No. 19-60847

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

HARRY SWALES, ET AL.,
Plaintiffs-Appellees,
v.
KLLM TRANSPORT SERVICES, L.L.C.,
Defendant-Appellant.

MARCUS BRENT JOWERS, ET AL.,
Plaintiffs-Appellees,
v.
KLLM TRANSPORT SERVICES, L.L.C.,
Defendant-Appellant.

On Appeal from the United States District Court
for the Southern District of Mississippi, No. 3:17-cv-490
Hon. Daniel P. Jordan III

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

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that, in addition to the persons and entities identified in the Appellant's Certificate, the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Amicus Curiae

The Chamber of Commerce of the United States of America

The Chamber of Commerce of the United States of America has no parent corporation. No publicly held company has any ownership interest in The Chamber of Commerce of the United States of America.

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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 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 its members. 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 collective actions.

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[1] No counsel for a party authored this brief in whole or in part, and no person other than *amicus*, its members, and its counsel made a monetary contribution to fund the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

This Court should reject the District Court's lenient, two-step "conditional certification" process, which allows "collective actions" to proceed under the Fair Labor Standards Act ("FLSA") before putative plaintiffs are actually determined to be "similarly situated" to the named plaintiff. 29 U.S.C. § 216(b). This Court "has carefully avoided" adopting the "conditional certification" framework and should reject it here. *In re JPMorgan Chase & Co.*, 916 F.3d 494, 500 n.9 (5th Cir. 2019).

In its place, this Court should clarify that many of the well-established procedural safeguards of traditional Rule 23 class actions—namely, *commonality* and *typicality*—should also apply to determining whether putative FLSA collective-action plaintiffs are "similarly situated." 29 U.S.C. § 216(b). District courts should not certify a collective action unless "there are questions of law or fact common to" all plaintiffs (commonality), and "the claims or defenses of the representative parties are typical of the claims or defenses of" the entire group (typicality). *Cf.* Fed. R. Civ. P. 23(a)(2)-(3).

Like traditional class actions, collective actions under the FLSA are a significant exception to the normal rules of civil procedure, and they

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 traditional class actions).

Nevertheless, most lower courts have adopted a lenient two-step procedure—relying on a so-called "conditional certification"—that allows FLSA actions to proceed as collective actions from the earliest stages of litigation before courts definitively answer whether plaintiffs are actually "similarly situated." 29 U.S.C. § 216(b); *see Lusardi v. Xerox Corp.*, 118 F.R.D. 351 (D.N.J. 1987) (creating the conditional certification method). The primary problem with this method is its first step and the consequences that flow from it.

At this first *Lusardi* "notice" stage, courts evaluate whether to "conditionally certify" the collective action and provide (or facilitate) notice to potential opt-in plaintiffs. These courts apply a "lenient" standard to determine whether plaintiffs have made a mere prima facie showing that there are "similarly situated" employees who should be notified and given the opportunity to opt-in to the action. *Mooney v. Aramco Services Co.*, 54

F.3d 1207, 1214 (5th Cir. 1995).[2] "Conditional certification," however, is a misnomer that obscures the true nature of the court's decision. Once a court "conditionally certifies" a collective action, the "action proceeds as a representative action throughout discovery." *Id.* Consequently, the second *Lusardi* step—the "decertification" stage that occurs much later in the litigation—can be of little help to defendants after they have been forced to defend a collective action through discovery.

As this Court has recognized, the "lenient" two-step *Lusardi* process "does not give a recognizable form to [a] representative class, but lends itself to *ad hoc* analysis on a case-by-case basis." *Id.* at 1213. This lenient, ad hoc certification standard creates an "opportunity for abuse of the collective-action device [because] plaintiffs may wield the collective-action format for settlement leverage"—which is why the Seventh Circuit just refused to adopt *Lusardi*. *Bigger v. Facebook, Inc.*, 947 F.3d 1043, 1049-50 & n.5 (7th Cir. 2020). In FLSA collective actions, as in Rule 23 class actions, "expanding the litigation with additional plaintiffs increases pressure to settle, no matter the action's merits." *Id.* at 1049. It is little

[2] *Mooney* was overruled on other grounds by *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003).

surprise, then, that "most collective actions settle." Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1807 (3d ed.) ("Wright & Miller").

The Supreme Court has never approved of this FLSA conditional certification method. *See Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, 170 (1989) (merely "confirm[ing] the existence of the trial court's discretion" over managing collective actions, "not the details of its exercise"); *Campbell v. City of Los Angeles*, 903 F.3d 1090, 1100 (9th Cir. 2018) ("[M]uch of collective action practice is a product of interstitial judicial lawmaking or ad hoc district court discretion.").

Instead, the Supreme Court has developed a robust body of (Rule 23) case law for determining whether a putative plaintiff is sufficiently similar to the named plaintiff. *See, e.g.*, *Dukes*, 564 U.S. at 350 (similarly situated plaintiffs must, at a minimum, have common claims capable of "generat[ing] common *answers*") (citation omitted). There is no principled reason to ignore this probative case law, evaluating the circumstances where plaintiffs are similarly situated, just because some *other* aspect of the FLSA (namely, its "opt-in" requirement) could be incompatible with Rule 23.

After all, significant authorities provide that some of Rule 23's requirements are evaluating whether plaintiffs are "similarly situated"—just like the FLSA's collective-action standard. The Supreme Court has repeatedly referred to traditional class action plaintiffs as being "similarly situated." *See infra* pp.13-14. The 1966 Advisory Committee Notes on Rule 23 likewise referred to traditional class actions as involving "similarly situated" plaintiffs. *See* Fed. R. Civ. P. 23, 1966 Advisory Committee's Note. And some lower courts evaluating *Lusardi*'s second "decertification" step apply factors similar to Rule 23's commonality and typicality requirements (although they do so with inconsistent stringency). *See Espenscheid v. DirectSat USA, LLC*, 705 F.3d 770, 772 (7th Cir. 2013) (noting "the case law has largely merged the standard" between FLSA and Rule 23 actions at the second *Lusardi* stage).

Indeed, the Supreme Court has explained that FLSA collective actions are designed to ensure "efficient resolution in one proceeding of *common issues* of law and fact arising from the same alleged" misconduct. *Hoffmann-La Roche*, 493 U.S. at 170 (emphasis added). And that is precisely what Rule 23's commonality and typicality requirements ensure: Traditional class action plaintiffs must assert a "*common contention* . . .

of such a nature that it is capable of [collective] resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Dukes*, 564 U.S. at 350 (emphasis added).

Only *after* a court has properly determined whether plaintiffs are actually "similarly situated," may the court "facilitat[e] notice to potential plaintiffs" of the FLSA collective action. *Hoffmann-La Roche*, 493 U.S. at 169. Otherwise, if a court has not definitively determined that putative plaintiffs are "similarly situated" to existing plaintiffs, then it is not "appropriate" for the court to facilitate notice to potential opt-in plaintiffs. *Id.* As this Court has explained, a district court "errantly applies *Hoffman-La Roche*" when it provides notice to those "who cannot ultimately participate in the collective." *JPMorgan*, 916 F.3d at 502.

Here, the District Court did not definitively answer whether putative plaintiffs are in fact "similarly situated" and share common issues with the named plaintiffs. So the District Court should not have certified this FLSA collective action—conditionally, permanently, or in any form.

ARGUMENT

I. Plaintiffs Must be "Similarly Situated" To Maintain an FLSA Collective Action, And This Threshold Inquiry Necessarily Entails the Same Commonality and Typicality Requirements as in Traditional Rule 23 Class Actions.

A. Only "Similarly Situated" Plaintiffs May Proceed With FLSA Collective Actions.

Among other things, the FLSA establishes a federal minimum wage, violations of which can be litigated through "collective actions" brought on behalf of individual named plaintiffs[3] plus other "similarly situated" employees:

> An action . . . may be maintained against any employer . . . by any one or more employees for and in behalf of himself or themselves and other employees *similarly situated*. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.

29 U.S.C. § 216(b) (emphasis added). The statute imposes strict liability for violations, and successful plaintiffs may collect unpaid wages, liquidated damages, and mandatory attorney's fees. *See id.*

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[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."

Despite thousands of FLSA cases filed every year and the enormous stakes involved,[4] the District Court correctly remarked that "[f]ew areas of the law are less settled than the test for determining whether" and *how* "a collective action should be certified under § 216(b)." Dist. Ct. Op. at 3.

The FLSA does not define "similarly situated," and courts have struggled to identify what this standard requires. *See, e.g.*, *Thiessen v. Gen. Elec. Capital Corp.*, 267 F.3d 1095, 1102 (10th Cir. 2001). Collective actions under the FLSA also pose a unique procedural consideration: they require plaintiffs to "give [] consent in writing" to become a "party" to the action, which requires those potential opt-in plaintiffs to have notice of the litigation. 29 U.S.C. § 216(b); *see Hoffmann-La Roche*, 493 U.S. at 171 (collective actions "depend on employees receiving accurate and timely notice").

So the Supreme Court has recognized "that district courts *have discretion, in appropriate cases*, to implement [§ 216(b)] . . . by facilitating

[4] *Federal Judicial Caseload Statistics*, Table C-2 (March 31, 2018) (reporting 7,643 FLSA cases filed between March 31, 2017 and March 31, 2018), https://www.uscourts.gov/statistics/table/c-2/federal-judicial-caseload-statistics/2018/03/31.

notice to potential plaintiffs." *Hoffmann-La Roche*, 493 U.S. at 169 (emphasis added).[5] But the Court has only "confirm[ed] the existence of the trial court's discretion, not the details of its exercise." *Id.* at 174.

B. Just Like Rule 23's Commonality and Typicality Requirements, the FLSA's "Similarly Situated" Standard Ensures that the Named Plaintiff and Putative Plaintiffs Raise Common Issues That Can Efficiently Generate Common Answers.

According to the Supreme Court, FLSA plaintiffs are "similarly situated" where they demonstrate that they raise claims capable of "efficient resolution in one proceeding of *common issues of law and fact* arising from the same alleged" misconduct. *Hoffmann-La Roche*, 493 U.S. at 170 (emphasis added). In other words, the FLSA's "similarly situated" provision requires plaintiffs to raise a *common issue* that is capable of collective resolution.

The commonality and typicality requirements of Federal Rule of Civil Procedure 23 offer ready-made bodies of law designed to ensure precisely that. *Dukes* made clear that courts must interpret phrases like "common questions" and "similarly situated" in the context of what

[5] *Hoffman-La Roche* considered a claim brought under the Age Discrimination in Employment Act, which incorporates the FLSA's collective-action provision. *See* 493 U.S. at 167-68 (citing 29 U.S.C. § 626(b)).

purpose they serve in the *litigation*—that is, whether "all their claims can productively be litigated at once" through a "common contention . . . that is capable of classwide resolution." *Dukes*, 564 U.S. at 350; *see Hoffmann-La Roche*, 493 U.S. at 170. As Appellant has argued, "There is no logical reason why the same common answer requirement in *Dukes* would not apply to . . . the similarly situated analysis of the FLSA." Appellant's Br. at 19.

Commonality requires there to be "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). This ensures that plaintiffs assert a "common contention . . . of such a nature that it is capable of [collective] resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Dukes*, 564 U.S. at 350. To be similarly situated, therefore, plaintiffs cannot simply raise "common 'questions'—even in droves," but must instead raise questions that are capable of "generat[ing] common *answers* apt to drive the resolution of the litigation." *Id.* (citations omitted).

Typicality also 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). While FLSA collective actions do not have "representatives," the typicality requirement is probative because it requires the court to identify a claim held by the named plaintiff and then identify whether that claim is typical compared to the claims held by putative plaintiffs.

In other words, "[t]he commonality and typicality requirements of Rule 23(a) tend to merge. Both 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).[6]

To be sure, not every requirement of Rule 23 applies to FLSA collective actions or sheds light on the FLSA's "similarly situated" requirement. *Cf. Shushan v. Univ. of Colorado at Boulder*, 132 F.R.D. 263, 269 (D. Colo. 1990) (holding that requirements of Rule 23 that are consistent with § 216(b) apply to FLSA collective actions). Of course, the FLSA's opt-in provision is the "fundamental, irreconcilable difference" between

[6] The Seventh Circuit has suggested that Rule 23(b)(3)'s predominance requirement—that "questions of law or fact common to class members predominate over any questions affecting only individual members"—also applies to FLSA collective actions. *See Alvarez v. City of Chicago*, 605 F.3d 445, 449 (7th Cir. 2010) ("If common questions predominate, the plaintiffs may be similarly situated . . . .").

§ 216(b) and traditional (opt-out) class actions. *See LaChapelle v. Owens-Illinois, Inc.*, 513 F.2d 286, 288 (5th Cir. 1975) (per curiam). And Rule 23(a)(1) and (4)'s *numerosity* and *adequacy* of representation requirements do not demonstrate whether plaintiffs are "similarly situated." *Cf.* Wright & Miller § 1807 (observing that some of "the Rule 23 requirements are not needed in collective actions because the rule's requirements are designed to protect the due-process rights of individuals who will be bound by the outcome of the litigation").

Although § 216(b) does not expressly cross-reference Rule 23, the FLSA *does* require that plaintiffs be "similarly situated."[7] And the Supreme Court understands "similarly situated" and "commonality" as the same requirement. For example, the Court described the putative class in *Dukes*—who failed Rule 23's commonality requirement—as "not similarly situated." *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1040 (2016). More generally, the Supreme Court has long referred to Rule 23

[7] *Cf.* Wright & Miller § 1807 (noting some courts have drawn negative inferences from the FLSA's lack of cross-reference to Rule 23).

class members as "similarly situated" plaintiffs.[8] *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).

The drafters of Rule 23 similarly 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).

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[8] 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 of both 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, as described in Part II.A, FLSA conditional certification creates the same significant settlement pressures and discovery burdens as Rule 23 class certification.

When Rule 23 was amended into its current form, the 1966 Advisory Committee Note described a class action under Rule 23(b)(3) (which requires "common" issues to predominate over individual issues) as involving "persons similarly situated." *See* Fed. R. Civ. P. 23, 1966 Advisory Committee's Note. This same Advisory Committee Note also said the "provisions of 29 U.S.C. § 216(b) are not intended to be affected by Rule 23," *id.*, which, in context, makes clear simply that § 216(b)'s opt-in provision was intended to remain valid even with Rule 23's "opt-out" requirements. *See* Fed. R. Civ. P. 23(c); *see also LaChapelle*, 513 F.2d at 288 (noting the opt-in provision distinguishes FLSA collective actions from Rule 23 class actions).

Even the pre-1967 FLSA collective action cases recognized the FLSA's overlap with the commonality requirement under the prior version of Rule 23. *See Shushan*, 132 F.R.D. at 266-67 (noting pre-1967 cases "applied rule 23 and treated section 216 cases as 'spurious' . . . class actions"); Wright & Miller § 1752 ("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).

That understanding continues in modern courts. Even among the courts that purport to reject Rule 23's modern commonality requirement in the FLSA context, their own articulations of the "similarly situated" standard are not much different from requiring commonality. *See, e.g.*, *Campbell*, 903 F.3d at 1115 (Ninth Circuit 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"). As addressed below in Part II, there are some courts that eventually apply factors similar to commonality and typicality (and even predominance) at the second *Lusardi* step, but they refuse to apply these factors at the threshold. *See infra* pp. 23-24, 27-28.

C. The FLSA's "Similarly Situated" Requirement for Plaintiffs Must be Rigorously Enforced at the Threshold to Any Collective Action.

It is imperative that courts rigorously enforce the FLSA's "similarly situated" requirement for plaintiffs at the threshold of any putative collective action.

The Supreme Court has suggested that district courts "begin [their] involvement" in FLSA collective actions "early, at the point of the initial notice." *Hoffmann-La Roche*, 493 U.S. at 171. This way, courts can "better manage" the collective action by "ascertain[ing] the contours of the action at the outset." *Id.* at 171-72. But, when courts get involved early, the Supreme Court has made clear that district courts may only facilitate notice to potential opt-in plaintiffs "in *appropriate* cases." *Id.* at 169 (emphasis added).

It is only "appropriate" to provide notice to those whose claims can be commonly resolved. *See JPMorgan*, 916 F.3d at 502. If a court facilitates notice to potential plaintiffs that a rigorous evaluation would demonstrate are not similarly situated, then that court has engaged in an inappropriate "'solicitation of claims'"—or providing other plaintiffs

with notice of their rights—"which *Hoffmann-La Roche* forbids." *Id.* at 503 n.19 (quoting *Hoffmann-La Roche*, 493 U.S. at 174).

Consequently, 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 Hoffmann-La Roche*, 493 U.S. at 169. Otherwise, a court "errantly appl[ies] *Hoffman-La Roche*" when it provides notice to those "who cannot ultimately participate in the collective." *JPMorgan*, 916 F.3d at 502, 504 (citing *Hoffmann-La Roche*, 493 U.S. at 174).

To avoid this improper FLSA solicitation, courts must conduct a "vigorous[]" examination of whether "'there are *in fact* . . . common questions of law or fact'" that bind the plaintiffs together—as courts do under Rule 23. *Flecha v. Medicredit, Inc.*, 946 F.3d 762, 766-67 (5th Cir. 2020) (quoting *Dukes*, 564 U.S. at 350). "Frequently that 'rigorous analysis' will entail some overlap with the merits of the plaintiff's underlying claim." *Dukes*, 564 U.S. at 351. So it might be "necessary for the court to probe behind the pleadings before coming to rest on the certification question," and thus courts may authorize limited discovery to facilitate a determination about whether putative plaintiffs are similarly situated. *Falcon*,

457 U.S. at 160. If that rigorous evaluation demonstrates that the plaintiffs will not be able to litigate towards a common answer collectively resolving their claims, the district court cannot allow notice to go to non-similarly situated people.

Importantly, rigorously applying the "similarly situated" requirement at the threshold does not run contrary to the purpose of the FLSA.[9] 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, 526, 525-26 (1987) (per curiam)). In all events, "even the most formidable argument concerning the statute's purposes [can]not overcome the clarity [found] in the statute's text." *Kloeckner v. Solis*, 568

[9] *Cf.* Wright & Miller § 1807 ("[I]t has been held that imposing any additional restrictions from Rule 23 would be contrary to the broad remedial goals of the . . . statute.").

U.S. 41, 55 n.4 (2012). And here, the text requires plaintiffs to be "similarly situated," even if that requirement will preclude some collective actions.

Moreover, district courts *already* allow plaintiffs multiple attempts to proceed as an FLSA collective action and obtain court-facilitated notice. *See Halle v. W. Penn Allegheny Health Sys. Inc.*, 842 F.3d 215, 224-25 (3d Cir. 2016) (noting current practice among district courts). So under this existing practice, if plaintiffs fail to demonstrate that there are other "similarly situated" plaintiffs, they may try again with more evidence or a different theory. Finally, other individual plaintiffs, of course, may be *joined* to the existing litigation through the typical operation of the normal rules of civil procedure.

II. The *Lusardi* Two-Step "Conditional Certification" Method Used by Many Courts is Erroneous, As It Does Not Require Plaintiffs to be "Similarly Situated" Before Allowing an FLSA Collective Action to Proceed.

Many courts do not enforce the FLSA's "similarly situated" requirement at the threshold. Instead, they—like the District Court here—have coalesced around *Lusardi*'s two-step "conditional certification." Despite the *Lusardi* method's widespread acceptance, this Court "has carefully avoided" adopting it—and with good reason. *JPMorgan*, 916 F.3d at 500

n.9; *see Bigger*, 947 F.3d at 1049 n.5 (Seventh Circuit declining to adopt *Lusardi*).

The *Lusardi* method fundamentally misplaces the burden on defendants to defend a collective action *before* the district court has determined that plaintiffs are actually "similarly situated." 29 U.S.C. § 216(b). Although these courts do eventually evaluate whether plaintiffs are similarly situated at the *second* step of this *Lusardi* test, that consideration comes far too late to be useful. Rule 23 no longer allows for conditional certification because "[a] court that is not satisfied that the requirements of Rule 23 have been met should refuse certification until they have been met." Fed. R. Civ. P. 23, 2003 Advisory Committee's Note. The same should be true for FLSA collective actions.

Accordingly, this Court should hold that *Lusardi*'s "conditional certification" method is inconsistent with § 216(b)'s requirements, as it does not ensure that FLSA collective actions may be maintained among only "similarly situated" plaintiffs.

A. The First *Lusardi* "Notice" Step Permits District Courts to "Conditionally" Certify a Collective Action Without Determining that Plaintiffs Are Actually "Similarly Situated"—Imposing Enormous Litigation Costs on Defendants.

The first *Lusardi* step—the "notice stage"—was designed for determining whether a court should provide notice to "similarly situated" opt-in plaintiffs. In spite of its modest theoretical ambitions, *in practice* the notice stage results in district courts certifying collective actions without any real evaluation of whether the plaintiffs are actually similarly situated. Once courts certify, the "action proceeds as a representative action throughout discovery." *Mooney*, 54 F.3d at 1214. This imposes many of the defense burdens of traditional class actions, but only requires a minimal prima facie showing from plaintiffs.[10]

[10] The Ninth Circuit has wrongly concluded that the district court has no "threshold role in creating a collective action." *Campbell*, 903 F.3d at 1101. To be sure, collective actions require other plaintiffs to take affirmative steps to join the litigation—whether opting in to a properly established FLSA collective action or joining the litigation through traditional joinder rules. *See Genesis*, 569 U.S. at 75. But *Campbell* elides two crucial points. First, the district court must conclude that the plaintiffs are "similarly situated" for an FLSA collective action to proceed. *See Hoffmann-La Roche*, 493 U.S. at 170. Second, while "'conditional certification' does not produce a class with an independent legal status," *Genesis*, 569 U.S. at 75, it still has enormous practical consequences on the litigation as this Part addresses.

The first *Lusardi* "notice" stage usually begins when plaintiffs move for "conditional certification," *JPMorgan*, 916 F.3d at 500-01—"contending that they have at least *facially satisfied* the 'similarly situated' requirement." *Campbell*, 903 F.3d at 1100 (emphasis added) (citation omitted). District courts in the Fifth Circuit typically require "a *minimal [factual] showing* that (1) there is a reasonable basis for crediting the assertions that aggrieved individuals exist, (2) that those aggrieved individuals are similarly situated to the plaintiff in relevant respects given the claims and defenses asserted, and (3) that those individuals want to opt in to the lawsuit." *Prater v. Commerce Equities Mgmt. Co., Inc.*, 2007 WL 4146714, at *4 (S.D. Tex. Nov. 19, 2007) (emphasis added) (collecting cases). Although these factors are similar to the inquiry that courts should make, *see* Part I.B, they do not fully ensure compliance with the FLSA's "similarly situated" requirement. Plus, their ad hoc application "offers no clue as to what *kinds* of 'similarity' matter under the FLSA." *Campbell*, 903 F.3d at 1114.

As this Court has explained, the standard "for satisfying [*Lusardi*] step one is 'fairly lenient.'" *JPMorgan*, 916 F.3d at 501 (quoting *Mooney*, 54 F.3d at 1214). Courts vary in how they describe the standard—

"sometimes articulated as requiring 'substantial allegations,' sometimes as turning on a 'reasonable basis,' but in any event *loosely akin to a plausibility standard*." *Campbell*, 903 F.3d at 1109 (emphasis added) (citations omitted). Courts usually justify this lenient standard on the limited evidence available to them at the early stages of litigation. *See, e.g.*, *Gatewood v. Koch Foods of Miss., LLC*, 2009 WL 8642001, at *12 (S.D. Miss. Oct. 20, 2009) ("This conditional certification was made based on minimal evidence and, thus, a fairly lenient standard was utilized.").[11] Of course, if there is limited evidence that does not prove plaintiffs are actually "similarly situated," then an FLSA collective action should not proceed at all.

Nevertheless, under the two-step *Lusardi* approach, if the court concludes that plaintiffs have met their "minimal" burden, the court may "conditionally certify" the collective action. *Sandoz v. Cingular Wireless LLC*, 553 F.3d 913, 915 n.2 (5th Cir. 2008) (citing *Mooney*, 54 F.3d at 1213-14). In theory, "conditional certification" begins with the court's

[11] And as discussed in Part I.C, courts may order limited discovery before "certification." When district courts have done so, they typically apply a "more stringent" standard. *See Harris v. Fee Transp. Services, Inc.*, 2006 WL 1994586, at *3 (N.D. Tex. May 15, 2006) (collecting cases).

definition of the scope of potentially "similarly situated" opt-in plaintiffs. *Id.* Once the court has defined the group of people who *may be* similarly situated to the plaintiffs, it then facilitates or even provides notice to that group. *See Prater*, 2007 WL 4146714, at *4 ("[N]otice does not issue unless a putative collective action is approved by the court.") (collecting cases).

But as the Seventh Circuit recently observed, conditional certification in practice "present[s] dangers" and creates an "opportunity for abuse of the collective-action device: plaintiffs may wield the collective-action format for settlement leverage." *Bigger*, 947 F.3d at 1049 (citing *Hoffmann-La Roche*, 493 U.S. at 171).

"Conditional" certification is a misnomer. In all practical effects, a "conditionally certified" collective action is a full-bore collective action, and it "proceeds as a representative action *throughout discovery*." *Mooney*, 54 F.3d at 1214 (emphasis added). As that discovery is ongoing, more plaintiffs may opt in to the litigation *before* the court can determine whether they are similarly situated.

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. Because collective actions can have thousands of potential opt-in plaintiffs and "mind-boggling" discovery costs, that pressure can be substantial. *Williams v. Accredited Home Lenders, Inc.*, 2006 WL 2085312, at *5 (N.D. Ga. July 25, 2006); *see, e.g.*, *JPMorgan*, 916 F.3d at 497 (describing collective action in which district court sent notice to approximately 42,000 employees); *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).

It is little surprise that "most collective actions settle" as a result. Wright & Miller § 1807. Once a district court improperly conditionally certifies a class, defendants may be left with no remedy—short of a permissive interlocutory appeal—for the resulting distortions to the litigation process. *See JPMorgan*, 916 F.3d at 497 (noting in the context of denying mandamus relief that, absent interlocutory appeal, improper conditional certification is "irremediable on ordinary appeal").

B. The Second *Lusardi* "Decertification" Step Comes at the End of Discovery and Cannot Alleviate the Burdens Imposed by Erroneous Decisions Made at the First Step.

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 'decertification' of the collective action," arguing that "plaintiffs' status as 'similarly situated' was not borne out by the fully developed record." *Id.* If the court finds that the plaintiffs are similarly situated, "the collective action may proceed, and if not, the court must dismiss the opt-in employees [without prejudice], leaving only the named plaintiff's original claims." *Sandoz*, 553 F.3d at 915 n.2 (citing *Mooney*, 54 F.3d at 1214).

Under *Lusardi*, it is only at this second stage—well into the litigation—that plaintiffs must affirmatively demonstrate they are "similarly situated" to proceed to trial collectively. But as is the hallmark of the *Lusardi* method, courts do not apply a consistent set of criteria in making even this "decertification" evaluation. *See, e.g.*, *Mooney*, 54 F.3d at 1214. The ad hoc nature of the *Lusardi* method means that even the same court can emphasize different factors from case to case. This is in stark contrast to the well-developed and consistently enforced requirements of

commonality and typicality under Rule 23. But generally, district courts consider the "factual and employment settings of the individual plaintiffs" and "the different defenses to which the plaintiffs may be subject on an individual basis" as they relate to the central claim in the action. *Halle*, 842 F.3d at 226 (quoting Wright & Miller § 1807).[12]

If these factors sound familiar, they should: They are essentially the commonality and typicality requirements of Rule 23. *See* Fed. R. Civ. P. 23(a)(2) ("[T]here are questions of law or fact common to the class."); Fed. R. Civ. P. 23(a)(3) ("[T]he claims or defenses of the representative parties are typical of the claims or defenses of the class."). Courts also consider prudential litigation concerns like "the degree of fairness and procedural impact of certifying the action as a collective action." *Halle*, 842 F.3d at 226. This is like Rule 23(b)(3)'s requirement that "a class action is superior to other available methods for *fairly and efficiently* adjudicating the controversy." Fed. R. Civ. P. 23(b)(3) (emphasis added).

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[12] "Relevant [sub]factors include (but are not limited to): whether the plaintiffs are employed in the same corporate department, division, and location; whether they advance similar claims; whether they seek substantially the same form of relief; and whether they have similar salaries and circumstances of employment." *Zavala v. Wal Mart Stores Inc.*, 691 F.3d 527, 536-37 (3d Cir. 2012).

All told, the factors that *some* courts *sometimes* apply at the second *Lusardi* step already overlap with, and borrow from, Rule 23's considerations. *See Thiessen*, 267 F.3d at 1103 (noting the similarities between the factors considered at the second step and Rule 23); *Lusardi*, 118 F.R.D. at 358 n.18 (describing that Rule 23's requirements "are instructive and lend useful guidance"). For those courts, "the case law has largely merged the standards" between FLSA and Rule 23 actions at the second *Lusardi* stage. *Espenscheid*, 705 F.3d at 772. But courts may not apply the requirements rigorously as they would in the context of a Rule 23 class action, as they tend to emphasize certain factors over others in the FLSA context. Thus, courts may not ensure that in *every case*, plaintiffs are similarly situated—even at this second step.

The problem is not that *Lusardi* forecloses a vigorous consideration of plaintiffs' claim. The problem is that this consideration, *if* it comes at all, comes far too long after it should—and too late to remedy the effects of an improper or overbroad "conditional certification."

* * *

In sum, the first *Lusardi* stage allows plaintiffs to litigate a collective action after making only a minimal showing—with the expectation

that the court will make a more stringent evaluation at the second stage, much later in the litigation after discovery has finished. This is a far cry from the rigorous standards that courts apply to class action certification, which are rigorous precisely because class certification *alone* can pose a "bet-your-company decision to [a defendant] and may induce a substantial settlement even if the customers' position is weak." *Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672, 675 (7th Cir. 2001). FLSA collective actions pose no fewer risks and should receive no different treatment.

III. The District Court Erred By Allowing This FLSA Lawsuit to Proceed as a Collective Action Without Concluding that Plaintiffs are "Similarly Situated."

This case is a perfect example of the importance of rigorously evaluating collective actions. Plaintiffs' misclassification claim—that they are "employees" subject to the FLSA's protections and not independent contractors—relies on the "economic realities" balancing test that this Court uses to determine employment status. *See Hopkins v. Cornerstone Am.*, 545 F.3d 338, 343 (5th Cir. 2008). And the District Court allowed the litigation to proceed as a collective action without determining whether plaintiffs are, in fact, "similarly situated" under this balancing test. This grants plaintiffs enormous collective leverage which—if the

collective action was improperly certified—can only "stir up litigation," and in all events "inflate[s] settlement pressure." *Bigger*, 947 F.3d at 1050.

The District Court improperly "conditionally certified" this lawsuit. Instead of asking whether the plaintiffs were similarly situated, it only asked whether the extensive discovery evidence provided "support beyond the bare allegations contained in [the] complaint and personal declaration" that plaintiffs made a prima facie showing that they are similarly situated. Dist. Ct. Op. at 4-5 (quoting *Valcho v. Dall. Cty. Hosp. Dist.*, 574 F. Supp. 2d 618, 622 (N.D. Tex. 2008)).[13] And it accordingly failed to determine whether the discovery evidence—in addition to "*minimally show[ing]* the existence of similarly situated aggrieved individuals"—demonstrated any dissimilarities that would confound collective resolution. *See id.* at 7 (emphasis added).

[13] And the District Court only applied that lenient standard against the factors courts typically consider at *Lusardi*'s first step: "(1) there is a reasonable basis for crediting the assertions that aggrieved individuals exist, (2) that those aggrieved individuals are similarly situated to the plaintiff in relevant respects given the claims and defenses asserted, and (3) that those individuals want to opt in to the lawsuit." *Prater*, 2007 WL 4146714, at *4.

Contrary to the District Court's suggestion, a close evaluation of the evidence as it relates to plaintiffs' claims is *not* an improper consideration of the merits.[14] Rather, it is a necessary evaluation of the court's ability to resolve a common issue in a collective proceeding. *See Dukes*, 564 U.S. at 352 ("[P]roof of commonality necessarily overlaps with [the] merits contention."). The "factual and employment settings of the individual plaintiffs," *Halle*, 842 F.3d at 226, and the ways in which they differ are not merely *relevant* to collective action certification, but are the *threshold* questions to providing notice to potential opt-in plaintiffs.

* * *

The District Court's decision exemplifies the problems with the *Lusardi* method. On the basis of a mere prima facie showing that plaintiffs are "similarly situated," the district court allowed the litigation to proceed as a collective action.

This Court should take the opportunity presented by this appeal to repudiate the two-step *Lusardi* "conditional certification" method for

[14] *See* Dist. Ct. Op. at 8 ("[W]hether the drivers were misclassified is based on the economic-realities test[.] . . . As stated above, the Court may not reach the merits of this issue at the pre-notice stage.") (citing *Hoffmann-La Roche*, 493 U.S. at 174).

FLSA collective actions. In its place, this Court should hold that district courts must rigorously consider whether plaintiffs are "similarly situated" according to the commonality and typicality requirements of Rule 23—*before* they allow the lawsuit to proceed as a collective action and facilitate notice to potential opt-in plaintiffs.

CONCLUSION

This Court should reverse the District Court's decision allowing an FLSA collective action to proceed and remand.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above document was filed and served on February 19, 2020, via ECF upon counsel of record for the parties.

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1. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 29(a)(5) because this brief contains 6481 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

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Dated: February 19, 2020

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