No. 25-559

IN THE

Supreme Court of the United States

CRACKER BARREL OLD COUNTRY STORE, INC.,

Petitioner,

v.

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

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR THE RETAIL LITIGATION CENTER, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether a district court may authorize notice inviting joinder to an FLSA collective action before a plaintiff shows by a preponderance of the evidence that the members of the collective receiving notice are "similarly situated" to the named plaintiff within the meaning of 29 U.S.C. § 216(b)? If not, what showing must be made before this notice may be authorized?

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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 hundreds 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 precedential opinions, including from this Court. *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).

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[1] *Amicus* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. Counsel of record for the parties received timely notice of *amicus*'s intent to file this brief.

As some of the largest employers in the United States, the RLC's members are often defendants in Fair Labor Standards Act 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.

INTRODUCTION AND SUMMARY OF ARGUMENT

Almost 40 years ago, this Court decided in *Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165 (1989), that district courts held an implied judicial power to "facilitat[e] notice" of Fair Labor Standards Act (FLSA) suits "to potential plaintiffs." *Id.* at 169. While this Court "confirm[ed] the existence of the trial court's discretion" to facilitate notice, it did not provide any guidance on "the details of its exercise." *Id.* at 170.

With little guidance from this Court, the lower courts—including the Second and Ninth Circuits explicitly, the First, Third, Tenth, and Eleventh Circuits implicitly, and district courts in the D.C., Fourth, Eighth, and Federal Circuits—have coalesced around a two-step approach to determine whether prospective opt-in plaintiffs in a proposed collective are "similarly situated" enough to satisfy the FLSA. In the first step, called "conditional certification," a district court will authorize notice of the FLSA suit to the proposed collective upon a "modest factual showing" that the proposed collective is "similarly situated" to the original plaintiff. Under this lenient notice approach, courts generally do not engage in fact finding, taking the plaintiff at his or her word and largely refusing to consider any rebuttal evidence.

Only at the second step, generally after a long and costly period of discovery, do courts employ a more demanding level of review to determine whether the proposed collective is, in fact, similarly situated to the original plaintiff. If the court finds that the proposed collective is not similarly situated, it will "decertify" the collective, and the case will proceed with just the original plaintiff.

But this two-step approach, with its lenient notice standard, "has become the object of increasing scrutiny," *Richards v. Eli Lilly & Co.*, 149 F.4th 901, 907 (7th Cir. 2025), and several courts—including the Fifth, Sixth, and Seventh Circuits—have explicitly departed from it, finding that it has no basis in the text of the FLSA and contradicts *Hoffmann-LaRoche*. These courts have instead required that a plaintiff make an affirmative factual showing that other employees are similarly situated before a trial court will authorize notice to be sent. In so doing, these courts have created an unambiguous circuit split on the applicable standard for how—and when—a court should determine who is "similarly situated" under the FLSA. 29 U.S.C. § 216(b). But even the courts that have departed from the two-step approach described above have splintered in defining the applicable standard, creating a quagmire of differing standards across multiple jurisdictions.

Which standard a court must use to decide whether employees are "similarly situated" matters. That is because conditional certification motions are almost always successful under the lenient standard applied by most courts, resulting in court-authorized notice being sent to hundreds or thousands of potential plaintiffs. In contrast, under a more

rigorous approach, notice may never be sent in the first place. *See, e.g.*, *Eltayeb v. Deli Mgmt.*, 2021 U.S. Dist. LEXIS 51864 (E.D. Tex. March 19, 2021) (reversing decision to conditionally certify a collective after the Fifth Circuit's decision departing from the lenient, two-step approach); *Eltayeb v. Deli Mgmt.*, 2021 U.S. Dist. LEXIS 238778 (E.D. Tex. Dec. 14, 2021) (denying renewed motion to certify a collective under the Fifth Circuit's new framework). The application of these differing standards is the difference between a single-plaintiff lawsuit and a lawsuit with potentially hundreds or even thousands of plaintiffs.

And while it is true that, under the two-step approach, courts will later consider whether to decertify the collective action under a more demanding level of review, empirical data and common sense show that conditional certification is often dispositive in FLSA actions because it "exerts formidable settlement pressure" on employers. *Swales v. KLLM Transp. Servs., L.L.C.*, 985 F.3d 430, 436 (5th Cir. 2021). This settlement pressure is tied not to the merits of the plaintiff's claims, but rather the enormous discovery costs that attend proceeding on a collective basis and the potential for expansive liability by opening the case to hundreds or even thousands of other plaintiffs.

Navigating this spectrum of differing standards has caused distinct harm for retail members of the RLC, many of whom operate in multiple jurisdictions. *First*, the circuit split has created an untenable situation whereby the outcome of an FLSA action can often depend on the circuit it is filed in, which undermines uniformity in the application of federal

law and has led to clear forum shopping by plaintiffs. *Second*, the lenient notice standard has caused retailers serious harm—both monetary (*e.g.*, litigation costs) and reputational (*e.g.*, the provision to employees of notice that will necessarily imply unlawful employment practices).

This Court should grant certiorari to resolve this circuit split and provide clarity on the proper standard under the FLSA.

ARGUMENT

I. THE LOWER COURTS ARE DIVIDED ON THE PROPER STANDARD FOR "SIMILARLY SITUATED" DETERMINATIONS UNDER THE FLSA, WHICH HAS UNDERMINED UNIFORMITY AND INVITED FORUM SHOPPING.

An unambiguous circuit conflict has arisen concerning the standard district courts must apply before authorizing the distribution of notice to a collective inviting joinder to an FLSA suit, with lower courts dividing into roughly two camps. Which of these camps a court finds itself in will often prove dispositive, as is illustrated by two sets of materially similar cases in which courts reached opposite conclusions. And recent trends in FLSA litigation bear this out: as some jurisdictions have demanded a greater showing that other employees are similarly situated before authorizing notice to be sent, plaintiffs shopping for the most favorable forum in which to litigate have abandoned those jurisdictions in favor of more lenient ones.

1. This Court's decision in *Hoffmann-La Roche* confirmed that, "in appropriate cases," district courts

have the implied authority to "facilitat[e] notice" of FLSA suits "to potential plaintiffs," but it did not provide those district courts with any meaningful guidance in their exercise of that discretion. 493 U.S. at 169–70 ("We confirm the existence of the trial court's discretion, not the details of its exercise."). With "little guidance" on what the "requisite showing" should be before sending notice, *Clark v. A&L Homecare & Training Ctr., LLC*, 68 F.4th 1003, 1007 (6th Cir. 2023), the lower courts have come to widely differing conclusions. These differing standards have now become so disparate that the outcome of an FLSA action can be almost entirely dependent on which circuit it is filed in.

a. Most courts have coalesced around a two-step framework for determining whether employees are "similarly situated." *Campbell v. City of Los Angeles*, 903 F.3d 1090, 1108–09 (9th Cir. 2018) (citing 1 McLaughlin on Class Actions § 2:16 (14th ed. 2017)). This framework is largely derived from an early notice case, *Lusardi v. Xerox Corp.*, 118 F.R.D. 351 (D.N.J. 1987), vacated in part sub nom. *Lusardi v. Lechner*, 855 F.2d 1062 (3d Cir. 1988). While only the Second Circuit has expressly adopted this approach, the Ninth Circuit has adopted a similar approach, and the First, Third, Tenth, and Eleventh Circuits have acquiesced to its application without expressly adopting it. *See Scott v. Chipotle Mexican Grill, Inc.*, 954 F.3d 502, 515 (2d Cir. 2020); *Campbell*, 903 F.3d at 1114–15; *Kwoka v. Enter. Rent-A-Car Co. of Bos., LLC*, 141 F.4th 10, 22 (1st Cir. 2025); *Zavala v. Wal Mart Stores Inc.*, 691 F.3d 527, 534 (3d Cir. 2012); *Thiessen v. Gen. Elec. Cap. Corp.*, 267 F.3d 1095, 1105

(10th Cir. 2001); *Hipp v. Liberty Nat'l Life Ins. Co.*, 252 F.3d 1208, 1219 (11th Cir. 2001).

Under the first step, a court makes a "preliminary certification" decision based largely on the facts alleged in the complaint. *Campbell*, 903 F.3d at 1109. 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 employees inviting joinder to the suit. *Id.*

In conducting this analysis, a court will often ignore any evidence the defendant presents showing that the proposed plaintiffs are not "similarly situated." In fact, many courts explicitly will "not rely on defendants' declarations, which seek to rebut plaintiffs' allegations" at the conditional certification stage. *Barry v. S.E.B. Serv. of New York, Inc.*, 2013 WL 6150718, at *4 (E.D.N.Y. Nov. 22, 2013) (considering defendants' evidence only "to the extent that any evidence defendants submit actually helps plaintiffs' case"); *see also, e.g.*, *Meyer v. Panera Bread Co.*, 344 F. Supp. 3d 193, 205–08 (D.D.C. 2018); *Goodman v. Burlington Coat Factory*, 2012 WL 5944000, at *6 (D.N.J. Nov. 20, 2012); *Benson v. Asurion Corp.*, 2010 WL 4922704, at *5 (M.D. Tenn. Nov. 29, 2010); *Gallagher v. Lackawanna Cnty.*, 2008 WL 9375549, at *9 (M.D. Pa. May 30, 2008). That is precisely what happened in this case, where the court declined to even *consider* Cracker Barrel's declarations and affidavits demonstrating that the proposed collective is not "similarly situated." *See* Pet. App. 83a.

Under the second step, the defendant employer may move for "decertification" of the collective action. *Campbell*, 903 F.3d at 1109. Only then does a court consider both sides' evidence to determine whether the other employees are in fact "similarly situated" under Section 216(b). *E.g.*, *Tripp v. Perdue Foods, LLC*, 2024 WL 4770282, at *8 (D. Md. Nov. 13, 2024) (declining to consider employer's evidence showing differences among employees because that "kind of determination is premature at the conditional certification stage").

But crucially, this second step typically comes "at or after the close of relevant discovery," *Campbell*, 903 F.3d at 1109, which can be *years* after the collective is conditionally certified. In the intervening time, defendants must litigate the case as a collective action against hundreds or even thousands of employees—despite the fact that the court has undertaken only a minimal review of whether the employees are similarly situated within the meaning of Section 216(b), oftentimes based merely on the allegations in the plaintiff's complaint and self-serving affidavits. This litigation, including the entirety of the discovery process, imposes substantial burdens on the defendant in terms of both time and money. It is for this reason that defendants often settle FLSA claims once a court conditionally certifies a collective. *See infra* at 19–20.

b. In contrast, several circuits have explicitly rejected this framework. These courts have explained that the majority two-step framework finds no support in the text of the FLSA and that giving only "lenient" review to the question whether employees are "similarly situated" before authorizing notice

being sent to the proposed collective "conflicts with a district court's obligation to 'maintain neutrality and to shield against abuse of the collective-action device'" in violation of *Hoffmann-La Roche*. *Richards*, 149 F.4th at 911 (quoting *Bigger v. Facebook, Inc.*, 947 F.3d 1043, 1050 (7th Cir. 2020)); *see also 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."); *In re JPMorgan Chase & Co.*, 916 F.3d 494, 502 (5th Cir. 2019) (observing that issuing notice to employees who may not be able to join the collective "reaches into disputes beyond the 'one proceeding'" envisioned by *Hoffmann-La Roche*).

Although these courts are unified in their rejection of the majority approach, they are not unanimous in their alternative approach, creating a quagmire of differing standards across the circuits. The Fifth Circuit, for example, now requires district courts to "rigorously scrutinize the realm of 'similarly situated' workers . . . from the outset of the case," *Swales*, 985 F.3d at 434, as "alerting those who cannot ultimately participate in the collective 'merely stirs up litigation,' which is what *Hoffmann-La Roche* flatly proscribes," *id.* at 441.

The Sixth Circuit "disagree[s]" with the Fifth Circuit's approach and instead requires plaintiffs to show a "'strong likelihood' that those employees are similarly situated to the plaintiffs themselves" before facilitating notice, as "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." *Clark*, 68 F.4th at 1010–11.

Meanwhile, the Seventh Circuit "decline[d]" to adopt either the Fifth or Sixth Circuits' approaches, concluding that they are "inconsistent with *Hoffmann-La Roche*." *Richards*, 149 F.4th at 911–12. Rather, the Seventh Circuit requires that the "plaintiff must produce some evidence suggesting that they and the members of the proposed collective are victims of a common unlawful employment practice or policy," and the "defendants must be permitted to submit rebuttal evidence." *Id.* at 913. But so long as the plaintiff "make[s] a threshold showing that there is a material factual dispute as to whether the proposed collective is similarly situated," the collective action may be conditionally certified and notice sent to the proposed collective. *Id.*

These varying approaches to authorizing notice cannot be squared with each other, the FLSA, or *Hoffmann-La Roche*. Only the Fifth Circuit's mandate that courts "rigorously scrutinize the realm of 'similarly situated' workers . . . from the outset of the case" comports with the statutory text and *Hoffmann-La Roche*. *Swales*, 985 F.3d at 434. As to the statutory text, "[t]he FLSA, and § 216(b) in particular, says nothing about 'conditional certification.'" *Id.* at 440. Section 216(b) provides only that plaintiffs may litigate jointly against an employer if they are "similarly situated." The plain text of the FLSA does not endorse sending notice to individuals who are only "similarly situated" enough for now, which even the Sixth and Seventh Circuits' less rigorous standards allow. These approaches also conflict with this Court's admonition in *Hoffmann-La Roche* that "intervention in the notice process" cannot amount to the "solicitation of claims." 493 U.S. at 174.

Courts "must take care to avoid even the appearance of judicial endorsement of the merits of the action," but sending notice to a collective without rigorously scrutinizing whether it meets the requirements of Section 216(b) does just that. *Id.*; *see also Swales*, 985 F.3d at 442.

2. The conflicting approaches adopted by the lower courts undermine the uniformity that is essential to the fair and equitable enforcement of federal law. In fact, even materially identical cases have yielded different outcomes based on the level of scrutiny employed by the district court, as is illustrated by two sets of cases.

a. Take the case of Barbara Tripp, an independent contractor of Perdue Foods who had two identical FLSA cases in two separate circuits. In the first case, *Parker v. Perdue Foods, LLC*, 2024 WL 1120391 (M.D. Ga. Mar. 14, 2024), Ms. Tripp attempted to join a suit against Perdue Foods for allegedly misclassifying chicken growers as independent contractors and failing to pay them minimum wage and overtime pay. In evaluating the chicken growers' motion for conditional certification, the court applied a "somewhat heightened standard of scrutiny" because the parties had "already engaged in six months of discovery focused on conditional certification." *Id.* at *3. The court denied certification, holding that the presence of only one opt-in plaintiff and declarations from the two named plaintiffs that "they believe that other growers would be interested in joining the class were the Court to send out Plaintiffs' requested Notice" were insufficient for conditional certification. *Id.* at *3–4. It therefore dismissed Ms. Tripp from the suit. *Id.* at *5.

By contrast, when Ms. Tripp brought *the exact same claim* in the District of Maryland—*Tripp v. Perdue Foods, LLC*, 2024 WL 4770282 (D. Md. Nov. 13, 2024)—the Court granted her motion for conditional certification under the lenient first step of the two-step framework. *Id.* at *1–2. Although Perdue Foods submitted evidence of the growers' varying schedules, salaries, and ownership of other businesses, the court held that evaluating these potential differences would require it to consider the merits of the plaintiff's claims, which would be "premature at the conditional certification stage." *Id.* at *8. Requiring only one "shared material issue for all collective members," the court held that the plaintiff had made the "necessary minimal evidentiary showing that the proposed collective is similarly situated." *Id.*

Because the court in the first case declined to authorize sending notice to the proposed class, the case proceeded with only one plaintiff, and Perdue Foods now has a motion for summary judgment pending. *Parker v. Perdue Foods, LLC*, No. 5:22-cv-00268-TES (M.D. Ga.), Dkts. 118, 136, 150. In the second case, despite involving the exact same facts, Perdue Foods is now faced with a collective of approximately 80 plaintiffs and is being forced to expend time and money conducting extensive discovery to prove that these plaintiffs are not, in fact, similarly situated. *Tripp v. Perdue Foods, LLC*, No. 1:24-CV-00987-JMC (D. Md.). The only explanation for the divergent outcomes in these two cases is the standard the district court applied in determining whether to send notice to a collective inviting joinder in the suit.

b. Likewise, materially similar claims brought by tipped restaurant employees fared differently under different standards.

In *Bradford v. Logan's Roadhouse, Inc.*, 137 F. Supp. 3d 1064 (M.D. Tenn. 2015), servers brought an FLSA action against Logan's Roadhouse restaurants in 23 states. *Id.* at 1067. The complaint alleged that the restaurants required tipped employees to (1) work non–tip producing jobs while paying them as tipped workers, (2) perform non-tipped work incidental to their server duties more than 20% of their work time, (3) misreport tips, and (4) perform duties off-the-clock. *Id.* at 1068.

Applying the "lenient" two-step framework, the court conditionally certified the collective and authorized notice to be sent. 137 F. Supp. 3d at 1071, 1081. In doing so, the court disregarded almost all of the defendant's arguments as "premature": it ignored issues with the plaintiffs' declarations to "avoid[] making credibility determinations at this stage of the certification process," *id.* at 1074–75; it held that the defendant's "substantive arguments against certification that are based upon the merits of the . . . case are premature," *id.* at 1075; and it refused to review the defendant's argument that "individualized issues would predominate over common ones" because those questions are reserved for "a motion for decertification," *id.* at 1076. Under this permissive standard, the court found that the plaintiffs had made the "'modest factual showing' required for conditional certification." *Id.* at 1075. Approximately 4,800 plaintiffs opted in and, unsurprisingly, the defendant settled the case without ever litigating the merits.

Bradford v. Logan's Roadhouse, Inc., No. 3:14-cv-02184 (M.D. Tenn.), Dkts. 467, 466-2.

On the other hand, in *Ide v. Neighborhood Restaurant Partners, LLC*, 32 F. Supp. 3d 1285 (N.D. Ga. 2014), tipped employees at the defendant's Applebee's restaurants brought an FLSA action alleging that the defendant, among other things, required tipped employees "to perform duties outside the scope of tipped occupations, while paying those employees at the tip-credit wage rate." *Id.* at 1288. The court applied a "heightened standard of review" because the plaintiff "was able to engage in more than eight months of discovery before filing her motion for conditional certification." *Id.* at 1291. Under this heightened standard, the court explicitly considered the evidence presented by defendants rather than relying solely on allegations in the complaint and the plaintiff's own affidavit. *Id.* at 1292. Doing so, the court found that the plaintiff failed to present sufficient evidence that all the defendant's tipped employees spent more than 20% of their time performing non–tip related duties, and that therefore "individual inquiries would be necessary." *Id.* at 1294. Because "individual inquiries w[ould] be necessary, certifying this case as a collective action would not aide [sic] in the resolution of common issues of law or fact." *Id.* The defendant thereafter moved for summary judgment on the individual plaintiff's claims, which the Court granted. *Ide v. Neighborhood Rest. Partners, LLC*, 2015 WL 11899143, at *10 (N.D. Ga. Mar. 26, 2015).

3. This Court has rightly emphasized the need for "a uniform and predictable standard" to govern questions of federal law. *See Burlington Indus., Inc.*

v. Ellerth, 524 U.S. 742, 754–55 (1998). Such uniformity is necessary to avoid forum shopping—a particularly serious concern for retailers like the RLC's members, who often operate in multiple states where different standards for determining whether a proposed collective is "similarly situated" may apply.

Recent studies confirm that forum shopping is already an issue. A report of FLSA actions in 2023 determined that the Sixth Circuit was one of "the top jurisdictions for FLSA-related litigation," along with the Second and Ninth Circuits, which had expressly adopted a form of the two-step approach. Duane Morris LLP, *Class Action Review 2024*, p. 249, https://tinyurl.com/29ktw3pa. After the Sixth Circuit's *Clark* decision heightened the standard for authorizing notice, however, the number of rulings on certification and decertification motions in that Circuit dropped by half. Duane Morris LLP, *Class Action Review 2025*, p. 468, https://tinyurl.com/mxb8s8j4 (noting that there were 22 rulings in 2023 and only 12 rulings in 2024). And in the first six months of 2025, "there have been a very small number of rulings emanating from the Fifth and Sixth Circuits (1 and 0 decisions, respectfully)"—the two jurisdictions that have adopted the most stringent standards for certification. Gerald L. Maatman, Jr. & Jennifer A. Riley, *DMCAR Mid-Year Review—2025/2026: FLSA Conditional Certifications Remain High, And So Far In 2025 Courts Are Granting More Class Certification Motions Overall Compared To 2024*, Duane Morris LLP (July 7, 2025) https://tinyurl.com/4xrzbnay.

This forum shopping is unsurprising given how much the two-step framework for certifying collective

actions served to facilitate FLSA litigation. Between 1988—when *Lusardi* first articulated the two-step framework—and 2010, the number of FLSA collective actions filed in federal courts increased from 6 to 1,994. Allan G. King, Lisa A. Schreter & Carole F. Wilder, *You Can't Opt Out of the Federal Rules: Why Rule 23 Certification Standards Should Apply to Opt-in Collective Actions Under the FLSA*, 5 Fed. Cts. L. Rev. 1, 11 n.25 (2011). In contrast, during the same period, the number of employment civil rights class actions filed in federal courts—mostly Title VII discrimination cases—increased from 13 to just 114. *Id.*

II. CONDITIONAL CERTIFICATION OF A COLLECTIVE ACTION IS OFTEN DISPOSITIVE.

The lenient approach adopted by many courts before authorizing notice to be sent to "similarly situated" employees under 29 U.S.C. § 216(b) does not only run afoul of the text of the FLSA and *Hoffmann-La Roche*, but also has caused serious harm to employers. Because conditional certification often imposes prohibitive costs on defendants, both monetary (*e.g.*, litigation costs) and reputational (*e.g.*, the provision to employees of notice that will necessarily imply unlawful employment practices), it is often dispositive in FLSA actions irrespective of the merits. In this sense, certification of a collective action is similar to certification of a Rule 23 class action, where, "[f]aced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011). This Court should grant certiorari and insist courts conduct a "rigorous analysis" before authorizing notice in

collective actions, just as courts do in the class action context. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351 (2011).

1. The vast majority of conditional certification motions are successful under the current legal landscape, in which most courts still apply a lenient standard. Out of 157 motions for conditional certification filed in federal courts in 2024, plaintiffs prevailed 125 times—a staggering success rate of 80%. Duane Morris LLP, *Class Action Review 2025*, p. 466, https://tinyurl.com/mxb8s8j4. Past years show similar results: a 75% success rate in 2023, an 82% success rate in 2022, and an 84% success rate in 2021. *Id.*

This trend has continued into 2025. In the first half of this year, courts granted 58 out of 71 motions for conditional certification—a success rate of 82%. Gerald L. Maatman, Jr. & Jennifer A. Riley, *DMCAR Mid-Year Review – 2025/2026: FLSA Conditional Certifications Remain High, And So Far In 2025 Courts Are Granting More Class Certification Motions Overall Compared To 2024*, Duane Morris LLP (July 7, 2025), https://tinyurl.com/4xrzbnay.

By contrast, courts granted motions to certify a class action under Rule 23 in employment discrimination cases just 53% of the time in 2024, 50% of the time in 2023, and 53% of the time in 2022. Duane Morris LLP, *Class Action Review 2025*, p. 162, https://tinyurl.com/mpfayud9.

2. Although conditional certification is intended to be only a preliminary step on the way to an ultimate decision on the merits, the costs of proceeding on a

collective basis are often so high as to cut off further proceedings.

Once a case is conditionally certified, defendants are required to provide the names of all employees who fall within the certified collective to plaintiff's counsel. Plaintiff's counsel then sends a court-approved notice—oftentimes materially indistinguishable from a class action notice—to every potential opt-in plaintiff, which can greatly expand the size of the collective and the employer's potential liability.

Conditional certification also triggers a lengthy and burdensome period of discovery with the greatly expanded number of plaintiffs, which can be "extensive" and last for at least "several years." *Campbell*, 903 F.3d at 1103. This discovery—which is required to mount a decertification motion at step two—can be so expensive and burdensome as to be prohibitive. *E.g.*, Michael W. Hawkins, *Current Trends in Class Action Employment Litigation*, 19 Lab. Law 33, 51 (2003) (noting that conditional certification creates "leverage," because "notice triggers a period of lengthy discovery" that "can be 'prohibitively expensive' for employers"). And there is often no avoiding that expense considering that, even where the defendant has evidence to rebut certification, district courts explicitly refuse to consider that evidence at step one. *E.g.*, *Tripp*, 2024 WL 4770282, at *8 (collecting cases). That means employers are often blocked from presenting evidence that undermines the plaintiff's "similarly situated" theory until *after* expensive discovery has been completed.

Retailers not only incur financial costs as a result of this lenient approach, but also reputational and operational harm. For example, a retailer might inadvertently fail to properly pay overtime to a single employee because of a mistake in payment processing. The employee sues under the FLSA and claims this is a systemic problem rather than a one-off mistake. Under a lenient standard, the court would conditionally certify the collective and authorize notice—based only on the employee's allegation that he or she was under a common policy or plan. That notice is then sent to potentially thousands of employees, who are now under the impression their employer is breaking the law by failing to pay overtime. Regardless of whether the employer later moves to decertify the class, the reputational harm is already done: the employees believe the retailer is a bad actor. Similarly, the retailer also suffers diminished employee morale and operational harm from employees believing their employer is engaging in illegal behavior at their expense. And the harm suffered can easily multiply—as the Seventh Circuit explained, "[n]otice to employees who are ineligible to join a collective may also risk stirring up further litigation against an employer." *Richards*, 149 F.4th at 907.

Faced with potentially "mind-boggling" discovery costs, *Williams v. Accredited Home Lenders, Inc.*, 2006 WL 2085312, at *5 (N.D. Ga. July 25, 2006), many employers have no choice but to settle regardless of the merits of the case, s*ee, e.g.*, *Clark*, 68 F.4th at 1007 ("the decision to send notice of an FLSA suit . . . is often a dispositive one, in the sense of forcing a defendant to settle"); *Swales*, 985 F.3d at 436 ("the

leniency of the stage-one standard . . . exerts formidable settlement pressure"). In 2024, 2,709 FLSA collective actions were terminated from the docket, but only a handful—34 in total—resolved after a trial on the merits. Seyfarth Shaw LLP, 2024 FLSA Litigation Metrics & Trends, p. 14, https://tinyurl.com/465mjwa4.

Not only does this lenient notice standard cause serious harm to employers, but it runs afoul of both the text of the FLSA (the term "conditional certification" appears nowhere in the text) and this court's admonition in *Hoffmann-La Roche* against the appearance of court-endorsed solicitation of claims. 493 U.S. at 174. A more rigorous standard at the outset would prevent this harm by allowing the employer to proffer evidence showing other employees are *not* similarly situated before notice issues.

3. In this sense, a collective action is similar to a Rule 23 class action, where "[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.").

But Rule 23, unlike the FLSA, contains numerous guardrails to ensure that "the 'issues involved are common to the class as a whole' and . . . 'turn on questions of law applicable in the same manner to each member of the class'" *before* a class is certified. *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 155 (1982) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 701 (1979)); *see also Dukes*, 564 U.S. at 351 (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 *Falcon*, 457 U.S. at 161). And even where a class is certified, Rule 23(f) allows a defendant to seek interlocutory review by showing that the certification order "may force [it] 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).

Absent the guardrails available in class actions under Rule 23, many collective actions are conditionally certified only to be subsequently decertified under the more rigorous standard applicable at step two—albeit only after years of litigation. As one court has observed, "district courts nation-wide granted 81% of conditional certification motions" in 2021, but "over half of those conditionally certified putative classes failed to survive upon a more rigorous review." *Laverenz v. Pioneer Metal Finishing, LLC*, 746 F. Supp. 3d 602, 614 (E.D. Wis. 2024) (noting that district courts granted 53% of decertification motions in 2021) (citing Seyfarth Shaw LLP, *18th Annual Workplace Class Action Report* 10 (2022), https://tinyurl.com/mr4amm5w).

That year was not an outlier. On the contrary, it is all too common for collective actions that do not settle to be decertified after thousands of employees have opted in and participated in years of discovery and litigation. *See, e.g.*, *Campbell*, 903 F.3d at 1102–03 (affirming decertification of over 2,200 opt-ins 14 years after lawsuit was filed); *In re JPMorgan Chase*, 916 F.3d at 497–98 (holding district court erred in ordering notice be sent to 35,000 employees who had signed arbitration agreements); *Roy v. FedEx Ground Package Sys.*, 2024 U.S. Dist. LEXIS 57669, at *7 (D. Mass. Mar. 29, 2024) (decertifying collective action seven years after litigation commenced and 554 plaintiffs had opted in); *LeVine v. Vitamin Cottage Nat. Food Mkts., Inc.*, 2023 U.S. Dist. LEXIS 92027, at *2 (D. Colo. May 25, 2023) (decertifying collective three years after litigation commenced and 158 plaintiffs had opted in); *Clarke v. Pei Wei Asian Dinner LLC*, 2023 U.S. Dist. LEXIS 42373, at *2 (N.D. Tex. Mar. 13, 2023) (decertifying collective three years after litigation commenced and 16 plaintiffs had opted in); *Salazar v. Driver Provider Phx. LLC*, 2023 U.S. Dist. LEXIS 153714, at *3 (D. Ariz. Aug. 30, 2023) (decertifying collective three years after litigation commenced and 80 plaintiffs had opted in); *Reinig v. RBS Citizens, N.A.*, 2023 U.S. Dist. LEXIS 149802, at *5 (W.D. Pa. Aug. 25, 2023) (decertifying collective seven years after litigation commenced and 351 plaintiffs had opted in). This number would undoubtably be higher given the number of cases that settle before getting to the decertification stage at all.

A more stringent standard of review will minimize the number of cases that are settled for reasons unrelated to the merits of a claim and avoid

unnecessary and wasteful litigation expenses when cases are litigated to a resolution on the merits.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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