No. 20-257

IN THE

Supreme Court of the United States

CHIPOTLE MEXICAN GRILL, INC., AND CHIPOTLE SERVICES, LLC,

Petitioners,

v.

MAXCIMO SCOTT, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE NATIONAL RETAIL FEDERATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[*]

The Chamber of Commerce of the United States of America is the world's largest business federation. 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.

The National Retail Federation ("NRF") is the world's largest retail trade association, representing discount and department stores, home goods and specialty stores, Main Street merchants, grocers, wholesalers, chain restaurants, and internet retailers from the United States and more than 45 countries. Retail is the largest private-sector employer in the United States, supporting

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[*] Pursuant to this Court's Rule 37.2(a), *amici* affirm that timely notice of intent to file this brief was provided to counsel for the parties, and all parties have consented to the filing of this brief. In accordance with Rule 37.6, no counsel for any party has authored this brief in whole or in part, and no person or entity, other than *amici*, their members, or their counsel, has made a monetary contribution to the brief's preparation or submission.

one in four U.S. jobs—approximately 52 million American workers—and contributing $3.9 trillion to the annual GDP. NRF periodically submits *amicus curiae* briefs in cases raising significant legal issues affecting the retail community.

SUMMARY OF ARGUMENT

This Court should grant review to resolve the confusion among lower courts in determining when plaintiffs are "similarly situated" to proceed as a collective action under the Fair Labor Standards Act ("FLSA"). 29 U.S.C. § 216(b). To provide guidance to the lower courts, the Court should make two important holdings. First, some of the well-established procedural safeguards of traditional Federal Rule of Civil Procedure 23 class actions—namely, *commonality*, *typicality*, and *predominance*—also should apply in assessing whether plaintiffs are "similarly situated" under the FLSA. Second, this "similarly situated" assessment must be resolved *at the outset* of a case before it can proceed as a collective action in any form.

I. As *Wal-Mart Stores, Inc.* v. *Dukes* recognized, courts must interpret statutory phrases like "similarly situated" in the context of what purposes those phrases serve in the litigation. 564 U.S. 338, 350 (2011). In the Rule 23 context, the purpose of the phrase "common questions" is to determine whether "all [plaintiffs'] claims can productively be litigated at once" through a "common contention * * * that * * * is capable of classwide resolution." *Ibid.*

The core inquiry under the FLSA likewise requires plaintiffs to be "similarly situated" *for purposes of efficient collective litigation*. After all, FLSA collective actions are designed to provide "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) (emphasis added).

II. This Court already has an established body of law, under Rule 23 doctrines, for determining whether putative plaintiffs are similarly situated to allow efficient collective resolution of common issues of law and fact. Spe-

cifically, Rule 23 analyzes whether plaintiffs are similarly situated through the doctrines of *commonality* ("questions of law or fact common"); *typicality* ("the claims or defenses of the representative parties are typical of the claims or defenses of" the entire group); and *predominance* ("the questions of law or fact common to class members predominate over any questions affecting only individual members"). Fed. R. Civ. P. 23(a)(2)-(3), (b)(3).

Traditional Rule 23 class action plaintiffs therefore 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). And courts must "give careful scrutiny to the relation between common and individual questions in a case," because a "common question is one where 'the same evidence will suffice for each member to make a prima facie showing [or] the issue is susceptible to generalized, class-wide proof.'" *Tyson Foods, Inc.* v. *Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016) (alteration in original) (quoting 2 W. Rubenstein, Newberg on Class Actions § 4:50, 196-197 (5th ed. 2012)).

This Court and Rule 23's drafters acknowledged that these Rule 23 criteria are ultimately determining whether plaintiffs are "similarly situated" to proceed efficiently through collective litigation. This Court has repeatedly referred to traditional class action plaintiffs as being "similarly situated." See *infra* pp.15-16; Pet. 25-26 (collecting additional authorities). 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.

This case perfectly illustrates the unnecessary discord between lower courts' assessments of Rule 23 doc-

trines and FLSA collective actions: The court below affirmed the district court's decision not to certify the Rule 23 class on predominance grounds, yet it permitted the FLSA collective action to go forward. Pet.App.33a. If "questions affecting only individual members" actually "predominate over" any "questions of law or fact common to class members," Fed. R. Civ. P. 23(b)(3), then the plaintiffs are not sufficiently "similarly situated" to proceed in efficient collective litigation. See, *e.g.*, *Espenscheid* v. *DirectSat USA, LLC*, 705 F.3d 770, 772 (7th Cir. 2013) ("[T]here isn't a good reason to have different standards for the certification of the two different types of action [under the FLSA and Rule 23], and the case law has largely merged the standards[.]") (collecting cases).

III. While this case involved application of the "similarly situated" standard to "decertify" a collective action after discovery closed, this Court should also clarify that district courts must resolve whether plaintiffs are "similarly situated" *at the outset* of a case before an FLSA collective action may proceed in any form. The FLSA's "similarly situated" requirement—like Rule 23—"does not set forth a mere pleading standard." *Dukes*, 564 U.S. at 350. To the contrary, it is Congress's requirement for maintaining a collective action in any form. 29 U.S.C. § 216(b).

If cases can even temporarily proceed as collective actions before resolving whether plaintiffs are "similarly situated," there is 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, 1049-1050 & 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.

Yet, some district courts currently "conditionally certify" an FLSA collective action before determining whether plaintiffs are, in fact, "similarly situated." This "conditionally certified" collective action then "proceeds as a representative action throughout discovery." *Mooney* v. *Aramco Servs. Co.*, 54 F.3d 1207, 1214 (5th Cir. 1995). As a result, "most collective actions settle." Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1807 (3d ed.) ("Wright & Miller"). But FLSA litigation should not be allowed to proceed as collective actions—even initially just through discovery—until a court has definitively held that plaintiffs are "similarly situated."

Accordingly, this Court should grant review and resolve the widespread confusion among lower courts in assessing whether plaintiffs are "similarly situated" under the FLSA.

ARGUMENT

I. THE CORE INQUIRY IN DETERMINING WHETHER PLAINTIFFS ARE "SIMILARLY SITUATED," UNDER THE FAIR LABOR STANDARDS ACT, IS WHETHER THEIR CLAIMS RAISE COMMON ISSUES SUITABLE FOR EFFICIENT COLLECTIVE LITIGATION.

The FLSA allows "collective actions" to provide "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). These collective actions must be brought on behalf of individual named plaintiffs plus other "similarly situated" employees, who must affirmatively "opt-in" to the litigation:[1]

> 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 FLSA does not define "similarly situated." And lower courts have struggled to identify what this standard requires. *E.g.*, *Thiessen* v. *Gen. Elec. Capital Corp.*, 267 F.3d 1095, 1102 (10th Cir. 2001); see *Campbell* v. *City*

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

of Los Angeles, 903 F.3d 1090, 1100, 1111 (9th Cir. 2018) (the statute "does not provide a definition of 'similarly situated,' on which access to the collective mechanism typically turns" "nor is there an established test for enforcing it").

Standing alone, the phrase "similarly situated," like its synonym "equal," "is an open term." *Premier Elec. Const. Co.* v. *Nat'l Elec. Contractors Ass'n, Inc.*, 814 F.2d 358, 367 (7th Cir. 1987) (Easterbrook, J.). Similarly situated "*with respect to what* is the essential question, the answer to which must come from some independent source." *Ibid.* Without explicit statutory criteria, that source is the surrounding context, which reveals the law's underlying *purpose* for assessing similarity. This objective purpose should not be confused with the concept of subjective legislative intent. Statutory purpose can permissibly illuminate meaning if defined carefully and gathered only from the text and its context, rather than extrinsic sources such as legislative history. See Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 33, 56-57 (2012). Indeed, looking to purpose (properly understood) is logically *unavoidable* whenever a law such as the FLSA directs courts to make a comparison without explicitly identifying the relevant criteria.

Without statutory purpose to measure against, courts have no criteria to judge whether individuals are sufficiently similar to require the same treatment under a particular law. For example, the Equal Protection Clause requires States to treat "alike all persons similarly situated." *Yick Wo* v. *Hopkins*, 118 U.S. 356, 368 (1886) (internal quotation marks omitted); accord *City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). Since all regulation inherently involves distinctions, however, "the Fourteenth Amendment does not prevent the states from resorting to classification for the purposes of legislation."

F.S. Royster Guano Co. v. *Virginia*, 253 U.S. 412, 415 (1920). The Constitution does not impose an abstract "disembodied equality" divorced from regulatory context. *Tigner* v. *Texas*, 310 U.S. 141, 147 (1940). Reasonable classifications for legitimate state purposes are permitted. The underlying "objective" behind a legal classification thus "gives substance" to the equality analysis, *Romer* v. *Evans*, 517 U.S. 620, 632 (1996), allowing courts to identify relevant criteria that make individuals similarly situated for the law's valid purposes.

So as this Court has accordingly long reminded lower courts, context and purpose necessarily give statutory phrases like "similarly situated" their meaning. See Pet. 23 ("the very nature of that phrase raises the question" of the comparison's purpose). Most pertinent here, *Dukes* made clear that statutory provisions requiring plaintiffs to be "similarly situated" or raise "common questions" must be read in light of what purpose they serve in facilitating collective litigation. *Dukes*, 564 U.S. at 350. Stated differently, these standards assess whether "all [plaintiffs'] claims can productively be litigated at once" through a "common contention * * * that * * * is capable of classwide resolution." *Ibid.*

Interpreted in context, therefore, the FLSA's requirement that plaintiffs be "similarly situated" provides the lower courts with a "core inquiry: Are plaintiffs similarly situated such that their claims of liability and damages can be tried on a class-wide and representative basis?" *Monroe* v. *FTS USA, LLC*, 860 F.3d 389, 417 (6th Cir. 2017) (Sutton, J., concurring in part and dissenting in part) (citation omitted); see *Halle* v. *W. Penn Allegheny Health Sys. Inc.*, 842 F.3d 215, 223 (3d Cir. 2016) (collective actions provide for "resolution in one proceeding of common issues") (citation omitted); Pet. 23 (collecting examples of uses of "similarly situated" in other statutes). Even courts that ultimately interpret the "similarly

situated" standard too leniently still recognize the importance of this "core inquiry." See, *e.g.*, *Campbell*, 903 F.3d at 1114 ("That goal is only achieved—and, therefore, a collective can only be maintained—to the extent party plaintiffs are alike in ways that matter to the disposition of their FLSA claims.").

Engaging in this "core inquiry" does not run contrary to the purpose of the FLSA.[2] The text requires plaintiffs to be "similarly situated" for purposes of efficient collective litigation, even if that requirement will preclude some collective actions. 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). "[N]o 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, 525-526 (1987) (per curiam)). And "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 U.S. 41, 55 n.4 (2012).

The court below, however, failed to heed statutory context and instead gave "similarly situated" its broadest possible interpretation—ignoring the "core inquiry" under the FLSA and this Court's analogous holding in *Dukes*. Under the lower court's interpretation, plaintiffs must only "share one or more similar questions of law or fact." Pet.App.31a. In dissent, Judge Sullivan correctly

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[2] 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."). Note that—as discussed *infra* pp.11-15—the commonality, typicality, and predominance doctrines are not "additional restrictions," but rather doctrines directly material to the "similarly situated" analysis required by the FLSA.

identified the majority's interpretation as nothing more than a "mere formality," Pet.App.35a (Sullivan, J., dissenting), especially because (as is true for Rule 23 class actions) "[a]ny competently crafted * * * complaint literally raises" "similar" law or facts, *Dukes*, 564 U.S. at 349 (alteration in original; citation omitted). Just as the Ninth Circuit did in *Dukes*, therefore, the court below here transformed an important and substantive threshold condition to collective litigation into a mere triviality, in contravention of statutory purpose. Cf. *id.* at 349-350 (the "commonality" "language is easy to misread" and "obviously, the mere claim by employees of the same company that they have suffered a Title VII injury * * * gives no cause to believe that all their claims can productively be litigated at once").

II. FEDERAL RULE OF CIVIL PROCEDURE 23'S COMMONALITY, TYPICALITY, AND PREDOMINANCE DOCTRINES ARE DESIGNED TO ENSURE PLAINTIFFS ARE "SIMILARLY SITUATED" FOR EFFICIENT COLLECTIVE LITIGATION.

A. This Court has ready-made bodies of law under Rule 23's commonality, typicality, and predominance doctrines to ensure that plaintiff groups are "similarly situated" for purposes of efficient collective litigation. Each of these doctrines analyzes whether a proposed collective litigation will entail "efficient resolution in one proceeding of common issues of law and fact," as the FLSA requires. *Hoffmann-La Roche*, 493 U.S. at 170.

Commonality. Rule 23(a)(2)'s commonality doctrine—requiring "questions of law or fact common to the class"—is the primary way Rule 23 evaluates whether plaintiffs are sufficiently similar to proceed in collective litigation.

Dukes held that Rule 23(a)(2)'s commonality requirement is designed to ensure that "all [plaintiffs'] claims can productively be litigated at once" through a

"common contention * * * that * * * is capable of *class-wide resolution*." *Dukes*, 564 U.S. at 350 (emphasis added). 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." *Ibid.*

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." *Ibid.* (citation omitted).

Typicality. Rule 23(a)(3)'s typicality requirement—that "claims or defenses of the representative parties are typical of the claims or defenses of the class"—also evaluates whether plaintiffs are sufficiently similar to proceed through collective litigation. FLSA collective actions, of course, do not have "representatives" as in Rule 23 class actions. But the same mode of analysis is still probative under the FLSA—by asking whether the claim held by the named plaintiff is typical compared to the claims held by other 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." *Gen. Tel. Co.* v. *Falcon*, 457 U.S. 147, 157 n.13 (1982).

Predominance. 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 addresses fitness for efficient collective litigation. "Section 216(b) of the FLSA and Rule 23(b)(3) are animated by similar concerns about the efficient resolution of common claims." *Calderone* v. *Scott*, 838 F.3d 1101, 1103 (11th Cir. 2016).

This Court has explained that the predominance doctrine

> calls upon courts to give careful scrutiny to the relation between common and individual questions in a case. An individual question is one where "members of a proposed class will need to present evidence that varies from member to member," while a *common question* is one where "the same evidence will suffice for each member to make a prima facie showing [or] the issue is *susceptible to generalized, class-wide proof*."

Tyson Foods, 136 S. Ct. at 1045 (emphases added) (quoting Newberg on Class Actions § 4:50, 196-197).

As the Seventh Circuit observed when applying the predominance doctrine in the FLSA context, "[i]f common questions predominate" and the issue is capable of class-wide proof, then "the plaintiffs may be similarly situated[.]" *Alvarez* v. *City of Chicago*, 605 F.3d 445, 449 (7th Cir. 2010);[3] see also *Myers* v. *Hertz Corp.*, 624 F.3d 537, 556 (2d Cir. 2010) (observing that Rule 23's predominance requirement is "admittedly similar" to the "similarly situated" standard).

B. Although the FLSA's collective-action provision does not expressly cross-reference Rule 23, the FLSA *does* require "similarly situated" plaintiffs.[4] And this "similarly situated" requirement entails the same analy-

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[3] "The Seventh Circuit has imported the 'predominance' requirement of Rule 23(b)(3) into section 216(b)." *Campbell*, 903 F.3d at 1111 (citing *Alvarez*, 605 F.3d at 449).

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

sis as the commonality, typicality, and predominance doctrines from Rule 23.

Courts assessing the FLSA's "similarly situated" requirement, therefore, should draw on the well-established and thoroughly considered body of Rule 23 law designed to identify when plaintiffs can proceed in efficient collective litigation. Unfortunately, right now "much of collective action practice is a product of interstitial judicial lawmaking or ad hoc district court discretion." *Campbell*, 903 F.3d at 1100.

The question here is not whether Rule 23 itself *applies by its own terms* to FLSA collective actions—as the rule would for other causes of action. Instead, what matters is whether Rule 23's commonality, typicality, and predominance doctrines also evaluate whether plaintiffs are "similarly situated" in the relevant sense, such that the substantive analysis under those criteria overlaps with the same core inquiry under the FLSA. The analysis does overlap, as explained above.

To be sure, not every Rule 23 requirement overlaps with FLSA collective actions, because not every Rule 23 requirement sheds light on whether plaintiffs are "similarly situated" to proceed in efficient collective litigation. Of course, the FLSA's opt-in requirement and Rule 23's opt-out requirement are "fundamentally different." *Genesis Healthcare Corp.* v. *Symczyk*, 569 U.S. 66, 74 (2013) (citing *Hoffmann-La Roche*, 493 U.S. at 177-178 (Scalia, J., dissenting), for discussion of Rule 23's opt-out requirement).[5] And Rule 23(a)(1) and (4)'s *numerosity* and

[5] *Genesis* 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).

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").

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

This Court has long understood "similarly situated" and "commonality" as the same requirement. For example, the Court described the putative *Dukes* class—which failed Rule 23's commonality requirement—as "not similarly situated." *Tyson*, 136 S. Ct. at 1040. More generally, this Court has long referred to Rule 23 class members as "similarly situated" plaintiffs. See, *e.g.*, *Cooper* v. *Fed. Reserve Bank of Richmond*, 467 U.S. 867, 875 (1984); *Deposit Guar. Nat'l Bank* v. *Roper*, 445 U.S. 326, 332 (1980); *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 465

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 171-172). For purposes of mootness, that "significant difference[]," *id.* at 70 n.1, distinguished Rule 23, which creates classes "with an independent legal status," *id.* at 75.

Here, however, the FLSA and Rule 23 are directly aligned. Both the FLSA and Rule 23 evaluate whether other plaintiffs are "similarly situated" before a collective or class action is allowed to proceed. Moreover, FLSA "conditional" certification creates the same significant settlement pressures and discovery burdens as Rule 23 class certification, as explained below at page 19.

(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 instructive because "the Committee's commentary is particularly relevant[.]" *Beech Aircraft Corp.* v. *Rainey*, 488 U.S. 153, 166 n.9 (1988); *United States* v. *Vonn*, 535 U.S. 55, 64 n.6 (2002) ("the Advisory Committee Notes provide a reliable source of insight into the meaning of a rule"). When Rule 23 was amended into its current form, the 1966 Advisory Committee Note described a class action under Rule 23(b)(3) as involving "persons similarly situated." See Fed. R. Civ. P. 23, 1966 Advisory Committee's Note.[6]

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 Colorado at Boulder*, 132 F.R.D. 263, 266-267 (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 class action plaintiffs extends back to courts sitting in equity—predating the Rules of Civil

[6] 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," Fed. R. Civ. P. 23, 1966 Advisory Committee's Note, 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).

Procedure. See, *e.g.*, *Carpenter* v. *Knollwood Cemetery*, 198 F. 297, 298 (D. Mass. 1912); *Venner* v. *Great N. Ry. Co.*, 153 F. 408, 409 (S.D.N.Y. 1907).

This basic understanding continues in lower courts today. Even courts that purport to reject Rule 23's modern commonality requirement in the FLSA context articulate the FLSA's "similarly situated" standard in terms substantially identical to Rule 23's commonality doctrine:

> The 'common question' requirement within Rule 23 * * * bears a close resemblance to the 'similarly situated' requirement of section 216(b). All these requirements serve comparable ends; their purpose is 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.

Campbell, 903 F.3d at 1115 (citations omitted); see Pet.App.32a (the court below observing "the 'common question' requirement of Rule 23(a) and the 'similarly situated' requirement of § 216(b) serve comparable ends: to identify those shared issues that will collectively advance the litigation of multiple claims in a joint proceeding.").

III. Some Lower Courts Fail to Determine Whether Plaintiffs Are in Fact "Similarly Situated" at the Outset of Putative Collective Actions.

Not only have some lower courts declined to consider Rule 23 doctrines relevant to the FLSA's "similarly situated" analysis, some have also erroneously failed to enforce the FLSA's "similarly situated" requirement for plaintiffs at the threshold of putative collective actions.

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 *Dukes*, 564 U.S. at 348-349 (noting the exceptional nature of traditional class actions). Much like Rule 23, the FLSA's "similarly situated" requirement "does not set forth a mere pleading standard," *Id.* at 350, but rather is *the prerequisite* to maintaining a collective action in any form. 29 U.S.C. § 216(b).

Instead of properly applying the FLSA's "similarly situated" standard at the threshold of putative collective actions, some district courts often "conditionally certify" collective actions without such analysis—and those actions "proceed[] as *** representative action[s] throughout discovery." *Mooney*, 54 F.3d at 1214. This Court has suggested that district courts "begin [their] involvement" in FLSA collective actions "early, at the point of the initial notice" to "better manage" the collective action by "ascertain[ing] the contours of the action at the outset." *Hoffmann-La Roche*, 493 U.S. at 171-172. A key component of district courts' early involvement is that "district courts have discretion, *in appropriate cases*, to *** facilitat[e] notice to potential plaintiffs." *Id.* at 169 (emphasis added).

But it is only "appropriate" to provide notice to potential plaintiffs who are in fact "similarly situated"—that is, other plaintiffs whose claims can be commonly resolved in efficient collective litigation. When courts facilitate notice to potential plaintiffs who do not satisfy the FLSA's "similarly situated" requirement, then those courts have engaged in the inappropriate "solicitation of claims" that *Hoffmann-La Roche* prohibits. *Id.* 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 *id.* at 169.

Accordingly, courts presented with putative FLSA collective actions must conduct a threshold examination

of whether "there are *in fact* * * * common questions of law or fact" that bind the plaintiffs together—as courts do under Rule 23. *Dukes*, 564 U.S. at 350. And if that rigorous evaluation demonstrates that the plaintiffs will not be able to efficiently litigate towards a common answer collectively resolving their claims, the district court cannot invoke the FLSA to provide notice to non-similarly situated individuals.

In FLSA collective actions especially, improperly "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 settlement pressure is substantial. *Williams* v. *Accredited Home Lenders, Inc.*, 2006 WL 2085312, at *5 (N.D. Ga. July 25, 2006); see, *e.g.*, *Amaraut* v. *Sprint/United Mgmt. Co.*, 2020 WL 1433281, at *11 (S.D. Cal. Mar. 23, 2020) ("at least 18,962 more Collective members"); *In re JPMorgan Chase & Co.*, 916 F.3d 494, 497 (5th Cir. 2019) (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) (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).

So it is little surprise that "most collective actions settle." Wright & Miller § 1807. But a proper application of the FLSA's "similarly situated" standard requires courts to resolve this inquiry before a collective action can proceed in any form, and this would prevent undue settlement pressure. This Court's review is therefore badly needed to restore this proper application of the FLSA's "similarly situated" requirement.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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