Nos. 23-15650, 24-1979

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ANDREW HARRINGTON; KATIE LIAMMAYTRY; JASON LENCHERT; DYLAN BASCH,

Plaintiffs-Appellees,

v.

CRACKER BARREL OLD COUNTRY STORE, INC.,

Defendant-Appellant.

On Appeal From U.S. District Court for the District of Arizona
Case No. 2:21-cv-00940-DJH
Hon. Diane J. Humetewa, Presiding

BRIEF OF RETAIL LITIGATION CENTER, INC. AS *AMICUS CURIAE* IN SUPPORT OF CRACKER BARREL OLD COUNTRY STORE, INC.'S PETITION FOR REHEARING OR REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1:

1. The Retail Litigation Center, Inc. certifies that it is a nonprofit, tax-exempt organization incorporated in the District of Columbia.

2. The Retail Litigation Center, Inc. has no parent corporation, and no publicly held company has 10% or greater ownership in the Retail Litigation Center, Inc.

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INTEREST OF *AMICUS CURIAE*[1]

The Retail Litigation Center, Inc. ("RLC") is a 501(c)(6) nonprofit trade association that represents national and regional retailers, including many of the country's largest and most innovative retailers, across a breadth of retail verticals. The RLC is the only trade organization solely dedicated to representing the retail industry in the courts. The RLC's members employ millions of people throughout the United States, provide goods and services to tens of millions more, and account for tens of billions of dollars in annual sales.

The RLC offers retail-industry perspectives to courts on important legal issues and highlights the industry-wide consequences of significant cases. Since its founding in 2010, the RLC has filed more than 250 amicus briefs on issues of importance to the retail industry. Its amicus briefs have been helpful to courts throughout the United States, as evidenced by citation to the RLC's amicus briefs in numerous

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[1] All parties have consented to the filing of this brief. *See* 9th Cir. R. 29-2(a). No counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amicus curiae*, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief. *See* Fed. R. App. P. 29(a)(4)(E).

precedential opinions. *See, e.g.*, *South Dakota* v. *Wayfair, Inc.*, 585 U.S. 162, 184 (2018); *Kirtsaeng* v. *John Wiley &. Sons, Inc.*, 568 U.S. 519, 542–43 (2013); *Chewy, Inc.* v. *U.S. Dep't of Lab.*, 69 F.4th 773, 777–78 (11th Cir. 2023); *State* v. *Welch*, 595 S.W.3d 615, 630 (Tenn. 2020).

As some of the largest employers in the United States, the RLC's members are often defendants in Fair Labor Standards Act ("FLSA") lawsuits. The RLC therefore has a strong interest in ensuring that the FLSA is correctly and uniformly applied across the many jurisdictions in which its members operate.

SUMMARY OF ARGUMENT

The FLSA allows employees to pursue alleged violations of the statute through a collective action procedure so long as the affected employees are "similarly situated." 29 U.S.C. § 216(b). The panel in this case endorsed and applied a two-step procedure for determining whether employees are "similarly situated." Op. at 9. Under that procedure, a court first makes a "preliminary certification" decision based on the facts alleged in the complaint and, if it finds that "the collective as defined in the complaint satisfies the 'similarly situated' requirement of section 216(b)" based on a "lenient" level of review, it

will order notice to be sent to the employees. *Campbell v. City of Los Angeles*, 903 F.3d 1090, 1109 (9th Cir. 2018); *see* Op. at 5. Then, as discovery progresses, the defendant may move to decertify the collective if it believes the evidence does not support the conclusion that members are similarly situated; that motion is reviewed under the standard applicable to a summary judgment motion. *Id.* at 1117–19.

The panel acknowledged that this procedure finds no support in the text of the FLSA. Op. at 8. And while it relied on dicta from an earlier panel's opinion (*Campbell*), the "lenient" approach the panel has endorsed conflicts with recent decisions from the Fifth and Sixth Circuits, both of which require district courts to always "rigorously scrutinize the realm of 'similarly situated' workers . . . from the outset of the case." *Swales v. KLLM Transp. Servs., LLC*, 985 F.3d 430, 434 (5th Cir. 2021); *see also Clark v. A&L Homecare & Training Ctr., LLC*, 68 F.4th 1003, 1011 (6th Cir. 2023) ("[F]or a district court to facilitate notice of an FLSA suit to other employees, the plaintiffs must show a 'strong likelihood' that those employees are similarly situated to the plaintiffs themselves.").

This inter-circuit conflict alone merits rehearing en banc. *See* Fed. R. App. P. 40(b)(2)(C). Review is all the more justified given the importance of the FLSA certification process and the sending of notice that it authorizes. As the Fifth and Sixth Circuit explained in adopting their more rigorous approach to FLSA certification, the certification of a collective (1) imposes immense settlement pressure on defendants, and (2) implicates the Supreme Court's warning in *Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, 174 (1989), that "intervention in the [FLSA] notice process" not devolve into "the solicitation of claims" by appearing to endorse the collective action's merits. *Swales*, 985 F.3d at 435–36, 442; *see also Clark*, 68 F.4th at 1007–08, 1010. These concerns are particularly acute for major retailers who employ large numbers of people throughout the United States and are regular targets of FLSA actions.

The Court should grant panel rehearing or rehearing en banc and align this Circuit's precedent with those circuits that apply a more rigorous approach to FLSA collective action certification than the lenient approach that the panel endorsed here.

ARGUMENT

I. The Panel's Decision Conflicts with Recent Decisions from the Fifth and Sixth Circuits.

The panel here did not independently consider the proper standard for certifying a collective under the FLSA because it understood *Campbell* to have "already endorsed" a lenient "two-step approach." Op. at 9. In *Campbell*, the Court noted in dicta that although "much of collective action practice is a product of interstitial judicial lawmaking or ad hoc district court discretion," it "is now the near-universal practice to evaluate the propriety of the collective mechanism . . . by way of a two-step 'certification' process." 903 F.3d at 1100. At the first step, "the district court's analysis is typically focused on a review of the pleadings but may sometimes be supplemented by declarations or limited other evidence." *Id.* at 1109. In either case, "[t]he level of consideration is 'lenient'—sometimes articulated as requiring 'substantial allegations,' sometimes as turning on a 'reasonable basis,' but in any event loosely akin to a plausibility standard, commensurate with the stage of the proceedings." *Id.* (internal citations omitted). At the second stage, which "will come at or

after the close of relevant discovery," the "district court will then take a more exacting look at the plaintiffs' allegations and the record." *Id.*

Three years later, the Fifth Circuit expressly departed from this "lenient" two-step approach. In *Swales*, Judge Willett—joined by Judge Jolly and Judge Jones—acknowledged "'the near-universal practice' of the district courts" of using "a two-step process to determine, 'on an *ad hoc* case-by-case basis,' whether prospective opt-in plaintiffs in a proposed collective are 'similarly situated' enough to satisfy the FLSA." 985 F.3d at 436. Despite its widespread adoption among lower courts, however, the Fifth Circuit in *Swales* concluded that this approach "has no anchor in the FLSA's text or in Supreme Court precedent interpreting it" and therefore "reject[ed] [the] two-step certification rubric." *Id.* at 434.

Instead, the Fifth Circuit "embrace[d] interpretive first principles: (1) the FLSA's text, specifically § 216(b), which declares (but does not define) that only those 'similarly situated' may proceed as a collective; and (2) the Supreme Court's admonition that while a district court may 'facilitate notice to potential plaintiffs' for case-management purposes, it cannot signal approval of the merits or otherwise stir up litigation."

985 F.3d at 434 (cleaned up). Based on these principles, the Fifth Circuit concluded that "a district court must ***rigorously scrutinize*** the realm of 'similarly situated' workers, and must do so ***from the outset of the case***, not after a lenient, step-one 'conditional certification.'" *Id.* (emphases added).

Specifically, *Swales* reasoned that "a district court should identify, at the outset of the case, what facts and legal considerations will be material to determining whether a group of 'employees' is 'similarly situated'" and should then "authorize preliminary discovery accordingly." 985 F.3d at 441. Although "[t]he amount of discovery necessary to make that determination will vary case by case," the "initial determination must be made, and as early as possible." *Id.* This approach, unlike the two-step approach, "ensures that any notice sent is proper in scope—that is, sent only to potential plaintiffs." *Id.* at 442. As the Fifth Circuit explained, "[w]hen a district court ignores that it can decide merits issues when considering the scope of a collective, it ignores the 'similarly situated' analysis and is likely to send notice to employees who are not potential plaintiffs." *Id.* This not only departs from the FLSA's "similarly situated" requirement, but "risks crossing

the line from using notice as a case-management tool to using notice as a claims-solicitation tool" in contravention of Supreme Court precedent. *Id.* (citing *Hoffmann-LaRoche*, 493 U.S. 165).

Just a few years later, the Sixth Circuit, in an opinion by Judge Kethledge, joined the Fifth Circuit in rejecting the proposition that "a district court should facilitate notice upon merely a 'modest showing' or under a 'lenient standard' of similarity." *Clark*, 68 F.4th at 1010. Although the Sixth Circuit declined to adopt *Swales*'s one-step approach, it shared the concern that "notice sent to employees who are not, in fact, eligible to join the suit amounts to solicitation of those employees to bring suits of their own" in violation of the Supreme Court's teaching in *Hoffmann-La Roche*. *Id.* Instead, the Sixth Circuit "analog[ized] to a court's decision whether to grant a preliminary injunction" and held that, "for a district court to facilitate notice of an FLSA suit to other employees, the plaintiffs must show a '***strong likelihood***' that those employees are similarly situated to the plaintiffs themselves." *Id.* at 1010–11 (emphasis added). This "standard requires a showing greater than the one necessary to create a genuine issue of

fact, but less than the one necessary to show a preponderance." *Id.* at 1011.

The panel's opinion does not mention *Clark* in its discussion of the preliminary certification process and, although it acknowledged *Swales*, the panel did not engage with its reasoning, as it considered itself bound by *Campbell*. Op. at 9. There is reason to doubt that conclusion, as Cracker Barrel's petition explains. Pet. at 21–26. But given the panel's opinion, it is now clear that this Circuit has adopted an approach to the FLSA that conflicts with both the Fifth and Sixth Circuits. This inter-circuit conflict is reason to grant rehearing and reassess the endorsement of an atextual "lenient" approach to certification under the FLSA. *See* Fed. R. App. P. 40(b)(2)(C).

II. The Proper Procedure for Certifying a Collective Action Is Crucially Important.

Although certification of a collective is in theory merely a procedural step for aggregating the individual claims of similarly situated employees, the reality is that a decision to certify a collective can have momentous implications for how those claims are ultimately resolved. In particular, a "lenient" approach to certification, like the

one adopted by the panel here, can undermine the purposes of the FLSA—not to mention due process principles—in at least three ways.

First, an overly permissive certification standard can force the settlement of claims that are not properly joined or not meritorious—or both. As Judge Kethledge observed, "the decision to send notice of an FLSA suit to other employees is often a dispositive one, in the sense of forcing a defendant to settle—because the issuance of notice can easily expand the plaintiffs' ranks a hundredfold." *Clark*, 68 F.4th at 1007. Judge Willett echoed this concern in *Swales*, noting that "the leniency of the stage-one standard . . . exerts formidable settlement pressure," 985 F.3d at 436, and thus presents "the opportunity for abuse (by intensifying settlement pressure no matter how meritorious the action)," *id.* at 435.

In this sense, a collective action is very similar to a Rule 23 class action. As the Supreme Court has repeatedly acknowledged, "[c]ertification 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." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978); *see also Amgen Inc. v.*

Connecticut Retirement Plans & Trust Funds, 568 U.S. 455, 475 (2013) ("Settlement pressure exerted by class certification may prevent judicial resolution of these issues."); *Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 445 n.3 (2010) (Ginsburg, J., dissenting) ("Even in the mine-run case, a class action can result in 'potentially ruinous liability.' A court's decision to certify a class accordingly places pressure on the defendant to settle even unmeritorious claims.") (internal citation omitted). This concern motivated the adoption of Rule 23(f), which provides for interlocutory review of class certification orders where certification "may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability." Committee Note on Rule 23(f).

This settlement pressure is clearly felt by employers in FLSA actions. Over the last decade, an average of 7,952 FLSA cases were filed each year by plaintiffs in federal courts. *See 2024 FLSA Litigation Metrics & Trends* at 7 (Seyfarth Shaw LLP), https://tinyurl.com/465mjwa4. In 2024, 2,709 collective actions were terminated from the docket, with only a handful of cases—34 in total—resolving after a trial on the merits. *Id.* at 14. The same year, FLSA

collective actions with publicly available settlement data settled for an average of $1.2 million per case. *Id.* at 15. This should come as no surprise: With FLSA certification typically granted after only very "lenient" review, the full weight of that settlement pressure is brought to bear in most FLSA actions, "no matter how meritorious." *Swales*, 985 F.3d at 434–35.

Second, sending notice to employees based only on a "lenient" review of whether they satisfy the statutory criteria to be members of a collective risks imposing substantial litigation burdens on those employees. "A grant of preliminary certification results in the dissemination of a court-approved notice to the putative collective action members, advising them that they must affirmatively opt in to participate in the litigation." *Campbell*, 903 F.3d at 1109. Those plaintiffs who choose to opt in then participate in discovery, which can be "extensive" and can last "several years." *Id.* at 1103.

Opt-in employees are also subject to depositions and other discovery requests. *See Clark*, 68 F.4th at 1010; *Morgan v. Fam. Dollar Stores, Inc.*, 551 F.3d 1233, 1277 (11th Cir. 2008) (noting deposition testimony of at least 250 opt-in employees). Then, at the end of this

lengthy and burdensome process, the employees may ultimately be kicked out at the decertification stage. Even where a district court can make an early step-two determination without discovery respecting each and every member of the proposed collective, a preliminary certification followed by a subsequent certification can leave employees confused about their rights and status in the litigation. Here, "crisp rules with sharp corners are preferable to a round-about doctrine of opaque standards." *Taylor v. Sturgell*, 553 U.S. 880, 901 (2008) (internal quotation marks omitted). A more rigorous review of whether employees are similarly situated at the outset would prevent such burden and confusion. *Cf. Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351 (2011) (courts must engage in a "'rigorous analysis'" to determine whether Rule 23 is satisfied, which may "entail some overlap with the merits of the plaintiff's underlying claim") (quoting *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 161 (1982)).

Third, a watered-down review of substantial similarity risks "facilitat[ing] abuse of the collective-action device and thus plac[ing] a judicial thumb on the plaintiff's side of the case." *Bigger v. Facebook, Inc.*, 947 F.3d 1043, 1050 (7th Cir. 2020); *see also In re JPMorgan Chase*

& Co., 916 F.3d 494, 502 (5th Cir. 2019) (notifying employees who may not be able to join the collective "reaches into disputes beyond the 'one proceeding'" envisioned by *Hoffmann-La Roche*). In other words, where a court sends notice to employees without undertaking a meaningful analysis to determine whether they are in fact similarly situated to the plaintiffs, it risks encouraging further suits irrespective of the underlying merits; even if the collective is ultimately decertified, the employees who received notice may take that notice as a signal from the court that they have claims they could pursue, at a minimum, on an individual basis.

The Supreme Court was clearly concerned that this might happen when it warned decades ago that "intervention in the notice process" cannot devolve into "the solicitation of claims." *Hoffmann-La Roche*, 493 U.S. at 174. The Fifth and Sixth Circuits have similarly recognized that too much lenience in the certification process can stir up unwarranted litigation. *See Swales*, 985 F.3d at 441 ("[A]lerting those who cannot ultimately participate in the collective 'merely stirs up litigation,' which is what *Hoffmann-La Roche* flatly proscribes."); *Clark*, 68 F.4th at 1010 ("[N]otice sent to employees who are not, in fact,

eligible to join the suit amounts to solicitation of those employees to bring suits of their own."). Indeed, doing so risks crossing the line of "using notice as a claims-solicitation tool," which the Supreme Court "flatly forbids." *Swales*, 985 F.3d at 442 (citing *Hoffmann-La Roche*, 493 U.S. 165); *see also Bigger*, 947 F.3d at 1049 ("[C]ourts 'must be scrupulous to respect judicial neutrality,' avoiding even the appearance of endorsing the action's merits.") (quoting *Hoffmann-La Roche*, 493 U.S. at 174).

Of course, these concerns are entirely independent from those that arise from the simple fact of a circuit conflict. The RLC's members are leading retailers that operate across multiple states. The RLC's members collectively employ millions of people throughout the United States, and many have a nationwide presence. An easy certification procedure in this Circuit will make it an attractive target for FLSA collective actions—particularly those that lack merit. A consistent interpretation of the FLSA is of great importance for retailers like the RLC's members in doing business across state and circuit lines.

CONCLUSION

The Court should grant panel rehearing or rehearing en banc and, like the Fifth and Sixth Circuits, reject a lenient approach to FLSA collective action certification.

Dated: July 25, 2025

Respectfully submitted,

/s/ Theane Evangelis

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