Nos. 22-3101, -3102

In the United States Court of Appeals for the Sixth Circuit

Brooke Clark, et al.,
Plaintiffs-Appellees, Cross-Appellants,
v.
A&L Home Care and Training Center, LLC, et al.,
Defendants-Appellants, Cross-Appellees.

On Appeal from the United States District Court
for the Southern District of Ohio, Western Division, No. 1:20-cv-00757

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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 AMICI CURIAE

The Chamber of Commerce of the United States of America ("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.

The National Federation of Independent Business ("NFIB") is the nation's leading small business association. Its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. Founded in 1943 as a nonprofit,

[1] All parties have consented to this brief's filing. *See* Fed. R. App. P. 29(a)(2). No counsel for a party authored this brief in whole or in part, and no person other than Amici, their members, or their counsel contributed money intended to fund the preparation or submission of this brief.

nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. The NFIB Small Business Legal Center ("Legal Center") is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. To fulfill its role as the voice for small business, the Legal Center frequently files amicus briefs in cases that will impact small businesses.

There are thousands of Fair Labor Standards Act ("FLSA") cases filed every year against employers, including Amici's members, and the conditional collective-action method employed in the District Court threatens enormous liability, thus facilitating settlements in otherwise meritless cases.[2] Therefore, Amici have a substantial interest in ensuring that district courts have clear procedural and substantive guidance for collective actions.

[2] *Federal Judicial Caseload Statistics*, Table C-2 (March 31, 2021) (reporting 6,207 FLSA cases filed between March 31, 2020, and March 31, 2021), https://bit.ly/3v044ET; *see also* Defs. Br. at 18 n.5 (noting dramatic increase in FLSA cases over last 20 years).

INTRODUCTION

In a collective action under the FLSA, an employee may sue an employer for wage-and-hour violations on behalf of themselves and "other employees *similarly situated*." 29 U.S.C. § 216(b) (emphasis added). This is an opt-in action: a plaintiff must "give[] . . . [] consent in writing" to become a "party" to the action, *id.*, which necessarily requires those potential opt-in plaintiffs to have notice of the litigation, *Hoffmann-La Roche, Inc. v. Sperling*, 493 U.S. 165, 170 (1989) (collective actions "depend on employees receiving accurate and timely notice").[3] Thus, the Supreme Court has recognized "that district courts have discretion, *in appropriate cases*, to implement [§ 216(b)] . . . by facilitating notice to potential plaintiffs." *Id.* at 169 (emphasis added).

To facilitate notice, district courts in this circuit have routinely used the lenient method invented in *Lusardi v. Xerox Corp.*, 118 F.R.D. 351 (D.N.J. 1987), under which courts "conditionally certify" a collective action before definitively answering whether the plaintiffs are "*actually*" "similarly

[3] *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 167-69 (citing 29 U.S.C. § 626(b)).

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). Under this *Lusardi* method, district courts facilitate notice to employees who may not be eligible to opt-in and permit the action to proceed as a collective action through discovery, before ultimately determining whether the potential plaintiffs can be actual plaintiffs.

The *Lusardi* method is inconsistent with the FLSA, as other circuits have already concluded. *Swales v. KLLM Transp. Servs., LLC*, 985 F.3d 430, 440 (5th Cir. 2021); *Campbell v. City of Los Angeles*, 903 F.3d 1090, 1117 (9th Cir. 2018).[4] In addition to its lack of textual support, the lenient, ad hoc *Lusardi* method creates perverse incentives for abusive litigation. *Swales*, 985 F.3d at 435; *Bigger*, 947 F.3d at 1049. The *Lusardi* method both (1) fails to ensure that plaintiffs' claims are capable of "efficient resolution in one proceeding," *Hoffmann-La Roche*, 493 U.S. at 170, and (2) creates an "opportunity for abuse of the collective-action device" because "plaintiffs may wield the collective-

[4] The Seventh Circuit too has declined to adopt *Lusardi*. *Bigger v. Facebook, Inc.*, 947 F.3d 1043, 1049 n.5 (7th Cir. 2020).

action format for settlement leverage," *Bigger*, 947 F.3d at 1049. In this case, as in others, proceeding through discovery as a collective action without any finding that the plaintiffs are similarly situated will only distort the litigation. As the Seventh Circuit noted, "expanding the litigation with additional plaintiffs increases pressure to settle, no matter the action's merits." *Id.* Conditional certification does precisely that. It is therefore little surprise that "most collective actions settle." 7B Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1807 (3d ed. 2022 update) (hereinafter "Wright & Miller"). Moreover, even before a settlement, conditional certification ratchets up notice and discovery costs for defendants—which they may never be able to recover.

This Court should join the other circuits that have declined to embrace *Lusardi*. 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).

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*":

> 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.*

Like a traditional class action, an FLSA collective action is a significant exception to the normal rules of civil litigation, and thus poses 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) (noting that 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.").

But it need not be. The FLSA's plain text imposes two clear requirements: (1) plaintiffs must bring claims that are capable of common resolution in the same action; and (2) courts must make that determination at the outset of litigation, *before* permitting extensive discovery.

A. The FLSA's "similarly situated" standard ensures that the named plaintiff and putative plaintiffs raise common issues that can efficiently generate common answers.

As this Court has already held, the FLSA expressly requires that "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 their claims must be 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). *Dukes* made clear that courts must interpret phrases like "common questions" and "similarly situated" in the context of what purpose they serve in the *litigation*—that is, whether "all their claims can productively be litigated at once" through a "common contention . . . that it is capable of classwide resolution." *Dukes*, 564 U.S. at 350.

That analysis naturally overlaps with the standards for class actions under Federal Rule of Civil Procedure 23.[5] Specifically, the commonality and typicality requirements of Rule 23 offer ready-made law to ensure that collective actions involve common issues capable of efficient resolution.

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]

[5] Though the FLSA does not cross reference Rule 23 or otherwise incorporate aspects of Rule 23—the two developed on separate tracks over the same time period—the FLSA does require plaintiffs to be "similarly situated." *Cf.* Wright & Miller § 1807 (noting some courts have drawn negative inferences from the FLSA's lack of cross-reference to Rule 23).

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). Although 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 analyze whether that claim is typical of the claims held by putative plaintiffs. Resolution of an atypical claim will not drive the resolution of the claims of other 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]

Significant authorities confirm that some of Rule 23's requirements are useful in evaluating whether plaintiffs are "similarly situated." The Supreme Court understands "similarly situated" and "commonality" as the same requirement. For example, the Court described the putative class in *Dukes*—which failed Rule 23's commonality requirement—as "not similarly situated." *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1048 (2016). More generally, the Supreme 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

[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. *Alvarez v. City of Chicago*, 605 F.3d 445, 449 (7th Cir. 2010).

(1980); *Coopers & Lybrand*, at 465; *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 549 (1949).[7]

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). 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

[7] The Supreme Court in *Genesis Healthcare Corporation 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." 569 U.S. at 75 (citing *Hoffmann-La Roche*, 493 U.S. at 171-72). For purposes of the mootness issue in that case, that "significant difference[]," *Genesis*, 569 U.S. 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, FLSA conditional certification creates the same significant settlement pressures and discovery burdens as Rule 23 class certification.

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).

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 v. Univ. of Colo. 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 § 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 in 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"); *Espenscheid v. DirectSat USA, LLC*, 705 F.3d 770, 772 (7th Cir. 2013) (noting that "the case law has largely merged the standard" between FLSA and Rule 23 actions at the second *Lusardi* stage). 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. 19-28.

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*, 132 F.R.D. at 269 (holding that requirements of Rule 23 that are consistent with § 216(b) apply to FLSA collective actions). The FLSA's opt-in provision is the "fundamental, irreconcilable difference" between § 216(b) and traditional (opt-out) class actions. *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").

B. The FLSA's "similarly situated" requirement must be rigorously enforced at the threshold to any collective action before courts issue any notice.

It is imperative that courts "rigorously enforce" the FLSA's similarity requirement "at the outset of the litigation." *Swales*, 985 F.3d at 443; *see also*

Defs. Br. at 9-10, 25, 30 (arguing for rigorous evaluation of whether plaintiffs are similarly situated). 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 under the FLSA—and unlike class actions under Rule 23—"all plaintiffs must signal in writing their affirmative consent to participate in the action." *Comer*, 454 F.3d at 546 (citations omitted).[8] 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-La Roche*, 493 U.S. at 169 (emphasis added).

[8] 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 can assert their own claims, Congress did nothing to lessen the requirement that those plaintiffs be "similarly situated."

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 are not similarly situated constitutes inappropriate "solicitation of claims"—which the Supreme Court has held improper. *Id.* at 174. In other words, 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-La Roche*, 493 U.S. at 174); a*ccord In re A&D Interests, Inc.*, 2022 WL 1315465, at *4 (5th Cir. May 3, 2022) (per curiam) (same).

To avoid this improper FLSA solicitation, courts must conduct "a rigorous analysis," about whether the proposed collective presents truly common issues as courts do under Rule 23. *Dukes*, 564 U.S. at 350-51. "Frequently that 'rigorous analysis' will entail some overlap with the merits of the plaintiff's underlying claim." *Id.* at 351. 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. *Gen. Tel. Co. of Sw.*, 457 U.S. at 160; *see also* Defs. Br. at 27-28 (noting district courts can engage in limited "notice discovery"). 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. *Swales*, 985 F.3d at 441 ("The fact that a threshold question is intertwined with a merits question does not itself justify deferring those questions until after notice is sent out.").

In all events, courts must conduct this rigorous analysis before facilitating any notice to prospective members of the collective action.

Importantly, rigorously applying the "similarly situated" requirement at the threshold does not run contrary to the purpose of the FLSA. Rather, it ensures that FLSA collective actions may be efficiently resolved for the benefit of employees and employers alike, rather than bogged down by the inclusion of non-similar claims. And in any event, 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)). Here, the text—which is the best indication of the statute's purpose—requires plaintiffs to be "similarly situated," even if that requirement will preclude some claims from being pursued as collective actions.

Moreover, numerous backstops exist against this requirement unduly closing the courthouse doors to FLSA claims. For example, district courts *already* allow plaintiffs multiple attempts to proceed using an FLSA collective action and to 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). Under this practice, if plaintiffs fail to demonstrate that there are other "similarly situated" plaintiffs, then they may try again with more evidence or a different theory. In addition, other

individual plaintiffs may always be *joined* to the existing litigation through the typical operation of the normal rules of civil procedure.

II. The *Lusardi* test does not ensure compliance with the FLSA at the outset of a collective action.

Though the *Lusardi* method "has no universally understood meaning," *Swales*, 985 F.3d at 439, courts generally "determine whether plaintiffs are similarly situated in a two-step process, the first at the beginning of discovery and the second after all class plaintiffs have decided whether to opt-in and discovery has concluded," *White v. Baptist Mem'l Health Care Corp.*, 699 F.3d 869, 877 (6th Cir. 2012). The first is conditional certification at the "notice" step, followed by the belated "decertification" step only after discovery concludes. But some courts even use the *Lusardi* method to avoid determining whether plaintiffs are "similarly situated" until *after trial*.[9] *Monroe v. FTS USA, LLC*, 860 F.3d 389, 402 (6th Cir. 2017) (district court "made its final certification determination post-trial"). Whenever it occurs, the need to conduct

[9] The Eleventh Circuit has "endorsed *Lusardi*," but "it did so only after a jury verdict." *Swales*, 985 F.3d at 439.

a second "decertification step" as a matter of course all but proves that the district court has not done its job at the outset.

The lenient approach at the first step produces harms that are not remediable at the second. *Lusardi* distorts the litigation process, imposing significant discovery costs upon defendants and exerting hydraulic settlement pressures, *Swales*, 985 F.3d at 440, and it otherwise "leads to collective actions that cannot be managed, and where trial does not lead to common answers to common questions," *Valte v. United States*, 155 Fed. Cl. 561, 570 (2021).

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. The "amorphous and ad-hoc test provides little help in guiding district courts in their notice-sending authority" under *Hoffman-La Roche*. *Id.* at 440. Despite its modest theoretical ambitions, in practice the notice stage leads district courts to improperly certify collective actions.

Rather than rigorously evaluate whether the plaintiffs are actually similarly situated as the FLSA requires, "[d]istrict courts use a 'fairly lenient

standard' that 'typically results in conditional certification of a representative class'" at the notice stage. *White*, 699 F.3d at 877 (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).

However phrased, the first *Lusardi* step requires only a "modest factual showing." *Comer*, 454 F.3d at 547 (quoting *Pritchard v. Dent Wizard Intern. Corp.*, 210 F.R.D. 591, 596 (S.D. Ohio 2002)).[10] And that minimal showing is enough to "conditionally certify" a collective. *See* Defs. Br. at 26-27

[10] Some courts conduct this analysis solely on the pleadings. *Pritchard*, 210 F.R.D. at 595. Others require a limited analysis beyond the pleadings: "whether potential plaintiffs were identified; whether affidavits of potential plaintiffs were submitted; and whether evidence of a widespread discriminatory plan was submitted." *Id.* (quoting *H & R Block, Ltd. v. Housden*, 186 F.R.D. 399, 400 (E.D. Tex. 1999)); *see also* Defs. Br. at 15-16 (collecting disparate evidentiary standards).

(collecting cases in which district courts note the meager factual allegations supporting conditional certification under *Lusardi*).

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) (emphasis added). Indeed, during discovery, more plaintiffs may opt into the litigation *before* the district court determines whether they are similarly situated. This imposes many of the defense burdens of traditional class actions, but only requires a minimal prima facie showing from plaintiffs.[11] Furthermore, the fact that the *court* is

[11] 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, although "'conditional certification' does not produce a class with

involved in sending notice poses the risk that the court could be understood to approve of and be actively soliciting claims from more potential plaintiffs. *Swales*, 985 F.3d at 436.

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-La Roche*, 493 U.S. at 171). In FLSA collective actions especially, "expanding the litigation with additional plaintiffs increases pressure to settle, no matter the action's merits." *Id.*; *accord Swales*, 985 F.3d at 435-36 (explaining that collective actions risk "intensifying settlement pressure no matter how meritorious the action"). 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.*, *JPMorgan*, 916 F.3d at 497 (describing collective action in which district court sent notice to

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an independent legal status," *Genesis*, 569 U.S. at 75, it still has enormous practical consequences on the litigation, as this Part addresses.

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).

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.[12] Notably, the district court 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 v. A&L Home Care & Training Ctr., LLC*, 552 F. Supp. 3d 731, 740 (S.D. Ohio 2021). 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

[12] The district court also noted the uncertainty about which standard to apply to the "notice" step. *Holder*, 552 F. Supp. at 740.

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). *See also* Defs. Br. at 22-23 (noting disparate evaluations of claims under Rule 12(b)(6) motions to dismiss and motions for conditional certification).

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. *Holder*, 552 F. Supp. 3d at 747. 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 738.

But few cases ever reach the decertification stage, because "most collective actions settle" due to the pressures inflicted by conditional certification. Wright & Miller § 1807. Once a district court improperly conditionally certifies a collective, defendants may be left with no remedy for the resulting distortions to the litigation process. *See In re New Albertsons, Inc.*, No. 21-2577,

2021 WL 4028428, at *2 (7th Cir. Sept. 1, 2021) (denying mandamus relief for conditional certification); *JPMorgan*, 916 F.3d at 497 (absent interlocutory appeal, improper conditional certification is "irremediable on ordinary appeal"); *see Holder*, 552 F. Supp. 3d at 747 ("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*, 552 F. Supp at 742.

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

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 that occur during 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 (14th ed. 2017)). 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." *Campbell*, 903 F.3d at 1100.

Under *Lusardi*, it is only at this second stage—well into the litigation and often after discovery closes—that a plaintiff must affirmatively demonstrate that he or she is "similarly situated" to proceed to trial as part of a collective. *White*, 699 F.3d at 877. But as is the hallmark of the *Lusardi* method, courts apply inconsistent criteria even in making this "decertification" evaluation.

Some courts consider "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.'" *O'Brien v. Ed Donnelly Enters., Inc.*, 575 F.3d 567, 584 (6th Cir. 2009) (quoting Wright & Miller § 1807 n.65). These factors 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."). But not all courts consider these factors, and even

those courts that *do* may not apply the requirements as rigorously as they would in the context of a Rule 23 class action, as courts tend to emphasize certain factors over others in the FLSA context.

The ad hoc nature of the *Lusardi* method thus means that even the same court can emphasize different factors from case to case. "By encouraging courts to rely on an array of different factors and considerations without firmly relating them to a clear understanding of what it means to be similar, the ad hoc test operates 'at such a high level of abstraction that it risks losing sight of the statute underlying it.'" *Valte*, 155 Fed. Cl. at 570-73 (quoting *Campbell*, 903 F.3d at 1117).

Furthermore, this second-step evaluation, *if* it comes at all, comes too late to remedy the distorting effects of an improper "conditional certification." And the costs imposed by such improper "solicitation of claims," *Hoffmann-La Roche*, 493 U.S. at 174, are unrecoverable.

CONCLUSION

The Court should reject the *Lusardi* method and reverse the district court.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with: (1) the type-volume limitation of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7) because it contains 5,426 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).

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CERTIFICATE OF SERVICE

I certify that on May 12, 2022, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court.

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