyn Savings Bank and Gangi*. *Id.* at 18, 23,
10 27. Indeed, according to the majority, public filing alone is enough to
11 distinguish meaningfully “stipulated judgments from private, back-
12 room compromises.” *Id.* at 17.

13 But the “public” filing is not and cannot be the kind of judicial
14 or Department of Labor supervision that the Supreme Court and
15 Congress made mandatory in the FLSA context. It does not give the
16 kind of protection that the Court held the FLSA mandates. There is no
17 way to tell, based on a Rule 68(a) filing, whether the settlement
18 awards plaintiffs damages below the statutory requirement. *See*
19 *Marek*, 473 U.S. at 6 (Rule 68(a) does not require an “itemize[d list of]
20 the respective amounts being tendered for settlement of the
21 underlying substantive claim”). In other words, the filing of Rule

1 68(a) settlements on the court docket in no way prevents settlements
2 that violate the express provisions of the FLSA.¹¹

3 As a result, the majority’s holding leads to an absurd outcome.
4 By the terms of Rule 68(a), once an offer of judgment has been made,
5 accepted, and submitted to the court by the parties, the clerk’s entry
6 of that judgment is mandatory. *See* Maj. Op. 7-8. And courts are
7 required to enter final judgments on all private Rule 68(a) settlements
8 of FLSA claims. This means that, if the parties in *Brooklyn Savings Bank*
9 or *Gangi* were to come before a district court today, and request that
10 the court enter judgment on their claims under Rule 68(a), the court
11 would have to do so. It would have to do so even though that
12 settlement is illegal under the FLSA. Nothing in the majority’s
13 opinion saves its holding from that absurd result.¹²

14 The majority’s attempt to avoid that absurd result—through an
15 appeal to the common law of contracts and to Rule 60(b) as ways of
16 avoiding illegal settlements—highlights the untenability of the
17 majority’s position. Maj. Op. 29. Placing the onus on a post-judgment

¹¹ Nor can one discern whether the settlement resolves a bona fide dispute, a requirement in the single circuit that has adopted the bona fide dispute exception. *See Bodle*, 788 F.3d at 161, 165.

¹² Indeed, the requirement that Rule 68(a) settlements be filed on the court docket makes matters worse. It renders the majority’s attempted distinction between a party’s capacity to enter into an agreement and that agreement’s enforceability meaningless. *See* Maj. Op. 10 n.31. We are here talking about unsupervised but court-ordered Rule 68(a) settlement agreements. These are court judgments and, hence, are enforceable as such.

1 motion to cure the judgment’s own illegality upends the basic
2 premise of how our judicial system functions. Because the entry of a
3 judgment carries significant legal consequences, there is a strong
4 presumption in favor of “the finality of judgments.” *Gonzalez v.*
5 *Crosby*, 545 U.S. 524, 535 (2005) (quoting *Liljeberg v. Health Servs.*
6 *Acquisition Corp.*, 486 U.S. 847, 873 (1988) (Rehnquist, C.J., dissenting).
7 That presumption reflects the foundational idea that if
8 “conclusiveness did not attend the judgments of [judicial] tribunals,”
9 parties would not “invoke[]” the “aid of [such] tribunals” for “the
10 vindication of rights of person and property.” *Southern Pac. R. Co. v.*
11 *United States*, 168 U.S. 1, 49 (1897). Precisely because of this
12 presumption, parties seeking relief from judgment under Rule 60(b)
13 must generally show “extraordinary circumstances.” *Gonzalez*, 545
14 U.S. at 535 (quotation marks and citations omitted). Had the drafters
15 of Rule 68(a) intended to reverse this presumption and allow the kind
16 of time-consuming challenges the majority suggests could avoid
17 illegal settlements, one would expect that they would have said so
18 explicitly. After all, as the majority notes, Congress does not “hide
19 elephants in mouseholes.” *Whitman v. Am. Trucking Ass’n*, 531 U.S.
20 457, 468 (2001); *see also* Maj. Op. 24.

21 In the end, my learned colleagues tip their hand: the majority’s
22 opinion is guided by broad policy notions concerning the desirability
23 of Rule 68 settlements in FLSA cases and the delays that prohibiting
24 such unsupervised settlements might bring. *See* Maj. Op. 30-31.
25 Irrespective of the merits of their argument concerning delay, which

1 I find doubtful,¹³ the majority is engaging precisely in the kind of
2 broad policy considerations that it correctly and so adamantly rejects
3 as irrelevant for statutory interpretation. The Supreme Court has told
4 us that the FLSA requires supervision of settlements. And the fact that
5 the majority happens to believe, whether correctly or not, that judicial
6 supervision is undesirable cannot change what Congress’s statute, as
7 interpreted by the Supreme Court, requires.¹⁴

8 In sum, there is nothing within Rule 68(a) that limits private
9 parties from making precisely the kind of general private settlements
10 that the High Court, all the circuit courts that have addressed the
11 issue, and the Department of Labor have said the FLSA prohibits. The
12 Rule necessarily conflicts with the federal statute.

13 **CONCLUSION**

14 At the end of the day, everyone who has addressed the issue—
15 from the Supreme Court to the circuit courts to the Department of
16 Labor—agrees that FLSA wage/hour claims cannot be settled by

¹³ Consider, for example, the delays that would occur as a result of the Rule 60(b) challenges that the majority invokes to save its result from absurdity.

¹⁴ The majority’s related argument that affirming the district court here would likely require “judicial approval of a variety of settlements that involve vulnerable citizens, such as discrimination suits under Title VII of the Civil Rights Act and § 1983 claims of serious violations of police misconduct,” has no merit. Maj. Op. 30. As the Department of Labor made abundantly clear, the FLSA, as read by the Supreme Court, is a “uniquely protective” statute, which—unlike any number of other statutes, including Title VII and § 1983—requires supervision of settlement agreements. *See* Brief of Sec’y of Labor as Amicus Curiae In Support of the District Court’s Decision at 6.

1 private agreement without court, Department of Labor, or similar
2 supervision. And *no* court's precedent—including our own—
3 supports the rule adopted by the majority here: that *all* FLSA
4 wage/hour claims, no matter their content, can be resolved—indeed,
5 can result in a final, binding judgment carrying a federal court's
6 imprimatur—as a result of a private settlement agreement reviewed
7 only by the employer and employee.

8 That conclusion has no basis in the text, history, design, or
9 purpose of the FLSA, nor indeed in common sense. I do not believe
10 the majority's holding can—or will—withstand Supreme Court
11 scrutiny. I respectfully, but emphatically, dissent.