ORAL ARGUMENT HAS NOT YET BEEN SCHEDULED

No. 22-7033

In the

United States Court of Appeals

For the District of Columbia Circuit

ISAAC HARRIS, *et al.*,

Plaintiffs-Appellees,

v.

MEDICAL TRANSPORTATION MANAGEMENT, INC.,

Defendant-Appellant.

On Appeal from the United States District Court
for the District of Columbia
Honorable Amit P. Mehta, District Judge
Case No. 1:17-cv-01371-APM

BRIEF OF AMICUS CURIAE THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF APPELLANT

Jennifer B. Dickey
Jordan L. Von Bokern
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062
T: (202) 463-5337

Gilbert C. Dickey
Jessica L. O'Brien
MCGUIREWOODS LLP
201 North Tryon Street
Suite 3000
Charlotte, NC 28202
T: (704) 343-2396

Counsel for Amicus Curiae *Chamber of Commerce of the United States of America*

CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

A. Parties and Amici

Except for the following, all parties, intervenors, and *amici* appearing before the district court and this Court are listed in the Opening Brief for Medical Transportation Management dated June 24, 2022:

The Chamber of Commerce of the United States of America is appearing in this Court as *amicus curiae* in support of Appellant Medical Transportation Management.

B. Rulings Under Review

References to the rulings at issue appear in the Opening Brief for Medical Transportation Management dated June 24, 2022.

C. Related Cases

Except for the following case, counsel is unaware of prior appeals before this Court or related cases pending in this Court or any other court:

Harris et al. v. Medical Transportation Management, Inc., Case No. 17-cv-01371 (D.D.C).

Dated: July 1, 2022

/s/ Gilbert C. Dickey
Gilbert C. Dickey

Counsel for Amicus Curiae
Chamber of Commerce
of the United States of America

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, *amicus curiae* the Chamber of Commerce of the United States is a nonprofit, tax-exempt organization incorporated in the District of Columbia. The Chamber has no parent corporation, and no publicly held company has 10% or greater ownership in the Chamber.

Dated: July 1, 2022

/s/ Gilbert C. Dickey
Gilbert C. Dickey

Counsel for Amicus Curiae
Chamber of Commerce
of the United States of America

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES*

Page(s)

Cases

* There are no authorities "chiefly" relied on under Circuit Rule 28.

Statutes

Rules

Other Authorities

GLOSSARY

Chamber	*Amicus Curiae* the Chamber of Commerce of the United States of America
FLSA	Fair Labor Standards Act

INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States (the "Chamber") is the world's largest business federation.[1] It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the county. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community.

The Chamber's members have a strong interest in promoting fair and predictable legal standards. Cases raising significant questions for employers subject to potential class or collective actions are of particular concern to the Chamber and its members. The Chamber therefore has an interest in ensuring that district courts have clear procedural and substantive guidance for overseeing class and collective actions.

[1] *Amicus curiae* affirms that timely notice of intent to file this brief was provided to counsel for the parties, and all parties have consented to the filing of this brief. Further, no counsel for a party authored the brief in whole or in part, and no such counsel nor any party here contributed money to fund the brief or its submission. No person other than *amicus*, its members, or its counsel made any monetary contribution intended to fund the preparation or submission of the brief.

SUMMARY OF THE ARGUMENT

This case presents critical questions of class action and Fair Labor Standards Act ("FLSA") collective action procedure. The first is whether a district court can certify an issues class under Federal Rule of Civil Procedure 23(c)(4) even though no cause of action satisfies Rule 23(b)(3)'s predominance requirement. The second is when plaintiffs are "similarly situated" under the FLSA's collective action provision. The district court below wrongly held that it could certify an "issues class" for damages under Rule 23(c)(4) even though no cause of action satisfied Rule 23(b)(3)'s predominance requirement. And it also erroneously concluded that plaintiffs are "similarly situated" for purposes of an FLSA collective action when they are alike in any aspect relevant to the resolution of the case.

The district court's misapplication of Rule 23(c)(4) not only conflicts with Rule 23's text, but generates massive pressure on class-action defendants to settle meritless claims. The district court's decision will make it trivially easy to obtain class certification. Under the district court's approach, a court can certify a class for the purpose of adjudicating common issues even in the face of "wide variation" in the circumstances of each putative class member's claims. JA1896–97. In other words, courts could certify classes for the purpose of adjudicating common issues even where such issues do not predominate over individualized questions for any cause of action as a whole. This reading of Rule 23(c)(4) would greatly expand

class-action litigation. A clever lawyer would almost always be able to identify some common factual or legal issue. And once a class has been certified, defendants confronting the prospect of a large loss in class proceedings would face overwhelming pressure to settle even the most frivolous of claims.

Rule 23's text and structure contradict the district court's reading. Rule 23(c)(4) does not establish an alternative route to class certification. Instead, it creates a tool that can be used to manage a class action that meets the requirements of Rules 23(a) and (b). The structure of Rule 23 confirms this understanding. Rule 23(a) establishes four prerequisites that all class actions must meet. Rule 23(b) identifies the three kinds of class actions and the requirements to bring each one. Rule 23(c) then provides a set of procedures and tools to administer a class action that satisfies the requirements for certification in Rule 23(a) and (b). If Rule 23(c)(4) established a *new* kind of class action instead of a tool to allow a class that has already met those requirements to proceed only on some issues, it would not have been placed among these management tools.

Turning to the FLSA, the district court's analysis of the "similarly situated" requirement ignored the purpose of that requirement in the statutory scheme. The relevant question for a court is whether plaintiffs are similarly situated for the purpose of collective litigation. That is, the court must ask whether the "other

employees" in a FLSA action are "similarly situated" for the purpose of "an action." 29 U.S.C. § 216(b).

This is precisely what Rule 23's requirements—namely commonality, typicality, and predominance—are also designed to ensure. So a court should look to the well-established body of precedent under these decisions to address whether plaintiffs are similarly situated under the FLSA. *See, e.g.*, *Espenscheid v. DirectSat USA, LLC*, 705 F.3d 770, 772 (7th Cir. 2013) ("[T]here isn't a good reason to have different standards for the certification of the two different types of action [under the FLSA and Rule 23], and the case law has largely merged the standard[.]") (collecting cases).

ARGUMENT

I. Rule 23(c)(4) Provides a Case-Management Tool, Not a New Type of Class Action Exempt from the General Certification Requirements.

Rule 23(c)(4) provides that "[w]hen appropriate, an action may be brought or maintained as a class action with respect to particular issues." Fed. R. Civ. P. 23(c)(4). This provision merely creates a discretionary case-management tool that a district court can use when a case otherwise satisfies the requirements for class certification. Rule 23(c)(4) does not authorize a court to certify a new type of class action—a so-called "issues class"—that does not satisfy the requirements of Rule 23(b).

A. All Damages Class Actions Must Satisfy the Same Requirements Established in Rules 23(a) and (b)(3).

Rule 23 establishes two sets of requirements that a case must satisfy to proceed as a class action. Rule 23(a) first establishes four "prerequisites"—numerosity, commonality, typicality, and adequacy. These prerequisites are "threshold requirements applicable to all class actions." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613 (1997).

A party who has satisfied the Rule 23(a) prerequisites "must" then "show that the action is maintainable under Rule 23(b)(1), (2), or (3)." *Id.* at 614; *accord Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013). These provisions identify three "types of class actions." Fed. R. Civ. P. 23(b). A case must satisfy the requirements for one of the three types of class actions "[i]n addition to satisfying Rule 23(a)'s prerequisites." *Amchem*, 521 U.S. at 614.

Importantly, Rule 23(b)(3) provides the only avenue for a damages claim to proceed as a class action. To satisfy that provision, the district court must find that common questions "predominate over" individualized ones and that "a class action is superior to other available methods" of "adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). These predominance and superiority requirements help limit class certification to cases where class litigation is the best route to resolve the case.

B. Rule 23(c)(4) Provides a Tool to Aid Class Adjudication, Not an Alternative Path to Certification.

After Rules 23(a) and (b) establish the requirements for all class actions, Rule 23(c) provides district courts with procedures and tools for their management. Consistent with that structure, Rule 23(c)(4) allows a district court to permit a case that has satisfied Rule 23(a) and (b) to proceed as a class action "with respect to particular issues." Fed. R. Civ. P. 23(c)(4). In a damages class action, that means that a cause of action as a whole must have satisfied the predominance and superiority requirements. Fed. R. Civ. P. 23(b)(3).

The district court's alternative view that Rule 23(c)(4) permits the certification of a class for certain issues even though no cause of action satisfies the predominance requirement contradicts the text of Rule 23. To begin, this creation of an issues class action under Rule 23(c)(4) cannot be reconciled with its placement among other case management tools in Rule 23(c). *See Murphy v. Smith*, 138 S. Ct. 784, 789 (2018) (looking to the "surrounding statutory structure" and "other provisions" to interpret statutory text). Each of the provisions of Rule 23(c) provides a tool or procedure for a district court to manage an existing or proposed class action. Rule 23(c)(1), for example, instructs a court to decide whether to certify a class by order "[a]t an early practicable time," and mandates that a certification order "define the class and the class claims, issues, or defenses, and . . . appoint class counsel." Rule 23(c)(2) establishes notice requirements for class actions, including individual

notice to members of a Rule 23(b)(3) class. Rule 23(c)(3) requires findings about class membership in the judgments in each of the three types of class action permitted by Rule 23(b). And Rule 23(c)(5) permits the division of a class into subclasses.

Like these provisions, Rule 23(c)(4) provides a tool for the management of a class action, not a new kind of class action. The Rules Committee would not have included Rule 23(c)(4) in the list of management tools if it had meant to create an entirely new and distinct type of class action. Rule 23(c)(4)'s placement confirms that "[t]he proper interpretation of the interaction between subdivisions (b)(3) and (c)(4) is that a cause of action, as a whole, must satisfy the predominance requirement of (b)(3) and that (c)(4) is a housekeeping rule that allows courts to sever the common issues for a class trial." *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 745 n.21 (5th Cir. 1996).

This understanding is confirmed by the absence of the kind of language Rule 23 uses to create a new type of class action in Rule 23(c)(4). Rule 23(b) is explicit about creating three different types of class action and establishing the requirements for each. It is titled "types of class actions." *See INS v. Nat'l Ctr. For Immigrants' Rights, Inc.*, 502 U.S. 183, 189 (1991) (explaining that the title of a statute or section can help clarify meaning). And it begins by explaining that a class action can be brought "if Rule 23(a) is satisfied and if" the conditions for one of the three types of

class action have been met. Fed. R. Civ. P. 23(b). It then lists detailed requirements for each of the three types of class action. *Id.*

Rule 23(c)(4), on the other hand, makes no reference to a "type[] of class action." Nor does it establish any requirements to bring a class action under Rule 23(c)(4). Instead, it merely announces that "when appropriate" a court may permit class proceedings "with respect to particular issues." Fed. R. Civ. P. 23(c)(4).

The district court wrongly read this absence of specific guidance to support the certification of a class action even though no cause of action satisfies Rule 23(b)(3)'s predominance requirement. It stated that Rule 23 permits "an issues class '[w]hen appropriate.'" JA2393. But as explained, that broad language supports the opposite conclusion. Rule 23 does not rely on this kind of broad standard when it establishes a type of class action.

What's more, the other provisions of Rule 23(c) assume that Rule 23(b) establishes the only three types of class action. Rule 23(c)(2), for example, provides notice requirements "[f]or any class certified under Rule 23(b)(1) or (b)(2)" and a separate set of notice requirements "[f]or any class certified under Rule 23(b)(3)." Fed. R. Civ. P. 23(c)(2). And Rule 23(c)(3) imposes rules for the judgments in "any class action certified under Rule 23(b)(1) or (b)(2)" and different requirements for "any class action certified under Rule 23(b)(3)." Fed. R. Civ. P. 23(c)(3). The

absence of any rules for the management of a Rule 23(c)(4) class action confirms that Rule 23(c)(4) does not establish a separate type of class action.

C. Recognizing a Freestanding "Issues" Class Action Would Undermine Rule 23(b)(3)'s Critical Safeguards.

Rule 23 establishes exacting procedures for the certification of a class action. Among other requirements, such actions must comply with Rule 23(b)(1), (2), or (3). As relevant here, a Rule 23(b)(3) damages class action requires predominance. The Supreme Court has acknowledged that Rule 23(b)(3) permits class proceedings in "situations in which class-action treatment is not as clearly called for." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 362 (2011). But it has counseled that, by requiring that common issues predominate, Rule 23(b)(3) aims "to assure the class cohesion that legitimizes representative action in the first place." *Amchem*, 521 U.S. at 623.

The district court's reading of Rule 23(c)(4) would undermine Rule 23(b)(3)'s critical safeguards and limits for damages class actions. Rule 23(b)(3) is already the "most adventuresome innovation" in Rule 23. *Id.* at 614; *see also Comcast*, 569 U.S. at 34. The district court's approach goes even further, permitting class adjudication of common issues even when they do not predominate over individualized questions and when each class member will still have to pursue individualized litigation to determine ultimate liability.

The Fifth Circuit has explained that this approach is untenable. It "would eviscerate the predominance requirement of Rule 23(b)(3)." *Castano*, 84 F.3d at 745 n.21. A court would be able to "sever issues until the remaining common issue predominates." *Id.* Such "nimble use of subdivision (c)(4)" would allow a class to be certified even though the common issues constitute only a small part of the issues in a case. *Id.* "[T]he result would be automatic certification in every case where there is a common issue, a result that could not have been intended." *Id.* Rule 23 should not be read to render any provision "nugatory through construction." *United States v. Tohono O'Odham Nation*, 563 U.S. 307, 315 (2011). But permitting certification any time that an issue can be resolved on a class basis would effectively eliminate Rule 23(b)(3)'s requirements that common questions must predominate.[2]

The district court suggested that class proceedings could be avoided "where there exist only minor or insignificant common questions" by "the concomitant application of Rule 23(b)(3)'s superiority requirement." JA2394. But the court also concluded that the superiority inquiry should apply only "after common issues have been identified for class treatment." JA2391. This post hoc consideration of whether

[2] The district court argued that its approach was necessary to prevent rendering Rule 23(c)(4) a nullity. But Rule 23(c)(4) is meaningful even though it does not create a separate category of class actions. Some cases may satisfy the requirements for class treatment but still involve issues that would be best resolved individually, or even impossible to resolve on a class basis. Rule 23(c)(4) permits a court to sever those issues for individual resolution.

class proceedings would be a superior way to identify a selected set of issues would not permit a court to consider whether those issues were minor within the cause of action, let alone limit class proceedings to cases where the issues were minor.

II. The FLSA's "Similarly Situated" Requirement for a Collective Action Entails the Same Commonality, Typicality, and Predominance Requirements as Rule 23 Class Actions.

The FLSA allows for "collective actions" to facilitate "efficient resolution in one proceeding of common issues of law and fact arising from the same alleged" misconduct. *Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, 170 (1989). These collective actions may be brought by individual named plaintiffs on behalf of themselves and other "similarly situated" employees, who must affirmatively opt-in to the litigation.[3] *See* 29 U.S.C. § 216(b). Read in context, this "similarly situated" requirement looks to whether plaintiffs have the kind of similarities relevant to collective litigation. This inquiry mirrors Rule 23's commonality, typicality, and predominance requirements.

[3] Congress added the FLSA's opt-in provision to "abolish[]" "representative action[s] by plaintiffs not themselves possessing claims." *Hoffmann-La Roche*, 493 U.S. at 173 (emphasis added). By ensuring that all plaintiffs to the action can assert their own claims, Congress did nothing to lessen the requirement that those plaintiffs be "similarly situated." 29 U.S.C. § 216(b).

A. The Core Inquiry in Determining Whether Plaintiffs are "Similarly Situated," under the FLSA, is Whether Their Claims Raise Common Issues Suitable for Efficient Collective Litigation.

The FLSA does not define "similarly situated." And courts have struggled to identify what it requires. *See, e.g.*, *Thiessen v. Gen. Elec. Capital Corp.*, 267 F.3d 1095, 1102 (10th Cir. 2001). Standing alone, "similarly situated . . . is an open term." *Premier Elec. Const. Co. v. Nat'l Elec. Contractors Ass'n, Inc.*, 814 F.2d 358, 367 (7th Cir. 1987). "[T]he essential question" is similarly situated "*with respect to what*." *Id*. (emphasis in original). "The answer" to that question "must come from some independent source." *Id*. Here, that source is the statutory context.

The statutory context confirms that employees must be "similarly situated" for the purpose of collective litigation. The FLSA provides "[a]n action . . . may be maintained" by one or more employees "for and in behalf of . . . themselves and other employees similarly situated." 29 U.S.C. § 216(b). Thus, the question posed by the FLSA is whether the "other employees" are "similarly situated" for the purpose of "maintain[ing]" an "action." *Id*. That question provides courts with a "core inquiry: Are plaintiffs similarly situated such that their claims of liability and damages can be tried on a class-wide and representative basis[.]" *Monroe v. FTS USA, LLC*, 860 F.3d 389, 417 (6th Cir. 2017) (Sutton, J., concurring in part and dissenting in part) (citation omitted).

This understanding is supported by the Supreme Court's decision in *Dukes*. There, the Court addressed Rule 23's similarly open requirement of "questions of law or fact common to the class." *Dukes*, 564 U.S. at 349. It explained that this requirement would be "easy to misread" because there will always be some common questions. *Id*. at 349–50. But many common questions "give[] no cause to believe that . . . claims can productively be litigated at once." *Id*. In light of the context of the commonality requirement, the Court held that Rule 23 required the kind of commonality relevant to collective litigation: the claims must "depend upon a common contention" that is "of such a nature that it is capable of classwide resolution." *Id*. at 350.

The district court here failed to address the purpose of "similarly situated" in the context of the FLSA's collective action procedure. Instead, it relied on the broad purpose of a FLSA collective action—to "give plaintiffs the advantage of lower individual costs to vindicate rights by the pooling of resources"—to conclude that any material similarity must be sufficient for collective proceedings. JA2384. But the Supreme Court has warned against this kind of resort to broad statutory purpose to read away limits in a statute. Statutes should not be construed "narrowly" or "broadly" to effectuate their "purpose"—they should be given a "fair reading." *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1142 (2018). "Legislation is, after all, the art of compromise, the limitations expressed in statutory terms often the

price of passage, and no statute yet known 'pursues its [stated] purpose [] at all costs.'" *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725 (2017) (alteration in original) (quoting *Rodriguez v. United States*, 480 U.S. 522, 525–26 (1987) (per curiam)). So instead of resorting to overarching purpose, the district court should have focused its inquiry on the purpose of the "similarly situated" requirement itself.

B. Federal Rule of Civil Procedure 23's Commonality, Typicality, and Predominance Requirements are Designed to Ensure Plaintiffs are "Similarly Situated" for Efficient Collective Litigation.

Had it considered whether plaintiffs are similar for the purpose of collective litigation, the Court would have had a ready example in Rule 23. Rule 23's commonality, typicality, and predominance requirements assess, from various angles, whether plaintiffs are sufficiently similar for "efficient resolution in one proceeding of common issues of law and fact." *Hoffmann-LaRoche*, 493 U.S. at 170. And the decisions implementing these requirements provide a ready-made body of law to ensure that plaintiffs are sufficiently "similarly situated" for collective resolution of a dispute.

Rule 23's commonality requirement is the primary mechanism through which courts decide whether plaintiffs are similarly situated for the purpose of class litigation. Commonality requires there to be "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). As explained, *Dukes* clarified that the

commonality required is the kind that permits claims to "productively be litigated at once." 564 U.S. at 350. Commonality is not met unless the claims depend on a "common contention . . . of such a nature that it is capable of classwide resolution." *Id*. What's more, that collective answer must "resolve an issue that is central to the validity of each" plaintiff's claim. *Id*.

Rule 23(a)'s typicality requirement is also relevant to the question whether plaintiffs are sufficiently similar for collective litigation. Typicality ensures that "claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). Although FLSA collective actions do not have representatives, the typicality requirement is still relevant because the FLSA asks whether "other employees" who opt in are "similarly situated" to the "one or more employees" who brought the action. 29 U.S.C. § 216(b). As the Supreme Court has explained, "[t]he commonality and typicality requirements of Rule 23(a) tend to merge," but "[b]oth serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical." *General Tel. Co. v. Falcon*, 457 U.S. 147, 157 n.13 (1982).

Finally, Rule 23(b)(3)'s predominance requirement tests whether the similarities between plaintiffs are sufficient for collective litigation. Predominance requires that "questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). In other

words, questions "susceptible to generalized, class-wide proof" must predominate over those that would call for individual adjudication. *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016). That requirement helps ensure that the named and unnamed plaintiffs' claims may be litigated in an efficient manner. *See Alvarez v. City of Chicago*, 605 F.3d 445, 449 (7th Cir. 2010) (explaining that "[i]f common questions predominate," then "the plaintiffs may be similarly situated"); *Myers v. Hertz Corp.*, 624 F.3d 537, 556 (2d Cir. 2010) (observing that Rule 23's predominance requirement is "admittedly similar" to the "similarly situated" standard).

While the FLSA's collective-action provision does not expressly refer to these Rule 23 requirements, its requirement that plaintiffs must be "similarly situated" calls for the same analysis. The question is not whether the text explicitly states that the commonality, typicality, and predominance requirements of Rule 23 apply to a FLSA collective action. Instead, it is whether the FLSA's inquiry about plaintiffs being "similarly situated" for the purpose of collective litigation overlaps with these Rule 23 requirements designed to select cases that are sufficiently similar for class litigation. As courts have recognized, "Section 216(b) of the FLSA and Rule 23(b)(3) are animated by similar concerns about the efficient resolution of common claims." *Calderone v. Scott*, 838 F.3d 1101, 1103 (11th Cir. 2016); *see also Campbell v. City of Los Angeles*, 903 F.3d 1090, 1115 (9th Cir. 2018) ("The

'common question' requirement within Rule 23 . . . bears a close resemblance to the 'similarly situated' requirement of section 216(b).").

Of course, that does not mean that every Rule 23 requirement also applies to a FLSA collective action. The FLSA opt-in requirement is "fundamentally different" from Rule 23's opt-out requirement. *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 74 (2013).[4] And some of the Rule 23 requirements, like numerosity and adequacy of representation, do not look to whether plaintiffs are "similarly situated."

Applying the commonality, typicality, and predominance doctrines to the "similarly situated" analysis under the FLSA is wholly consistent with the Supreme Court's decisions, the history of Rule 23, and early collective litigation.

[4] The Supreme Court in *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66 (2013), analyzed a feature of FLSA collective actions that is starkly different from Rule 23 class actions (which create a class "with an independent legal status"), while the instant case involves a feature that is virtually identical (the "similarly situated" requirement). *Genesis* stated that the "sole consequence" of FLSA conditional certification is facilitation of "court-approved written notice to employees." *Id.* at 75 (citing *Hoffmann-La Roche*, 493 U.S. at 171–72). For purposes of mootness, that "significant difference[]," *id.* at 70 n.1, distinguished Rule 23, which creates classes "with an independent legal status." *Id.* at 75.

Here, however, the FLSA and Rule 23 are directly aligned. Both the FLSA and Rule 23 evaluate whether other plaintiffs are "similarly situated" before a collective or class action is allowed to proceed. Moreover, FLSA "conditional" certification creates the same significant settlement pressures and discovery burdens as Rule 23 class certification.

First, the Supreme Court has long understood the above Rule 23 requirements as testing whether class members are "similarly situated." For example, in *Dukes*, the Court described the putative *Dukes* class—which failed Rule 23's commonality requirement—as "not similarly situated." *Tyson Foods*, 136 S. Ct. at 1040. More generally, the Court has long referred to Rule 23 class members as "similarly situated" plaintiffs. *See, e.g.*, *Cooper* v. *Fed. Reserve Bank of Richmond*, 467 U.S. 867, 875 (1984); *Deposit Guar. Nat'l Bank* v. *Roper*, 445 U.S. 326, 332 (1980); *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 465 (1978); *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541, 549 (1949).

Second, the drafters of Rule 23 understood class members as "similarly situated" plaintiffs, which is especially instructive because "the Advisory Committee Notes provide a reliable source of insight into the meaning of a rule." *United States v. Vonn*, 535 U.S. 55, 64 n.6 (2002). When Rule 23 was amended into its current form, the 1966 Advisory Committee Note described a class action under Rule 23(b)(3) as involving "persons similarly situated." *See* Fed. R. Civ. P. 23, 1966 Advisory Committee's Note.

Finally, even the pre-1967 FLSA collective action cases recognized the FLSA's overlap with the requirements for class actions. *See Shushan v. Univ. of Colorado at Boulder*, 132 F.R.D. 263, 266–67 (D. Colo. 1990) (noting pre-1967 cases "applied rule 23 and treated section 216 cases as 'spurious' . . . class actions");

Wright & Miller, Federal Practice and Procedure § 1752 (4th ed.) ("The 'spurious' class action was used extensively in [FLSA] litigation[.] . . . [W]hen the employees *were not similarly situated, so that there was no common question affecting their several rights to relief,* neither a 'spurious' class suit nor permissive joinder under Rule 20(a) was proper." (emphasis added) (footnotes omitted)). The use of "similarly situated" to describe plaintiffs to a class action extends back to courts sitting in equity—predating the Rules of Civil Procedure. *See, e.g.*, *Carpenter v. Knollwood Cemetery*, 198 F. 297, 298 (D. Mass. 1912); *Venner v. Great N. Ry. Co.*, 153 F. 408, 409 (S.D.N.Y. 1907).

This understanding continues in modern courts. Even among many courts that purport to reject the application of Rule 23's requirements in the FLSA context, their own articulations of the "similarly situated" standard are not much different. *See, e.g.*, *Campbell*, 903 F.3d at 1115 (describing the "similarly situated" requirement's purpose as "not simply to identify shared issues of law or fact of *some kind*, but to identify those shared issues that will collectively advance the prosecution of multiple claims in a joint proceeding").

III. The District Court's Opinion Invites a Wave of Class and Collective Action Abuse.

The district court's misreading of Rule 23(c)(4) and flawed FLSA "similarly situated" analysis will permit a flood of abusive class and collective actions, with

troubling and far-reaching consequences for businesses, shareholders, employees, customers, and the judicial system.

Certification of class actions and FLSA collective actions massively raises the litigation stakes, creating enormous pressure on defendants to settle. The certification of a class often results in a massive increase in the potential liability and costs faced by a defendant. *See Coopers & Lybrand*, 437 U.S. at 476 ("Certification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense."). This increased potential liability and cost may force the defendant to enter what Judge Friendly called "blackmail settlements." Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1973); *see also AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011) (noting the "risk of 'in terrorem' settlements that class actions entail"). The risk of a massive loss means that "even a complaint which by objective standards may have very little chance of success at trial has a settlement value to the plaintiff out of any proportion to its prospect of success at trial." *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 740 (1975); *see also Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 445 n.3 (2010) (Ginsburg, J., dissenting) ("A court's decision to certify a class . . . places pressure on the defendant to settle even unmeritorious claims.").

It is unsurprising, then, that most class action defendants settle even when a claim is meritless. *See* Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical Legal Stud. 811, 812 (Dec. 2010) ("virtually all cases certified as class actions and not dismissed before trial end in settlement"); Wright & Miller § 1807 ("[M]ost collective actions settle."). In 2021, for example, companies reported that they settled 73.1% of class actions. *See* Carlton Fields Class Action Survey, at 26 (2022), available at https://classactionsurvey.com.

The district court's approach would accomplish two massive expansions of the inherent pressure to settle class or collective litigation. The Supreme Court has recognized that "any competently crafted class complaint literally raises common questions." *Dukes*, 564 U.S. at 349 (quotation marks and citation omitted). Looking only to common issues to certify a class under Rule 23(c)(4) would permit a court to "sever issues until the remaining common issue[s] predominate" and thereby ease certification. *Castano*, 84 F.3d at 745. Likewise, focusing only on the similarities between plaintiffs—without consideration of dissimilarities relevant to collective litigation—would permit a collective action in any FLSA case. As a result, defendants could face immense pressure to settle in nearly every case.

The district court's creation of an "issues class" under Rule 23(c)(4) would also undercut the bellwether process that federal courts have developed to promote

the resolution of complicated multi-district litigation. This process sends a handful of representative cases to a jury. Edward F. Sherman, *Segmenting Aggregate Litigation: Initiatives and Impediments for Reshaping the Trial Process*, 25 Rev. Litig. 691, 696 (2006). These bellwether trials promote settlement by providing guidance on how juries are likely to assess the arguments in the remaining cases. *See In re Methyl Tertiary Butyl Ether (MTBE) Prods.*, 2007 WL 1791258, at *2 (S.D.N.Y. June 15, 2007). A key feature of this process is that bellwether trials lack preclusive effect—permitting a defendant to gain information about the likely value of claims without facing the unfair pressures exacted by a single resolution applying in all cases. But if these key issues can be resolved in a way that binds the defendant in all future cases, the defendant will face enormous pressure to settle without the valuable information that bellwether proceedings provide to both sides.

The costs of these class and collective actions will reverberate through the entire economy. Class actions already impose huge costs. In 2021, these costs totaled more than $3.37 billion. *See* Carlton Fields Class Action Survey 6. Defense costs in a single class action can run into nine figures. *See* Adeola Adele, *Dukes v. Wal-Mart: Implications for Employment Practices Liability Insurance* 1 (July 2011) (noting defense costs of $100 million). Businesses will have to expend substantial resources to defend against these new class and collective actions. But they will not

bear those expenses alone. Instead, the costs will ultimately be passed to consumers through higher prices.

The increased costs resulting from the district court's approach will not be accompanied by any improvement in the resolution of cases. By definition, that approach means that class and collective proceedings can go forward even when common issues do not predominate and class treatment is not a superior method of resolving the dispute. So the substantial costs resulting from class treatment will be imposed with no countervailing benefit of efficient resolution of a multitude of disputes.

CONCLUSION

For the foregoing reasons, the order of the district court should be reversed.

Dated: July 1, 2022

Respectfully submitted,

/s/ Gilbert C. Dickey

Gilbert C. Dickey
Jessica L. O'Brien
MCGUIREWOODS LLP
201 North Tryon Street
Suite 3000
Charlotte, NC 28202
T: (704) 343-2396
F: (704) 444-8854
gdickey@mcguirewoods.com
jobrien@mcguirewoods.com

Jennifer B. Dickey
Jordan L. Von Bokern
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062
T: (202) 463-5337

Counsel for Amicus Curiae
Chamber of Commerce
of the United States of America

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) because it contains 5,389 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

2. This brief complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it has been prepared in proportionally spaced Times New Roman typeface using Microsoft Word, in 14-point size.

/s/ Gilbert C. Dickey
Gilbert C. Dickey

CERTIFICATE OF SERVICE

I hereby certify that on July 1, 2022, the foregoing was electronically filed with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the CM/ECF system. All participants in the case are registered CM/ECF users and will be served by the system.

/s/ Gilbert C. Dickey
Gilbert C. Dickey