No. 21-305

In the United States Court of Appeals for the Sixth Circuit

IN RE: A&L HOME CARE AND TRAINING CENTER, ET AL.

Larry Holder, et al., on behalf of themselves and others similarly situated,
Plaintiffs-Respondents,

A&L Home Care and Training Center, LLC, et al.,
Defendants-Petitioners.

On Appeal from the United States District Court
for the Southern District of Ohio, Western Division, No. 1:20-cv-757

MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANTS' PETITION FOR PERMISSION TO APPEAL

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The Chamber of Commerce of the United States of America respectfully moves for leave to file an amicus brief in support of Defendants' Petition for Permission to Appeal pending before this Court. Counsel for Petitioners has consented to the filing of this amicus brief. Counsel for Respondents has not consented to the filing of this amicus brief.

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 country. 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. Indeed, the Chamber recently filed an amicus brief regarding the Fair Labor

[1] 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 contributed money to the preparation or submission of the brief.

Standards Act in this Court. *See* Brief of the Chamber of Commerce of the United States of America and the Retail Litigation Center, Inc., 2021 WL 624451 (Feb. 8, 2021), *Canaday v. Anthem Companies, Inc.*, 2021 WL 3629916 (6th Cir. Aug. 17, 2021).

The Chamber has a vital interest in promoting a predictable, rational, and fair legal environment for business. Cases raising significant questions for employers subject to potential class or collective actions are of particular concern to the Chamber and its members, who may be subjected to such actions. The Chamber therefore has an interest in ensuring that district courts have clear procedural and substantive guidance for overseeing collective actions under the FLSA.

The Chamber is well-positioned to aid this Court's understanding of the important issues raised by Defendants' Petition for Permission to Appeal. The Chamber's unique perspective is relevant not only to why this Court should reject the *Lusardi* method of "conditional" class-certification at issue here, but also to what method should replace *Lusardi*. *See* 29 U.S.C. §216(b) (permitting collective actions under the FLSA); *Lusardi v. Xerox Corp.*,

118 F.R.D. 351 (D.N.J. 1987) (creating the conditional certification method). In fact, the Chamber submitted an amicus brief in *Swales v. KLLM Transportation Services, LLC*, which rejected the *Lusardi* method. 985 F.3d 430, 439-40 (5th Cir. 2021); *see* Brief of Amicus Curiae the Chamber of Commerce of the United States of America, 2020 WL 957305 (Feb. 19, 2020).

In conclusion, the Chamber respectfully requests that this Court grant the Chamber leave to file its amicus brief in support of Defendants' Petition for Permission to Appeal.

Respectfully submitted.

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CERTIFICATE OF COMPLIANCE

This brief complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 475 words, excluding the parts of the brief exempted by Rule 32(f); and (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Palatino Linotype) using Microsoft Word (the same program used to calculate the word count).

/s/ Jonathan D. Urick
JONATHAN D. URICK

CERTIFICATE OF SERVICE

On August 23, 2022, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court.

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Amicus makes the following disclosure under Sixth Circuit Rule 26.1:

1. Is amicus a subsidiary or affiliate of a publicly owned corporation?

No. The Chamber is a nonprofit corporation organized under the laws of the District of Columbia.

2. Is there a publicly owned corporation, not a party to the appeal or an amicus, that has a financial interest in the outcome?

None known.

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INTEREST OF AMICUS CURIAE

The Chamber of Commerce of the United States of America 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 country. 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 has a vital interest in promoting a predictable, rational, and fair legal environment for business. Cases raising significant questions for employers subject to potential class or collective actions are of particular concern to the Chamber and its members, who may be subjected to such

[1] No counsel for a party authored this brief in whole or in part, and no such counsel nor any party here contributed money to fund this brief or its submission. No person other than amicus, its members, or its counsel contributed money to the preparation or submission of this brief.

actions. The Chamber therefore has an interest in ensuring that district courts have clear procedural and substantive guidance for overseeing collective actions.

INTRODUCTION

This Court should grant review and reject the lenient, two-step *Lusardi* "conditional certification" process, which allows "collective actions" to proceed under the Fair Labor Standards Act ("FLSA") before a court determines that putative plaintiffs are "similarly situated" to the named plaintiff—contrary to the FLSA's clear command. 29 U.S.C. §216(b) (permitting collective actions); *see Lusardi v. Xerox Corp.*, 118 F.R.D. 351 (D.N.J. 1987) (creating the conditional certification method). This method (1) fails to ensure that plaintiffs' claims are capable of "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); and (2) creates an "opportunity for abuse of the collective-action device" because "plaintiffs may wield the collective-action format for settlement leverage," *Bigger v. Facebook, Inc.*, 947 F.3d 1043, 1049 (7th Cir. 2020).

As the district court's decision makes clear, this Court's guidance is necessary to clarify an underdeveloped area of law where the district courts have adopted an erroneous interpretation of the FLSA. Despite thousands of FLSA cases filed every year and the enormous stakes involved, "[f]ew areas of the law are less settled than the test for determining whether" and *how* "a collective action should be certified under" the FLSA. *Swales v. KLLM Transp. Servs., LLC*, 985 F.3d 430, 440 (5th Cir. 2021) (quoting district court); Defendants' Br. at 10 n.10 (6,663 FLSA cases were filed in 2020). Many district courts have coalesced around the two-step *Lusardi* method, in which courts "conditionally certify" collective actions before definitively answering whether plaintiffs are "*actually*" "similarly situated," as this Court has held the FLSA requires. *Comer v. Wal-Mart Stores, Inc.*, 454 F.3d 544, 546 (6th Cir. 2006) (emphasis added; citation omitted).

This case presents a perfect illustration of the flaws in the *Lusardi* method: The district court "conditionally certif[ied]" two collectives for expensive discovery without any submissions by potential opt-in plaintiffs, repeatedly emphasizing the "lenient standard," and noting that there was

particularly "thin" evidence supporting one of the collectives. *Holder v. A&L Home Care & Training Ctr., LLC*, 2021 WL 3400654, at *4, *6 (S.D. Ohio Aug. 4, 2021). Without this Court's intervention, the case will proceed through discovery as a collective action without any finding the plaintiffs are similarly situated.

But "nothing in the FLSA, nor in Supreme Court precedent interpreting it, requires or recommends (or even authorizes) any 'certification' process." *Swales*, 985 F.3d at 440. The district court observed that the "lenient review of the parties' evidence for conditional certification" under the *Lusardi* method "can be in tension with the requirement that the employees who are to receive notice be '*in fact*, similarly situated.'" *Holder*, 2021 WL 3400654, at *10 (quoting *Comer*, 454 F.3d at 546).

Accordingly, this Court should grant the Defendants' Petition for Permission to Appeal and reject the *Lusardi* method, as the Fifth and Ninth Circuits have done. *Swales*, 985 F.3d at 439; *Campbell v. City of Los Angeles*, 903 F.3d 1090, 1117 (9th Cir. 2018). Apart from its lack of textual support, the lenient, ad hoc *Lusardi* method creates perverse incentives for abusive

litigation. *See Swales*, 985 F.3d at 435; *Bigger*, 947 F.3d at 1049. Perhaps for that reason, the Seventh Circuit too has declined to adopt *Lusardi*. *Bigger*, 947 F.3d at 1049 n.5.

In place of the *Lusardi* method, this Court should hold that a district court may only allow an FLSA collective action to proceed if plaintiffs establish at the outset of litigation that prospective opt-in plaintiffs are actually "similarly situated."

ARGUMENT

I. Courts must determine whether plaintiffs are "similarly situated" at the outset of an FLSA collective action.

The FLSA allows employees to enforce its requirements (like the federal minimum wage) through "collective actions" brought on behalf of "themselves and other employees *similarly situated*." 29 U.S.C. §216(b) (emphasis added). Like traditional class actions, FLSA collective actions are a significant exception to the normal rules of civil litigation, and thus pose many of the same risks. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348-49 (2011) (noting the exceptional nature of class actions); *Taylor v. Sturgell*, 553 U.S. 880, 901 (2008) (Federal Rule of Civil Procedure 23's demanding

requirements are "grounded in due process"); *Coopers Lybrand v. Livesay*, 437 U.S. 463, 476 (1978) ("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."). Plaintiffs seeking to maintain an FLSA collective action must meet two burdens.

First, "the plaintiffs must *actually* be 'similarly situated.'" *Comer*, 454 F.3d at 546 (emphasis added). Although the FLSA does not define what makes employees "similarly situated," the statutory context makes clear that plaintiffs must be "similarly situated" such that their claims are capable of "efficient resolution in one proceeding of *common issues of law and fact* arising from the same alleged" misconduct. *Hoffmann*, 493 U.S. at 170 (emphasis added). That analysis naturally overlaps with the standards governing Federal Rule of Civil Procedure 23 class actions. As the Seventh Circuit has observed, "there isn't a good reason to have different standards for the certification of the two different types of action, and the case law has largely

merged the standards, though with some terminological differences." *Espenscheid v. DirectSat USA, LLC*, 705 F.3d 770, 772 (7th Cir. 2013).

District courts "should rigorously enforce" the FLSA's similarity requirement "at the outset of the litigation." *Swales*, 985 F.3d at 443. As is the case for class certification under Rule 23, "that 'rigorous analysis' will entail some overlap with the merits of the plaintiff's underlying claim." *Dukes*, 564 U.S. at 351. Because it might be "necessary for the court to probe behind the pleadings before coming to rest on the certification question," courts may likewise authorize limited discovery to facilitate a determination about whether putative plaintiffs are similarly situated. *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 160 (1982).

Second, "all plaintiffs must signal in writing their affirmative consent to participate in the action." *Comer*, 454 F.3d at 546 (citations omitted). Because "similarly situated" employees must "opt in" as FLSA collective-action plaintiffs, 29 U.S.C. §216(b), the Supreme Court has recognized "that

district courts *have discretion, in appropriate cases*, to … facilitat[e] notice to potential plaintiffs," *Hoffmann*, 493 U.S. at 169 (emphasis added).

But it is only "appropriate" for a court to provide notice to putative plaintiffs after the court determines that they are in fact "similarly situated" to the named plaintiff. *See id.* Sending notice to potential plaintiffs that a rigorous evaluation would reveal are not similarly situated constitutes inappropriate "solicitation of claims," which the Supreme Court has held improper. *Id.* at 174. As the Fifth Circuit has held, a court "errantly appl[ies] *Hoffman*" when it provides notice to those "who cannot ultimately participate in the collective." *In re JPMorgan Chase & Co.*, 916 F.3d 494, 502, 504 (5th Cir. 2019) (citing *Hoffmann*, 493 U.S. at 174).

II. The *Lusardi* test does not ensure compliance with the FLSA.

Instead of enforcing the FLSA's "similarly situated" requirement at the threshold, many courts—like the district court here—have coalesced around various versions of the *Lusardi* two-step "conditional certification" method. *Holder*, 2021 WL 3400654, at *2 (collecting cases). First comes conditional certification at the "notice" step, followed by the belated "decertification" step

after discovery concludes. The need to conduct a second "decertification step" as a matter of course all but proves that the district court has not done its job at the outset. And as this case demonstrates, the lenient standard courts apply at the first step produces harms that are not remediable at the second step. *Lusardi* places the burden on defendants to defend a collective action *before* the district court has determined that plaintiffs are actually "similarly situated," as the FLSA requires. 29 U.S.C. § 216(b). Some courts even use the *Lusardi* method to avoid determining whether plaintiffs are "similarly situated" until *after trial*. *See Monroe v. FTS USA, LLC*, 860 F.3d 389, 402 (6th Cir. 2017) (district court "made its final certification determination post-trial").

A. The first *Lusardi* step imposes enormous litigation costs on defendants not authorized by the FLSA.

"The real issues *Lusardi* creates" start at the very "beginning of the case." *Swales*, 985 F.3d at 439. Rather than seriously evaluate whether the plaintiffs are actually similarly situated, "[d]istrict courts use a 'fairly lenient standard' that 'typically results in conditional certification of a representative class'" at the notice stage. *White v. Baptist Mem'l Health Care Corp.*, 699

F.3d 869, 877 (6th Cir. 2012) (quoting *Comer*, 454 F.3d at 547). Though courts vary in how they describe this standard—"sometimes articulated as requiring 'substantial allegations,' sometimes as turning on a 'reasonable basis'"—it is "*loosely akin to a plausibility standard*." *Campbell*, 903 F.3d at 1109 (emphasis added; citations omitted). Often, plaintiffs merely "contend[] that they have at least *facially satisfied* the 'similarly situated' requirement." *Id.* at 1100 (emphasis added; citation omitted).

This "conditional" certification triggers expensive and time-consuming discovery. Thus, while "conditional" in name, a "conditionally certified" collective action is, in all practical respects, a full-bore collective action that "proceeds as a representative action *throughout discovery*." *Mooney v. Aramco Servs. Co.*, 54 F.3d 1207, 1214 (5th Cir. 1995). Indeed, during discovery, more plaintiffs may opt into the litigation *before* the court determines whether they are similarly situated.

Conditional certification thus creates an "opportunity for abuse of the collective-action device" because "plaintiffs may wield the collective-action format for settlement leverage." *Bigger*, 947 F.3d at 1049 (citing *Hoffmann*, 493

U.S. at 171); *see also Swales*, 985 F.3d at 436 ("formidable settlement pressure" after conditional certification). In FLSA collective actions especially, "expanding the litigation with additional plaintiffs increases pressure to settle, no matter the action's merits." *Bigger*, 947 F.3d at 1049. That pressure can be substantial because collective actions can have thousands of potential opt-in plaintiffs and "mind-boggling" discovery costs. *Williams v. Accredited Home Lenders, Inc.*, 2006 WL 2085312, at *5 (N.D. Ga. July 25, 2006); *see, e.g.*, *Pippins v. KPMG LLP*, 2011 WL 4701849, at *3 (S.D.N.Y. Oct. 7, 2011) (describing a collective action with 500 members and 2,300 potential members in which the defendants had already incurred "more than $1,500,000" in evidence-preservation costs).

This case is a good example. After the named plaintiffs provided a minimal showing that other employees were similarly situated, the district court certified two of three proposed collectives.[2] Notably, the district court

[2] The district court also noted the uncertainty about which standard to apply to the "notice" step. *Holder*, 2021 WL 3400654, at *3.

found the declarations supporting one of the three collectives "largely inadequate"—either because they were conclusory or did not support the inference that other similarly situated employees exist. *Holder*, 2021 WL 3400654, at *4. Nevertheless, the court conditionally "certified" this collective based on "*one statement* that addresses" a common issue that could potentially support a collective. *Id.* (emphasis added; quotation marks and citations omitted). Even the district court agreed that this evidence was "thin" and "pushes the envelope of what constitutes a modest factual showing," but the court nevertheless concluded that it "suffices to satisfy the lenient burden of demonstrating that a similarly situated class of potential plaintiffs exists." *Id.* (citation omitted).

Consequently, the district court acknowledged that "notice may go to individuals who are not actually similarly situated to the named plaintiffs," which is why the decertification stage is necessary. *Id.* at *10. Only after "discovery concludes" would the district court "examine more closely whether particular members of the class are, in fact, similarly situated" and issue any "final certification." *Id.* at *2.

But few cases ever reach the decertification stage because "most collective actions settle" as a result of conditional certification. 7B Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1807 (3d ed.). Once a district court improperly conditionally certifies a class, defendants may be left with no remedy for the resulting distortions to the litigation process. *See JPMorgan*, 916 F.3d at 497 (absent interlocutory appeal, improper conditional certification is "irremediable on ordinary appeal"); *see Holder*, 2021 WL 3400654, at *4 ("This pressure, in turn, may materially affect the case's outcome.") (citation omitted). And settlement becomes the only realistic option.

As the district court remarked, FLSA defendants will continue to face these burdens from the *Lusardi* first step "absent contrary direction from the Sixth Circuit." *Holder*, 2021 WL 3400654, at *6.

B. The second *Lusardi* "decertification" step after discovery cannot correct the distortions created by the first step.

This Court should grant review now to correct the district court's conditional certification. Although the district court will theoretically evaluate whether plaintiffs are similarly situated at the *second* step of the *Lusardi*

method, that consideration will be far too late to correct the errors at step one.

Lusardi's second step—the "decertification stage"—comes only "after the necessary discovery is complete." *Campbell*, 903 F.3d at 1100 (citing 1 McLaughlin on Class Actions §2:16). Defendants then must "move for 'de-certification' of the collective action," arguing that "plaintiffs' status as 'similarly situated' was not borne out by the fully developed record." *Id.*

Under *Lusardi*, it is only at this second stage—well into the litigation—that plaintiffs must affirmatively demonstrate that they are "similarly situated" to proceed to trial collectively. But as is the hallmark of the *Lusardi* method, courts apply inconsistent criteria even in making this "decertification" evaluation. *O'Brien v. Ed Donnelly Enters., Inc.*, 575 F.3d 567, 584 (6th Cir. 2009) (the "variety of factors" "includ[e] the 'factual and employment settings of the individual[] plaintiffs, the different defenses to which the plaintiffs may be subject on an individual basis, [and] the degree of fairness and procedural impact of certifying the action as a collective action'") (quoting Wright & Miller §1807 n.65).

And this evaluation, *if* it comes at all, comes too late to remedy the distorting effects of an improper "conditional certification." As the district court observed, conditional certification might add parties to the litigation "who are not actually similarly situated to the named plaintiffs." *Holder*, 2021 WL 3400654, at *10. The costs imposed by such improper "solicitation of claims," are unrecoverable. *Hoffmann*, 493 U.S. at 169.

CONCLUSION

The Court should grant the Defendants' Petition for Permission to Appeal.

Respectfully submitted.

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