

American University Law Review

Volume 61 | Issue 3

Article 2

2012

The Second-Class Action: How Courts Thwart Wage Rights by Misapplying Class Action Rules

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Moss, Scott A. and Ruan, Nantiya (2012) "The Second-Class Action: How Courts Thwart Wage Rights by Misapplying Class Action Rules," *American University Law Review*: Vol. 61: Iss. 3, Article 2.

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The Second-Class Action: How Courts Thwart Wage Rights by Misapplying Class Action Rules

Abstract

Courts apply to wage rights cases an aggressive scrutiny that not only disadvantages low-wage workers, but is fundamentally incorrect on the law. Rule 23 class actions automatically cover all potential members if the court grants plaintiffs' class certification motion. But for certain employment rights cases—mainly wage claims but also age discrimination and gender equal pay claims—29 U.S.C. § 216(b) allows not class actions but “collective actions” covering just those opting in affirmatively. Yet courts in collective actions assume a gatekeeper role just as they do in Rule 23 class actions, disallowing many actions by requiring a certification motion proving strict commonality among members. This Article argues that conditioning § 216(b) collective actions on certification motions proving commonality is incorrect. Section 216(b) is not an opt-in version of Rule 23; it is a liberalized form of simple Rule 20 joinder, which permits joint suit whenever claims share one common issue and address related events. No text authorizes any § 216(b) certification inquiry, nor is judicial gatekeeping justified by economic logic: Rule 23 classes present principal-agent and asymmetric information problems because lead plaintiffs may inadequately represent unengaged members, but all § 216(b) collective actions members are full plaintiffs with individual claims, obviating the need for judicial scrutiny.

Keywords

Law

THE SECOND-CLASS CLASS ACTION: HOW COURTS THWART WAGE RIGHTS BY MISAPPLYING CLASS ACTION RULES

SCOTT A. MOSS & NANTIYA RUAN*

Courts apply to wage rights cases an aggressive scrutiny that not only disadvantages low-wage workers, but is fundamentally incorrect on the law. Rule 23 class actions automatically cover all potential members if the court grants plaintiffs' class certification motion. But for certain employment rights cases—mainly wage claims but also age discrimination and gender equal pay claims—29 U.S.C. § 216(b) allows not class actions but “collective actions” covering just those opting in affirmatively. Yet courts in collective actions assume a gatekeeper role just as they do in Rule 23 class actions, disallowing many actions by requiring a certification motion proving strict commonality among members.

This Article argues that conditioning § 216(b) collective actions on certification motions proving commonality is incorrect. Section 216(b) is not an opt-in version of Rule 23; it is a liberalized form of simple Rule 20 joinder, which permits joint suit whenever claims share one common issue and address related events. No text authorizes any § 216(b) certification inquiry, nor is judicial gatekeeping justified by economic logic: Rule 23 classes present principal-agent and asymmetric information problems because lead plaintiffs may inadequately represent unengaged members, but all § 216(b) collective actions members are full plaintiffs with individual claims, obviating the need for judicial scrutiny.

Wage rights cases commonly are high-impact challenges to entire industry pay practices, seeking millions in unpaid wages for thousands of workers. Especially for

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low-wage workers, disallowing collective actions ends the claims; individual suits are cost-prohibitive. Even when collective actions proceed, certification motions yield cost and delay, thwarting claims and deterring attorneys.

Courts should presumptively allow collective actions whenever workers for the same employer press the same statutory claims. Defendants should bear the burden of challenging collective actions in a Rule 21 misjoinder or Rule 12 dismissal motion. This Article provides two explanations for such pervasive judicial error. In a complex, once-obscure field, courts heavily relied upon early precedent that proved incorrect, yielding path-dependent “lock-in” of bad law. Less charitably, courts’ mishandling of collective actions is just another example of federal courts erecting procedural hurdles to rights-vindicating litigation.

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INTRODUCTION

*Wal-Mart Stores, Inc. v. Dukes*¹ heightened the degree of “commonality”² required in a class action and thereby rejected a nationwide sex discrimination class action.³ Because of a decades-old misapplication of class action law, the Supreme Court’s decision in *Wal-Mart Stores* may undercut not only class actions, but also the procedurally distinct “collective actions” that let masses of workers sue for unpaid wages.

Plaintiffs with similar claims need not bring a class action, of course; joinder rules let them just file one joint complaint.⁴ But joinder becomes infeasible with too many plaintiffs, so a few named plaintiffs can file a class action for a large group. Federal Rule of Civil Procedure 23 compels class action plaintiffs to file a motion for “class certification,” applying the seven-part test of Rule 23(a)–(b);⁵ a certified class automatically includes all within the class definition, with no need for each individual to join affirmatively.⁶

Rule 23, however, is trumped by the special procedure established in 29 U.S.C. § 216(b) for certain employment claims⁷—mainly for unpaid minimum or overtime wages, but also for age discrimination and gender wage discrimination.⁸ For those claims, § 216(b) authorizes not automatic-inclusion class actions, but opt-in collective actions: “No employee shall be a party” without filing a “consent in writing” and being “similarly situated” to the others.⁹

While the § 216(b) “similarly situated” language would seem to demand less than the substantial commonality of Rule 23, courts subject § 216(b) collective actions to rules largely paralleling Rule 23.¹⁰ Courts require plaintiffs to move for collective action

1. 131 S. Ct. 2541 (2011).

2. See FED. R. CIV. P. 23(a) (requiring “questions of law or fact common to the class”).

3. See *Wal-Mart Stores*, 131 S. Ct. at 2551 (finding plaintiffs lacked “commonality” because “claims must depend upon a common contention,” like violations by “the same supervisor,” or another issue “capable of classwide 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”).

4. See FED. R. CIV. P. 20(a)(1).

5. See FED. R. CIV. P. 23(a)–(b) (requiring that plaintiffs must satisfy the four elements of Rule 23(a)(1)–(4), plus any one of the three requirements of Rule 23(b)(1)–(3)).

6. *Id.*

7. 29 U.S.C. §§ 201–219 (2006).

8. See Daniel V. Dorris, *Fair Labor Standards Act Preemption of State Wage-and-Hour Law Claims*, 76 U. CHI. L. REV. 1251, 1251 (2009) (explaining that wage claims are the most common claim type, comprising nearly one in five of all federal class or collective actions).

9. 29 U.S.C. § 216(b).

10. See *infra* Part I.B.2.

“certification” paralleling the Rule 23 class certification motion.¹¹ On that motion, courts impose on plaintiffs a burden of proof of a “stricter” degree of commonality than Rule 20 joinder, under which plaintiffs must show there are not “disparate factual and employment settings” or individualized defenses.¹² Courts thus disallow collective actions even by workers claiming the same employer violated the same wage rule; for example, if workers had different supervisors, worksites, or pay schemes.¹³

This Article argues that courts handle § 216(b) cases fundamentally incorrectly. After Part I details how courts apply Rule 23 and § 216(b), Part II.A then describes the many problems with the § 216(b) jurisprudence. Part II.A first argues that no collective action “certification motion” is authorized by rule, by statute, by historical practice, or by the logic under which such motions exist in class actions. Because § 216(b) lacks the motion requirement of Rule 23, collective actions should be filed freely, just as the original version of Rule 23 featured no certification motion for “spurious” opt-in class actions closely paralleling § 216(b) cases.¹⁴ Moreover, whereas Rule 23 covers all class members automatically, § 216(b) collective actions adjudicate the claims of only those opting in. As a result, § 216(b) collective actions lack the key “principal-agent” problem¹⁵ justifying courts’ role as gatekeepers scrutinizing Rule 23 classes: that class actions adjudicate the claims of even those unaware of the case, an “asymmetric information” problem¹⁶ that leaves absent class members at the mercy of class counsel.¹⁷

11. See *infra* Part I.B.

12. Anderson v. Cagle’s, Inc., 488 F.3d 945, 953 (11th Cir. 2007) (quoting Thiessen v. Gen. Elec. Capital Corp., 267 F.3d 1095, 1103 (10th Cir. 2001)) (internal quotation marks omitted).

13. See *infra* notes 75–85 and accompanying text.

14. FED. R. CIV. P. 23 (1938).

15. See ROBERT S. PINDYCK & DANIEL L. RUBINFELD, MICROECONOMICS 609 (5th ed. 2001) (defining a principal-agent problem as “agents pursu[ing] their own goals even when doing so entails lower profits for . . . principals”).

16. *Id.* at 596.

17. See, e.g., John H. Beisner et al., *Class Action “Cops”: Public Servants or Private Entrepreneurs?*, 57 STAN. L. REV. 1441, 1451 (2005) (asserting that the role of class counsel in “hold[ing] renegade corporations accountable” trumps recovery for class members (internal quotation marks omitted)); John C. Coffee, Jr., *Litigation Governance: Taking Accountability Seriously*, 110 COLUM. L. REV. 288, 291–92 (2010) (discussing checks on the system of “entrepreneurial litigation” by lawyers that create “principal-agent” problems); Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs’ Attorney’s Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 3–5 (1991) (asserting that the “existing regulatory system” to protect “absent class members” is “poorly designed”). But see Myriam Gilles & Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. PA. L. REV. 103, 104 (2006) (“[T]he so-called ‘agency cost’ problem is mostly a mirage.”).

Part II.A next argues that on § 216(b) certification motions, courts wrongly demand strict Rule 23 commonality, not the more liberal Rule 20 joinder requirement of one common issue. Enacted in 1938 and amended in 1947,¹⁸ § 216(b) was not a tightened opt-in version of Rule 23; it was a liberalized version of simple Rule 20 joinder, which allowed joint suits by plaintiffs with just one common issue. By allowing “similarly situated” plaintiffs to join, § 216(b) aimed to facilitate, not restrict, joinder of presumptively similar coworker wage claims.

Part II.B then explains how courts’ improperly high § 216(b) threshold imposes troubling consequences, starting with the rejection of meritorious collective actions. Where wage violations go without remedy, the law goes without vindication; the cost is substantial, especially for low-income workers. Even when courts allow collective actions, the complex certification motion and the necessary preliminary discovery generate delay and cost. The delay eliminates the claims of workers whose statutes of limitations keep running until they can opt in; the cost means fewer claims are prosecuted, with large cases litigated by only a few major class action firms instead of a broad range of smaller or nonprofit firms. Courts’ misstep in applying Rule 23 to § 216(b) cases is all the more troubling because the heightened Rule 23 “commonality” requirement in *Wal-Mart Stores* has the potential to largely limit employment class actions to addressing uniformly imposed unlawful policies.

Part III offers a prescription for how courts should handle § 216(b) collective actions without any “certification motion” or strict commonality standard. Properly interpreted, § 216(b) should let claims proceed as collective actions presumptively on a simple prima facie showing that workers press (a) the same statutory claim (e.g., a minimum wage violation, not wage claims mixed with discrimination claims) by (b) the same employer. With no “certification motion,” proper defendants should bear the burden of challenging collective actions in either Rule 21 misjoinder or Rule 12 dismissal motions, paralleling practice in closely analogous “spurious” opt-in class actions under old Rule 23.

With the opt-in rule lessening the asymmetric information and principal-agent problem of unaware class members, courts should not wield intrusive Rule 23-style powers over plaintiffs’ litigation choices. Rather, courts simply should grant or deny defense misjoinder or dismissal motions and supervise any court-ordered notification to

18. H.R. REP. NO. 80-71 (1947), *reprinted in* 1947 U.S.C.C.A.N. 1029, 1030–32.

potential plaintiffs that is requested. Still, collective actions are complex, and the same counsel represents plaintiffs of varied engagement levels; so some asymmetric information and principal-agent problems remain, though not much more than in most non-class litigation. To police any remaining asymmetric information and principal-agent problems in § 216(b) cases, courts should carefully apply ethics rules requiring attorneys to keep clients informed, respect client decision-making autonomy, avoid client conflicts of interest, and competently represent clients.

Part IV concludes by discussing how the § 216(b) case law ended up so wrong. Part of the answer is that collective actions are much less known and studied than class actions; the few publications on § 216(b) collective actions are mainly litigators' practice pieces¹⁹ or student notes.²⁰ Although the statute is old, the lack of attention is attributable to the fact that § 216(b) actions were obscure until a 1990s proliferation of high-impact cases.²¹ Now, one in five aggregate (class or collective) lawsuits is a wage case,²² typically a multi-million dollar action by hundreds or thousands of employees claiming years of unpaid minimum²³ or overtime wages,²⁴ that challenges entire

19. See, e.g., David Borgen & Laura L. Ho, *Litigation of Wage and Hour Collective Actions under the Fair Labor Standards Act*, 7 EMP. RTS. & EMP. POL'Y J. 129, 130 (2003) (describing "the development of the collective action as a means of private Fair Labor Standards Act enforcement and the issues that have arisen in implementing these procedures"); Allan G. King & Camille C. Ozumba, *Strange Fiction: The "Class Certification" Decision in FLSA Collective Actions*, 24 LAB. LAW. 267, 267 (2009) (asserting that procedural rules for collective actions under the FLSA "needlessly discard the carefully balanced trade-offs between efficiency and due process struck by the Federal Rules of Civil Procedure").

20. See, e.g., James M. Fraser, Note, *Opt-In Class Actions Under the FLSA, EPA, and ADEA: What Does It Mean to Be "Similarly Situated"?*, 38 SUFFOLK U. L. REV. 95, 98 (2004) (emphasizing that differences between § 216(b) and Rule 23 "resulted largely by mistake"); Brian R. Gates, Note, *A "Less Stringent" Standard? How to Give FLSA § 16(b) a Life of Its Own*, 80 NOTRE DAME L. REV. 1519, 1521 (2005) (arguing that instead of being analyzed merely as "less stringent" than the Federal Rules, § 216 should "claim its own place in the federal court system"); Daniel C. Lopez, Note, *Collective Confusion: FLSA Collective Actions, Rule 23 Class Actions, and the Rules Enabling Act*, 61 HASTINGS L.J. 275, 278–79 (2009) (concluding that § 216 is an "antiquated vestige" that should be repealed).

21. See *infra* Part II.A.3.

22. Dorris, *supra* note 8, at 1251.

23. See, e.g., *Acevedo v. Allsup's Convenience Stores, Inc.*, 600 F.3d 516, 518 (5th Cir. 2010) (per curiam) (describing plaintiffs as eight hundred former employees of defendant "seeking payment of unpaid wages"); *Zivali v. AT&T Mobility, LLC*, 784 F. Supp. 2d 456, 459 (S.D.N.Y. 2011) (providing that plaintiffs alleged their employer "failed to pay wages . . . in violation of the Fair Labor Standards Act").

24. See, e.g., *Morgan v. Family Dollar Stores, Inc.*, 551 F.3d 1233, 1239–40 (11th Cir. 2008) (explaining that plaintiffs "used Family Dollar's payroll records to establish that 1,424 store managers routinely worked 60 to 70 hours a week and to quantify the overtime wages owed to each [of them]"); *Archuleta v. Wal-Mart Stores, Inc.*, 543 F.3d 1226, 1228 (10th Cir. 2008) (determining whether full-time pharmacists fell within the overtime exemption under FLSA for "executive,

industry pay practices.²⁵ Furthermore, as § 216(b) is a complex, once-obscure field of law, a small body of precedent, particularly one misconstrued decision, initially got it wrong; the American legal system's respect for precedent resulted in "path dependence" that "locked in" this erroneous case. A second, less charitable explanation for this erroneous case law is the federal courts' hostility to individual rights litigation. Especially as to procedural matters, courts display an agenda of limiting rights litigation, with rulings expanding dispositive motions, compelling arbitration, pre-empting state court litigation—and, as this Article discusses—erecting misguided barriers to major aggregate litigation.

I. HOW § 216(b) COLLECTIVE ACTIONS DIFFER FROM RULE 23 CLASS ACTIONS

A. *Rule 23 Class Actions: Close Scrutiny to Guard Against Agency Problems in Automatic-Inclusion Classes*

Class actions under Rule 23 cover varied subject matter, from common-law consumer fraud and mass torts claims to federal statutory antitrust and civil rights claims.²⁶ Rule 23(a) imposes four conditions for a class action:

- (1) the class is so numerous that joinder of all members is impracticable;
- (2) there are questions of law or fact common to the class;
- (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
- (4) the

administrative or professional' employees").

25. See, e.g., *Cheatham v. Allstate Ins. Co.*, 465 F.3d 578, 584–85 (5th Cir. 2006) (per curiam) (affirming a district court holding that plaintiffs "were employed in an administrative capacity and thus exempt from 29 U.S.C. § 207(a)(1)'s requirement of overtime compensation for employment in excess of forty hours"); *Lee v. ABC Carpet & Home*, 236 F.R.D. 193, 196–98 (S.D.N.Y. 2006) (describing employer's practice of characterizing carpet installation mechanics as "independent contractors" and the mechanics' contention that they be considered "employee[s]" (internal quotation marks omitted)); *Ansoumana v. Gristede's Operating Corp.*, 255 F. Supp. 2d 184, 186 (S.D.N.Y. 2003) (addressing whether plaintiffs were "independent contractors or employees entitled to be paid a minimum wage and time-and-a-half for overtime").

26. Edward F. Sherman, *Class Actions after the Class Action Fairness Act of 2005*, 80 TUL. L. REV. 1593, 1594 (2006) ("[Rule 23(b)(2)] lead to the civil rights and institutional reform class actions of the 1970s and 1980s that resulted in significant changes in . . . governmental institutions and private businesses. [Rule 23(b)(3)] lead initially to class actions based on . . . antitrust, securities fraud, and employment discrimination, but, by the 1980s and 1990s, migrated to a broad spectrum of commercial, consumer protection, environmental, product liability, and mass tort cases.").

representative parties will fairly and adequately protect the interests of the class.²⁷

A class also must qualify as one of the three types in Rule 23(b), defined mainly by the relief sought.²⁸ The least common, contained in Rule 23(b)(1), applies when separate actions risk multiple court orders inconsistent with each other or the rights of non-parties.²⁹ Rule 23(b)(2) applies when members seek mainly injunctive or declaratory relief against a party who acted “on grounds that apply generally to the class,”³⁰ as in lawsuits against segregation or pollution. Finally, Rule 23(b)(3) applies to money damages claims,³¹ making it most similar to § 216(b) wage collective actions. A Rule 23(b)(3) class requires that common issues “predominate” over individual ones and that a class action be “superior to other” options, such as many individual suits.³²

Courts on class certification motions serve as gatekeepers, undertaking a “rigorous analysis” of whether evidence establishes each Rule 23 element.³³ The Court in *Wal-Mart Stores* stressed this in holding that a class of 1.5 million plaintiffs failed to prove sufficiently “common questions” and in suggesting that the tougher requirements of Rule 23(b)(3), rather than 23(b)(2), are more proper for a class seeking substantial damages, not just injunctive relief.³⁴ Certification receives close scrutiny because a Rule 23 class automatically includes and litigates all members’ claims with finality. Members must affirmatively opt out to be excluded, and they are guaranteed opt-out rights only in Rule 23(b)(3) damages classes.³⁵ Whether or not opting out is possible, class actions are criticized for causing “agency problems” in that most members participate

27. FED. R. CIV. P. 23(a).

28. FED. R. CIV. P. 23(b).

29. FED. R. CIV. P. 23(b)(1); *see Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997) (applying Rule 23(b)(1) where the party “is obliged by law to treat the members of the class alike (a utility acting toward customers; a government imposing a tax) or where the party must treat all alike as a matter of practical necessity” (internal quotation marks omitted)).

30. FED. R. CIV. P. 23(b)(2).

31. *See supra* notes 23–24 and accompanying text.

32. FED. R. CIV. P. 23(b)(3).

33. *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 161 (1982); *see Amchem Prods.*, 521 U.S. at 613–14 (citing the four threshold requirements applicable to all class actions).

34. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2556–57 (2011).

35. *See, e.g., Martens v. Smith Barney, Inc.*, 181 F.R.D. 243, 260 (S.D.N.Y. 1998) (collecting circuit court decisions in limited fund and employment discrimination class actions in which the courts held that (b)(1) or (b)(2) members do not enjoy mandatory notice or opt-out rights under Rule 23, but “it is within judicial discretion to . . . [grant] such rights”).

minimally, if at all, in the case, allowing counsel and the few named plaintiffs to neglect or “sell out” the interests of the class.³⁶

B. Collective Actions: Opt-In Required by Statute, Certification Motion Required by Judicial Practice, and Certification Frequently Denied

For minimum or overtime wage claims under the Fair Labor Standards Act (FLSA),³⁷ age discrimination claims under the Age Discrimination in Employment Act (ADEA),³⁸ and gender wage discrimination claims under the Equal Pay Act (EPA),³⁹ 29 U.S.C. § 216(b) trumps Rule 23,⁴⁰ authorizing collective actions⁴¹ very different from Rule 23 classes.

36. See *infra* Part II.A.4.b (describing how the few decisionmakers can neglect or “sell out” the interests of the class).

37. 29 U.S.C. §§ 201–219 (2006).

38. 29 U.S.C. §§ 621–634 (2006). Collective actions are typically FLSA claims, but for ADEA cases, see, for example, *Hoffmann-La Roche v. Sperling*, 493 U.S. 165, 167 (1989) (addressing whether “a district court conducting [an ADEA suit] may authorize and facilitate notice of the pending action”); *Thiessen v. Gen. Elec. Capital Corp.*, 267 F.3d 1095, 1102 (10th Cir. 2001) (observing that “[c]lass actions under the ADEA are authorized by 29 U.S.C. § 626(b), which expressly borrows the opt-in class action mechanism of the [FLSA]”); *Grayson v. K Mart Corp.*, 79 F.3d 1086, 1090 (11th Cir. 1996) (deciding on interlocutory appeal the district judge’s order creating an opt-in class for store managers who “allege[d] that their demotions or terminations were motivated by age-discrimination in violation of the [ADEA]”); *Krueger v. N.Y. Tel. Co.*, 163 F.R.D. 446, 448 (S.D.N.Y. 1995) (denying plaintiffs’ motion to “bifurcate liability and damage issues” in ADEA class action).

39. 29 U.S.C. § 206(d). EPA claims are the least common collective action type, but for examples, see *Collins v. Dollar Tree Stores, Inc.*, 788 F. Supp. 2d 1328, 1330–31 (N.D. Ala. 2011) (granting defendant’s motion to decertify in case brought by female store managers claiming they were paid less than their male counterparts); *Jarvaise v. Rand Corp.*, 212 F.R.D. 1, 2 (D.D.C. 2002) (granting certification for limited class of three women alleging EPA violations).

40. Arguments that Rule 23 trumps § 216(b), a federal statute, have consistently failed. See, e.g., *Kinney Shoe Corp. v. Vorhes*, 564 F.2d 859, 862 (9th Cir. 1977) (noting “[t]he clear weight of authority holds that Rule 23 procedures are inappropriate for the prosecution of class actions under s 216(b)” and collecting cases); *Schmidt v. Fuller Brush Co.*, 527 F.2d 532, 536 (8th Cir. 1975) (per curiam) (“Rule 23 cannot be invoked to circumvent the [§ 216(b)] consent [Courts] have uniformly ruled that . . . Rule 23 [is] not applicable to [§ 216(b) cases].”); *LaChapelle v. Owens-Ill., Inc.*, 513 F.2d 286, 288–89 (5th Cir. 1975) (per curiam) (finding a “fundamental, irreconcilable difference between” Rule 23 and § 216(b), and that the court “must apply [§ 216(b)] as it has been written” because it is “unambiguous”); *Wright v. U.S. Rubber Co.*, 69 F. Supp. 621, 624 (S.D. Iowa 1946) (observing that § 216(b) “supersedes the Rules of Civil Procedure and is a statement by the ‘supreme power of the state’ as to who is entitled to be made parties to a suit”).

A group of employment defense litigators recently argued that Rule 23 does, and should, apply to § 216(b) collective actions. Their argument was based on the theory that Rule 23, as a validly enacted rule under the Rules Enabling Act, is not inconsistent with § 216(b) and thus should apply to § 216(b) actions. Allan G. King et al., *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 (2011). This Article, however, sees the § 216(b) procedure, as originally envisioned and as properly applied, as a liberalized, party-initiated rather than court-supervised joinder

I. Early § 216(b) history: facilitating aggregation of wage claims

Enacted in 1938 as part of the FLSA and applicable to later employment laws codified in the same statutory chapter, § 216(b) provides that “[a]n action . . . may be maintained against any employer . . . by any one or more employees for . . . other employees similarly situated.”⁴² Under the initial statutory language, “collective actions” let employees have third-parties, mainly labor unions, file their wage suits—which drew colorful denunciations that such lawsuits filed by “an outsider, perhaps someone who is desirous of stirring up litigation without being an employee at all . . . may result in very decidedly unwholesome champertous situations.”⁴³ To eliminate third-party suits, Congress amended § 216(b) in 1947 to require workers themselves to be the plaintiffs⁴⁴ and to require anyone other than an original plaintiff to affirmatively “opt in” by filing a written consent,⁴⁵ thereby codifying the opt-in rule already prevailing among the courts.⁴⁶

Enacted before modern class actions existed,⁴⁷ § 216(b) does not mention any judicial gatekeeping power over whether a case can

procedure wholly inconsistent with the restrictive (rather than liberal) and judicially supervised (rather than party-initiated) procedure Rule 23 grants for class actions. Because applying Rule 23 to § 216(b) actions would substantially eliminate the applicability to § 216(b)-specific procedures, the proper statutory construction is to enforce Rule 23 for all actions except those governed by 216(b): “[w]hen there are two [federal] acts upon the same subject, the rule is to give effect to both,” *Trollinger v. Tyson Foods, Inc.*, 370 F.3d 602, 609 (6th Cir. 2004) (quoting *United States v. Borden Co.*, 308 U.S. 188, 198 (1939)) (internal quotation marks omitted), under the “repeatedly stated” rule that where two statutes “are in tension,” both “continue to apply” absent “irreconcilable conflict” or “clearly expressed congressional intention” to curtail one, *Branch v. Smith*, 538 U.S. 254, 273 (2003) (citations omitted) (internal quotation marks omitted).

41. Fair Labor Standards Act of 1938, Pub. L. No. 75-718, 52 Stat. 1060 (codified as amended at 29 U.S.C. §§ 201–219).

42. 29 U.S.C. § 216(b).

43. 93 CONG. REC. 2182 (1947), *quoted in* *Arrington v. Nat’l Broad. Co.*, 531 F. Supp. 498, 501 (D.D.C. 1982).

44. Portal-to-Portal Act of 1947, Pub. L. No. 80-49, § 5(a), 61 Stat. 84, 87 (codified as amended at 29 U.S.C. § 216(b)); *see* Nantiya Ruan, *Facilitating Wage Theft: How Courts Use Procedural Rules to Undermine Substantive Rights of Low-Wage Workers*, 63 VAND. L. REV. 727, 731–32 (2010) (citing Fraser, *supra* note 20, at 98) (observing that the earlier version of the statute enabled uninterested parties to launch numerous “fishing expeditions [that] were costly to employers”).

45. *See Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, 173 (1989) (noting that the 1947 Portal-to-Portal Act added a “requirement that an employee file a written consent”).

46. *See Pentland v. Dravo Corp.*, 152 F.2d 851, 853–56 (3d Cir. 1945) (noting that before the 1947 opt-in statute, most courts let § 216(b) cases cover only those employees who affirmatively opted in).

47. *See* FED. R. CIV. P. 23 advisory committee’s note (1966) (explaining that Congress enacted the modern version of the Federal Rules of Civil Procedure several decades after the FLSA).

proceed as a collective action.⁴⁸ Section § 216(b) requires merely that members be “similarly situated” and opt in individually.⁴⁹ One of the first § 216(b) cases denied a motion to dismiss after adopting a liberal definition of “similarly situated.”⁵⁰ The court in *McReynolds v. Louisville Taxicab & Transfer Co.*⁵¹ observed that workers joining a collective action “stand or fall along with” the named plaintiff, so if their claims fail, it will be at the later stage when the evidence does not “sustain the allegation that . . . [all] are similarly situated.”⁵² The “similarity” required was modest in other early decisions allowing § 216(b) collective actions, such as *McNorrill v. Gibbs*,⁵³ which found “no serious question about the two employees being similarly situated” when “both worked for the same employer during substantially the same period of time, and as stated in the complaint they ‘performed similar duties and were paid wages at the same time.’”⁵⁴ Other early cases noted the importance of “liberally administer[ing]” § 216(b) to avoid “a multiplicity of suits”⁵⁵ and because of the importance of collective actions to workers:

[E]mployees . . . can join in their litigation so that no one of them need stand alone in doing something likely to incur the displeasure of an employer. It brings something of the strength of collective bargaining to a collective lawsuit.⁵⁶

Some early courts, though, did not accept that the § 216(b) similarity standard was any broader than then-existing Rule 23 class action requirements. In *Sinclair v. United States Gypsum Co.*,⁵⁷ the court struck down a complaint alleging wage claims on behalf of plaintiffs and others “similarly situated,” reasoning that the § 216(b) suit failed Rule 23 elements, including that the class be “so numerous as to make [joinder] impracticable,”⁵⁸ even though § 216(b) had no numerical threshold.

48. 29 U.S.C. § 216(b).

49. *Id.*

50. *McReynolds v. Louisville Taxicab & Transfer Co.*, 5 F.R.D. 61, 62 (W.D. Ky. 1942).

51. 5 F.R.D. 61 (W.D. Ky. 1942).

52. *Id.* at 62.

53. 45 F. Supp. 363 (E.D.S.C. 1942).

54. *Id.* at 365.

55. *Barrett v. Nat'l Malleable & Steel Castings Co.*, 68 F. Supp. 410, 416 (W.D. Pa. 1946) (“[Section 216(b)] should be liberally administered since it may be that other persons interested in the same common question of law or facts might desire to join as party plaintiffs and by . . . being permitted . . . a litigious situation would be corrected at one time.”).

56. *Pentland v. Dravo Corp.*, 152 F.2d 851, 853 (3d Cir. 1945).

57. 75 F. Supp. 439 (W.D.N.Y. 1948).

58. *Id.* at 441–42.

2. *Modern § 216(b) case law: split authority but a common theme and many collective actions rejected*

With the dramatic increase in the number of FLSA cases since the 1990s,⁵⁹ the modern § 216(b) case law is far more extensive than, and quite contrary to, the early cases detailed above. Whether or not expressly citing Rule 23, courts adjudicating § 216(b) collective actions perform an essentially similar analysis, requiring of plaintiffs an evidentiary motion proving a substantial degree of commonality, as Rule 23 does.⁶⁰

Under one approach, courts explicitly apply the Rule 23(a) class action requirements to determine whether employees in a § 216(b) collective action are “similarly situated”: whether the members are sufficiently numerous (Rule 23(a)(1)); whether common claims predominate (Rule 23(a)(2)–(3)); and whether there are conflicts of interest among the plaintiffs or their counsel (Rule 23(a)(3)–(4)).⁶¹ While conceding that § 216(b) differs from, and cannot be trumped by, Rule 23, these courts have applied to collective actions all Rule 23 elements not flatly inconsistent with § 216(b), including the four Rule 23(a) requirements, plus the Rule 23(b)(3) requirement for damages claims that common questions must “predominate” over individual ones.⁶² Some courts similarly require collective actions to establish the substantial commonality required of damages class actions under the original, pre-1966 version of Rule 23—because that rule, like § 216(b), required each plaintiff with damages claims to “opt in.”⁶³

59. See *infra* notes 154–156 and accompanying text.

60. For case dockets with scheduling orders requiring collective action certification motions, see, for example, *Capsolas v. Pasta Res. Inc.*, No. 10-5595 (S.D.N.Y. Sept. 21, 2010) (scheduling order); *Calibuso v. Bank of Am. Corp.*, No. 09-2674 (S.D.N.Y. July 29, 2009) (case management plan and scheduling order); *Clarke v. J.P. Morgan Chase & Co.*, No. 08-2400 (S.D.N.Y. Feb. 4, 2009) (stipulation and order of discovery and briefing schedule).

61. See, e.g., *Shushan v. Univ. of Colo. at Boulder*, 132 F.R.D. 263, 266–68 (D. Colo. 1990) (specifying that the plaintiffs failed to demonstrate the “normal class actions requirements,” such as “numerosity, typicality, [and] adequacy”), *abrogated in part by Thiessen v. Gen. Elec. Capital Corp.*, 267 F.3d 1095, 1105 (10th Cir. 2001); *St. Leger v. A.C. Nielsen Co.*, 123 F.R.D. 567, 569 (N.D. Ill. 1988) (holding that certification was inappropriate and plaintiffs were not similarly situated because common questions did not “predominate” individual questions).

62. See, e.g., *Burns v. Vill. of Wauconda*, No. 99-C-0800, 1999 WL 529574, at *2–3 (N.D. Ill. July 15, 1999) (denying certification on same Rule 23 analysis of § 216(b) certification as *Shushan*); *Camp v. Lockheed Martin Corp.*, No. H-97-1938, 1998 WL 906915, at *2 (S.D. Tex. Apr. 23, 1998) (citing *Shushan* and requiring § 216(b) plaintiffs to satisfy Rule 23); *Wilkerson v. Martin Marietta Corp.*, 875 F. Supp. 1456, 1461 (D. Colo. 1995) (citing *Shushan* in applying the Rule 23 class action requirements).

63. See *Lusardi v. Xerox Corp.*, 855 F.2d 1062, 1078–79 (3d Cir. 1988) (observing that “those who did not file individual charges and nevertheless forge ahead with

Most courts, however, do not expressly apply Rule 23, instead taking an “ad hoc” approach to whether workers are “similarly situated” enough for a § 216(b) collective action. These courts apply a two-stage certification process that, though unique to § 216(b), still parallels key Rule 23 requirements; particularly, that class members must share strict commonality and that a collective action would be superior to multiple individual suits.⁶⁴

The process begins with the plaintiffs first filing a motion, as under Rule 23, seeking court “certification” of the collective action.⁶⁵ Often called the “notice stage,” at this step the court decides whether a collective action is sufficiently proper to justify notifying potential members that they can opt into a collective action.⁶⁶ Court approval of notice derives from the Supreme Court decision in *Hoffmann-La Roche Inc. v. Sperling*,⁶⁷ which mentioned no “certification” process, but held that to serve the “broad remedial goal” of the FLSA, and in light of the “wisdom and necessity for early judicial intervention,” courts can manage the notice and opt-in process.⁶⁸ Courts call the burden of proving that plaintiffs are “similarly situated” at this stage “minimal”—just a “modest factual showing”⁶⁹—but discovery is necessary.⁷⁰ Courts require evidentiary proof (employee affidavits, corporate documents, etc.) that members are “similarly situated,”⁷¹ challenge the same conduct,⁷² and faced “a common policy or plan

individual actions despite the district court’s erroneous ruling may find their actions defeated on a law of the case theory”); *EEOC v. Sandia Corp.*, 639 F.2d 600, 602 (10th Cir. 1980) (considering an interlocutory appeal of a district court finding that “a *prima facie* case had been established showing that Sandia had engaged in a pattern or practice of discrimination against a portion of the protected class”).

64. *Lopez*, *supra* note 20, at 288–89; *see also* *Cuzco v. Orion Builders, Inc.*, 477 F. Supp. 2d 628, 632 (S.D.N.Y. 2007) (describing a two-step process that courts generally use to determine whether a collective action under FLSA may proceed); *Sipas v. Sammy’s Fishbox, Inc.*, No. 05 Civ. 10319 (PAC), 2006 U.S. Dist. LEXIS 24318, at *6–7 & n.1 (S.D.N.Y. Apr. 24, 2006) (citing that the plaintiffs “need show only ‘some identifiable factual nexus’” as a “minimal burden” for conditional certification).

65. FED. R. CIV. P. 23(a)–(c).

66. *Torres v. Gristede’s Operating Corp.*, No. 04 Civ. 3316 (PAC), 2006 U.S. Dist. LEXIS 74039, at *23 (S.D.N.Y. Sept. 29, 2006).

67. 493 U.S. 165 (1989).

68. *Id.* at 171–73.

69. *Damassia v. Duane Reade, Inc.*, No. 04 Civ. 8819 (GEL), 2006 U.S. Dist. LEXIS 73090, at *8–10 (S.D.N.Y. Oct. 5, 2006) (internal quotation marks omitted).

70. *Lusardi v. Xerox Corp.*, 99 F.R.D. 89, 93 n.8 (D.N.J. 1983) (“[T]he Court set up a 45 day discovery period for . . . establishing the number of persons similarly situated [P]laintiffs may [then] move to certify a . . . class to whom notice will ultimately be sent.”).

71. *Gjurovich v. Emmanuel’s Marketplace, Inc.*, 282 F. Supp. 2d 101, 104 (S.D.N.Y. 2003); *Realite v. Ark Rests. Corp.*, 7 F. Supp. 2d 303, 306 (S.D.N.Y. 1998).

72. *Gjurovich*, 282 F. Supp. 2d at 104.

that violated the law.”⁷³ After discovery is a second-stage certification motion, typically a defense motion to decertify; the court makes an even more searching evidentiary inquiry into whether members are similarly situated,⁷⁴ decertifying the case if they are not.⁷⁵

Courts deny certification when they find insufficient evidence of, for example, common facts among members,⁷⁶ common policies affecting all members,⁷⁷ or common “employment settings” of all

73. *Hoffmann v. Sbarro, Inc.*, 982 F. Supp. 249, 261 (S.D.N.Y. 1997).

74. *Torres v. Gristede's Operating Corp.*, No. 04 Civ. 3316 (PAC), 2006 U.S. Dist. LEXIS 74039, at *37–38 (S.D.N.Y. Sept. 29, 2006); *Gjurovich*, 282 F. Supp. 2d at 105 n.1.

75. *See, e.g.*, *O'Brien v. Ed Donnelly Enters.*, 575 F.3d 567, 585 (6th Cir. 2009) (affirming decertification because not all plaintiffs alleged same unlawful practices); *Anderson v. Cagle's, Inc.*, 488 F.3d 945, 952–53 (11th Cir. 2007) (affirming decertification because employee duties and pay structures differed); *Beauperthuy v. 24 Hour Fitness USA, Inc.*, 772 F. Supp. 2d 1111, 1116, 1122–27 (N.D. Cal. 2011) (granting defendant's motions to decertify because of plaintiffs' varying circumstances and defendant lacking a uniform policy compelling unpaid work); *Hernandez v. United Auto Credit Corp.*, No. 08-3404, 2010 U.S. Dist. LEXIS 40209, at *10–15 (N.D. Cal. Mar. 31, 2010) (granting motion to decertify because employee duties and authority levels differed); *Brechler v. Qwest Commc'ns Int'l, Inc.*, No. cv-06-00940, 2009 U.S. Dist. LEXIS 24612, at *9 (D. Ariz. Mar. 17, 2009) (decertifying class because a “subtler system of pressure and coercion,” not a unified policy, denied wages to employees); *Johnson v. Big Lots Stores, Inc.*, 561 F. Supp. 2d 567, 576–87 (E.D. La. 2008) (decertifying class because of “the dissimilarity of plaintiffs' self-reported job duties,” which made it “exceedingly difficult for Big Lots to assert its statutory exemption defense on a collective basis”); *Proctor v. Allsup's Convenience Stores, Inc.*, 250 F.R.D. 278, 282 (N.D. Tex. 2008) (granting defendant's motion to decertify because “there is no evidence of a single decision, policy, or plan that is causing the Plaintiffs to work off the clock”); *Sharer v. Tandberg, Inc.*, No. 06-626, 2007 WL 676220, at *3 (E.D. Va. Feb. 27, 2007) (granting motion to decertify because employees' job titles and responsibilities were too dissimilar and named plaintiffs did not all allege same wage deprivations); *Smith v. Heartland Auto. Servs., Inc.*, 404 F. Supp. 2d 1144, 1152 (D. Minn. 2005) (decertifying upon finding “significant the discrepancies between and among the named plaintiffs and the opt-in class members with respect to a Store Manager's ability to exercise discretion, perform management tasks, and act independently of the district manager”); *Johnson v. TGF Precision Haircutters, Inc.*, No. Civ.A. H-03-3641, 2005 WL 1994286, at *2, *8 (S.D. Tex. Aug. 17, 2005) (decertifying because multiple sites varied and employer defenses were individualized observing that “if it were not for [issues such as geographic differences], the job duties per se *might not require decertification*”); *Bayles v. Am. Med. Response of Colo., Inc.*, 950 F. Supp. 1053, 1061–63 (D. Colo. 1996) (decertifying because pay-docking policy was not consistent for all); *Lusardi v. Xerox Corp.*, 118 F.R.D. 351, 359 (D.N.J. 1987) (granting motion to decertify because of disparate employee duties and locations among ADEA plaintiffs).

76. *See, e.g.*, *Rappaport v. Embarq Mgmt. Co.*, No. 6:07-cv-468, 2007 WL 4482581, at *4 (M.D. Fla. Dec. 18, 2007) (stating that plaintiffs failed to offer any basis of employer's plan to deny overtime pay “on a company-wide scale” and observing that “federal courts across the Middle and Southern Districts of Florida have routinely denied requests for conditional certification where, as here, the plaintiffs attempt to certify a broad class based only [on] the conclusory allegations of few employees”); *D'Anna v. M/A-Com, Inc.*, 903 F. Supp. 889, 894 (D. Md. 1995) (noting that plaintiff failed to make the “modest factual showing” of an improper corporate policy and holding that “[t]he mere listing of names, without more, is insufficient absent a factual showing that the plaintiffs are ‘similarly situated’”).

77. *See, e.g.*, *Bishop v. Petro-Chem. Transp.*, 582 F. Supp. 2d 1290, 1307 (E.D. Cal.

members.⁷⁸ On claims that the same employer denied many workers minimum and overtime wages, the district court in *Sheffield v. Orius Corp.*⁷⁹ denied collective action certification because “members held different job titles, enjoyed different payment structures (piece-rate, hourly, and salaried), and worked at nine different job sites;” with each claim entailing individualized issues, the alleged violations arose differently among subdivisions, so members were “not related as victims of a uniform, national policy.”⁸⁰ Similarly, in *Bishop v. Petro-Chemical Transport*,⁸¹ a claim that an employer did not pay truck drivers required overtime,⁸² the plaintiff truck driver testified that he and other members were identical in key respects: “(a) held the same job (truck drivers), (b) hauled similar products (bulk petroleum products), (c) were based within the State of California and (d) were not paid overtime for all hours worked in excess of forty per week.”⁸³ But the court denied certification, deeming plaintiff’s “declaration . . . entirely deficient” because certification requires “evidentiary support” of worker similarity,⁸⁴ and at this early stage—before discovery was completed—plaintiff had “no strong evidence of company wide policies and corporate structure.”⁸⁵

A common thread is that many courts deny certification where alleged wrongs were decentralized among different managers, different sites, and different job categories—paralleling the Supreme Court’s rejection in *Wal-Mart Stores* of a Rule 23 class claiming sex discrimination among varied employees and managers.⁸⁶ As detailed below, Rule 23-style inquiry in § 216(b) collective actions is

2008) (citing *Dukes v. Wal-Mart, Inc.*, 509 F.3d 1168, 1177 (9th Cir. 2009) (requiring substantial commonality and finding “no evidence . . . that there is a company wide policy to deny, *improperly*, overtime to those who are entitled to overtime compensation”); *Jimenez v. Lakeside Pic-N-Pac, L.L.C.*, No. 1:06-CV-456, 2007 WL 4454295, at *5 (W.D. Mich. Dec. 14, 2007) (“Although Plaintiffs have presented evidence of a uniform policy of not precisely recording their hours, they have not come forward with any authority to suggest that this failure, in and of itself, violated the FLSA.”); *Moeck v. Gray Supply Corp.*, No. 03-1951, 2006 WL 42368, at *4 (D.N.J. Jan. 6, 2006) (noting that the plaintiffs “failed to satisfy” a “more lenient standard” than “modest factual showing” of a corporate policy).

78. See, e.g., *Pfohl v. Farmers Ins. Grp.*, No. 03-CV-3080, 2004 WL 554834, at *2–3 (C.D. Cal. Mar. 1, 2004) (noting additional factors that determine whether plaintiffs are similarly situated such as “the various defenses available to the defendant which appeared to be individual to each plaintiff” and “fairness and procedural considerations”).

79. 211 F.R.D. 411 (D. Or. 2002).

80. *Id.* at 413.

81. 582 F. Supp. 2d 1290 (E.D. Cal. 2008).

82. *Id.* at 1292.

83. *Id.* at 1296.

84. *Id.*

85. *Id.* at 1307.

86. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2555–57 (2011).

misplaced; it neglects the very different text, history, and nature of each provision.

II. HOW COURTS ARE WRONG

The prevailing § 216(b) collective action certification process is excessive in many ways—in its importation of Rule 23 standards, in requiring evidentiary support on an early procedural motion, and in the complexity of the two-stage inquiry. There is a far more fundamental problem, however: there should be *no* collective action “certification” inquiry at all because there is no statutory or rule authority for requiring any such motion by plaintiffs.

Part II.A explains that applicable statutory and rule text does not support judicial authority to deny § 216(b) plaintiffs the right to file actions that other similarly situated individuals can join. This Part also elaborates that the historical development of Rule 23 and § 216(b) confirms that § 216(b) is no analogue of modern Rule 23. Rather, § 216(b) and the old form of Rule 23, both enacted in 1938, liberalized joinder, allowing easy consolidation of similar damages claims. The idea of courts scrutinizing the propriety of aggregation arose only in 1968, when the revised Rule 23 established modern class actions. Rule 23 classes, unlike § 216(b) actions, allow named plaintiffs and class counsel to dispose of absent class members’ claims—an agency problem absent from collective actions, in which all participants affirmatively choose to participate.

Part II.B then demonstrates that this is not a harmless error or a mere procedural technicality: improper judicial scrutiny of collective actions prejudices the rights of workers claiming violations and leaves substantial violations without remedy.

A. *Why No Certification Inquiry: The Text, History, and Nature of § 216(b)*

1. *Statutory text and purpose: no judicial authority in § 216(b) to veto plaintiffs’ litigation choices*

Normally, courts have little say in plaintiffs’ choice of counsel, choice to file jointly with others, or choice among permissible procedures (e.g., using diversity jurisdiction to choose federal over state court). Plaintiffs pursuing a class action, however, face judicial inquiry into whether a class action is proper. In fact, pursuant to the express language of Rule 23, they must file a motion proving the class is proper: “the court must determine by order whether to certify the

action as a class action”⁸⁷ and must “appoint class counsel,” who makes an “application” to the court showing they meet rule-delineated criteria focusing on experience, resources, and skill.⁸⁸

Section 216(b), however, specifies a different procedure for a collective action, one lacking any judicial “certification” of plaintiffs’ “application” process:

An action . . . may be maintained . . . [by] one or more employees for . . . other employees similarly situated. No employee shall be a party plaintiff . . . unless he gives his consent in writing to become such a party and such consent is filed in the court⁸⁹

This text does not give courts the power to scrutinize the matters that Rule 23 regulates, such as the case’s status as aggregate litigation and plaintiffs’ choice of counsel. There is no provision in § 216(b) for a “certification” inquiry like in Rule 23(c)(1), no provision for scrutiny of plaintiffs’ counsel like in Rule 23(g), and, more generally, no requirements analogous to those in the Rule 23(a)(1)–(4) and Rule 23(b)(1)–(3) seven-subsection labyrinth. Rather, § 216(b) requires only two criteria: members must be “similarly situated” and must make one of the types of employment claims covered by § 216(b) (minimum or overtime wage, age discrimination, or gender pay discrimination).

Accordingly, regardless of whether judicial gatekeeping of collective actions under § 216(b) is good policy, it is unauthorized. In an adversarial legal system (like that of the United States), rather than an inquisitorial system (like most of Europe), parties can file and resolve lawsuits as they please, absent a specific rule granting judges authority over parties’ decisions. Judicial scrutiny of a settlement in a non-class action is unauthorized: lawsuits can be settled and dismissed with mutual consent under Rule 41(a), and, because that rule “does not . . . empower . . . court[s] to attach conditions to the parties’ stipulation of dismissal,”⁹⁰ judges are uniformly reversed on rare occasions when they force parties to disclose settlement terms.⁹¹

Courts do have one modest power over § 216(b) actions: to control “notice” of opt-in rights sent to potential members. The one

87. FED. R. CIV. P. 23(c)(1)(A).

88. FED. R. CIV. P. 23(g)(1)–(2).

89. 29 U.S.C. § 216(b) (2006).

90. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 381 (1994).

91. *E.g.*, *Gambale v. Deutsche Bank AG*, 377 F.3d 133, 144 (2d Cir. 2004) (finding “serious abuse of discretion” in court ordering disclosure of confidential settlement); *Smith v. Phillips*, 881 F.2d 902, 904 (10th Cir. 1989) (noting that settlement executes Rule 41 voluntary dismissal, “divest[ing]” court jurisdiction to order disclosure of settlement).

Supreme Court case on courts' procedural powers in § 216(b) actions, *Hoffmann-La Roche Inc. v. Sperling*, was a narrow holding: § 216(b) implicitly grants courts "managerial responsibility" over the opt-in process, and, "[b]y monitoring preparation and distribution of the notice, a court can ensure that it is timely, accurate, and informative."⁹² The Court described such "trial court involvement in the notice process" as "inevitable," at least in cases with "numerous plaintiffs."⁹³

But a court's notice decision is not a "certification" decision. The Supreme Court held in *Hoffmann-La Roche* that a notice order is not a Rule 23 certification analogue, but a simple case management order under the modest Rule 83(b) provision, which provides that district judges "may 'regulate their practice in any manner not inconsistent with' federal or local rules."⁹⁴ Notice will not even be necessary in all cases because plaintiffs can sue alone; the opt-in requirement means those who have not joined have no rights at stake in its outcome.⁹⁵ Notice is more powerful and comprehensive when court-ordered, but plaintiffs can use informal notice methods. For example, ethics rules against soliciting clients do not apply to counsel strengthening clients' cases by inviting co-plaintiffs; plaintiffs' counsel can contact potential class members without court approval.⁹⁶ The lack of universal need for court notice further confirms that judicial power over notice does not imply power to reject the entire collective action.

Thus, plaintiffs can request notice and defendants can oppose it, just as the parties did in *Hoffmann-La Roche*. Arguably, the "inevitable" language of *Hoffmann-La Roche* lets courts *sua sponte* require plaintiffs to send court-approved notice. On a contested motion on notice, the defendant would likely make its motion challenging the entire collective action, as detailed below, at the same time. But neither judicial power over notice, nor plaintiffs' motions for such notice, provides any support for a collective action "certification" inquiry.

92. *Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, 171–72 (1989).

93. *Id.* at 171.

94. *Id.* at 172 (quoting FED. R. CIV. P. 83(b)).

95. See 29 U.S.C. § 216(b) (2006) ("No employee shall be a party plaintiff to any such action unless he gives his consent in writing . . .").

96. See *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 101–02 (1981) (holding that order barring plaintiffs' counsel from inviting potential class members' participation "interfered" with counsel's ability to "inform potential class members" and "obtain information about the merits," and that any "order limiting communications between parties and potential class members" must be based on "specific findings . . . [of] potential abuses . . . [and] limit[] speech as little as possible"). *Gulf Oil* was a Rule 23 class action but "[t]he same justifications apply in the context of [a § 216(b)] action." *Hoffmann-La Roche*, 493 U.S. at 171.

2. *No motion and just one common issue required by rules that closely parallel § 216(b): Rule 20 joinder and original Rule 23(a)(3) “spurious class actions”*

a. *Collective actions as liberalized joinder, not Rule 23-style class actions*

As detailed above, most courts appear to view § 216(b) as an opt-in only variation on modern Rule 23. Section 216(b), a 1938 and 1947 statute, was never created as a variant on modern Rule 23, which was enacted in 1966.⁹⁷ Rather, § 216(b) closely parallels a different aggregate litigation device: as originally understood, § 216(b) is a *joinder* rule, and a liberalizing one, with a streamlined process for more plaintiffs to join a case by filing a simple “written consent.”

The one Supreme Court case on collective actions, *Hoffmann-La Roche*, does not address whether such cases require “certification” motions, nor the standard for such motions—but it repeatedly uses the word “joinder” for the process of similarly situated workers opting into a case.⁹⁸ A worker filing a “consent form . . . fulfill[s] the statutory requirement of *joinder*,”⁹⁹ the Court noted; its decision on court supervision of worker notification was based on courts’ “managerial responsibility to oversee the *joinder* of additional parties.”¹⁰⁰

Perhaps *Hoffmann-La Roche* used the word “joinder” in only a general sense; but even more informatively, the case law contemporaneous with the enactment of § 216(b) constantly described § 216(b) opt-in as “joinder.” *Pentland v. Dravo Corp.*,¹⁰¹ in allowing a § 216(b) suit in 1945 summarized the early 1940s case law on § 216(b): “all think in terms of permissive *joinder* of parties.”¹⁰² Many of the cases that the court cited in *Pentland* did not actually use the word “joinder,”¹⁰³ but a survey of 1940s cases using the term confirms that *Pentland* was right: many of the early cases viewed § 216(b) as a form of joinder, not as a form of class action:

- “The distinction between a true class action . . . [under]

97. Compare 29 U.S.C. § 216(b) (1934 & Supp. V 1938) (enacting § 216(b)), and 29 U.S.C. § 216(b) (1946 & Supp. V 1947) (amending § 216(b)), with FED. R. CIV. P. 23 (1966) (enacted 1966).

98. *Hoffmann-La Roche*, 493 U.S. at 168, 171, 173.

99. *Id.* at 168 (emphasis added).

100. *Id.* at 170–71 (emphasis added).

101. 152 F.2d 851 (3d Cir. 1945).

102. *Id.* at 855 (emphasis added).

103. *Id.* at 853 (discussing three groups of cases interpreting the nature of § 216(b)). *Pentland* cannot be faulted; no Westlaw search for the word “joinder” was possible in 1946.

Rule 23 . . . and a *joinder* of suits by employees ‘similarly situated’ . . . is clear[]”¹⁰⁴

- “[This] is not a true class suit but is merely a unique representative action permitted by Section 16(b) of the Fair Labor Standards Act, which section provides for permissive *joinder* of claims of other employees similarly situated.”¹⁰⁵
- “Congress . . . by Section 16(b) of the Fair Labor Standards Act of 1938 . . . intended to permit a *joinder* of such suits by employees ‘similarly situated’”¹⁰⁶
- “[T]he intention of Congress [was] to authorize the *joinder* of [wage] actions into one proceeding to prevent the necessity of separate actions where the questions of law and facts are the same and to, therefore, avoid the multiplicity of suits.”¹⁰⁷

Case law through the 1970s continued to describe § 216(b) as a “joinder” device.¹⁰⁸ The view of § 216(b) as joinder apparently ended only after the 1966 enactment of modern Rule 23; modern class actions then became the predominant form of aggregate litigation.¹⁰⁹ This left the misimpression that § 216(b) collective actions are a *tighter version of class actions* (because of the opt-in requirement) rather than a *liberalized version of joinder*.

Plaintiffs joining claims under Rule 20 need not do anything like what courts currently require of plaintiffs in a § 216(b) collective action. Under Rule 20, plaintiffs suing together need not file any

104. *Calabrese v. Chiumento*, 3 F.R.D. 435, 437 (D.N.J. 1944) (emphasis added) (denying dismissal).

105. *Wright v. U.S. Rubber Co.*, 69 F. Supp. 621, 622–23 (S.D. Iowa 1946) (emphasis added) (citation omitted) (denying dismissal).

106. *Lofther v. First Nat’l Bank of Chi.*, 45 F. Supp. 986, 988 (N.D. Ill. 1941) (emphasis added).

107. *Winslow v. Nat’l Elec. Prods. Corp.*, 5 F.R.D. 126, 129 (W.D. Pa. 1946) (emphasis added).

108. *E.g.*, *Locascio v. Teletype Corp.*, 74 F.R.D. 108, 111 (N.D. Ill. 1977) (observing that § 216(b) “authorizes joinder of plaintiffs who file a consent”); *Berry v. Crocker Nat’l Bank*, No. 75-0711, 1976 WL 673, at *6 (N.D. Cal. Apr. 22, 1976) (recognizing § 216(b) as “merely a joinder provision”); *Mistretta v. Sandia Corp.*, No. 74-536, 1975 WL 195, at *4 (D.N.M. Apr. 23, 1975) (“The liberal joinder device available under § 216 makes joinder simple.”).

109. *See, e.g.*, Edward A. Purcell, Jr., *The Class Action Fairness Act in Perspective: The Old and the New in Federal Jurisdictional Reform*, 156 U. PA. L. REV. 1823, 1851 n.98 (2008) (“From the late 1960s into the early 1980s, the federal courts were unwilling to certify even relatively simple ‘single event/single situs’ mass accident torts as class actions, but by the late 1980s they were certifying far more complicated and multifaceted [classes]. . . . The next decade brought a growing number of such cases into the national courts.”); Adam N. Steinman, *What Is the Erie Doctrine? (And What Does It Mean for The Contemporary Politics of Judicial Federalism?)*, 84 NOTRE DAME L. REV. 245, 287 (2008) (“[D]uring the 1970s and 1980s, federal courts interpreted . . . Rule 23(b)(3) to allow . . . large-scale class actions . . .”).

motion to allow joinder; they merely state all plaintiffs' names together on the caption of their complaint.¹¹⁰ If more individuals want to join after the suit commences, Rule 24(b)(1), in express terms, requires them to file a motion to intervene as plaintiffs.¹¹¹ The text of § 216(b) requires no motion for opt-in, mandating only that the new plaintiff "gives his consent in writing . . . and such consent is filed in the court."¹¹²

More importantly, the standards under Rule 20 (joinder) and Rule 24 (intervention) are far more liberal than a class action-style seven-part inquiry under Rule 23. Joinder requires only that the parties sue about "the same transaction, occurrence, or series of transactions or occurrences," and share just "any question of law or fact common to all plaintiffs."¹¹³ Both requirements are permissive: only one "common question" is required,¹¹⁴ even if plaintiffs differ in other ways or seek different relief;¹¹⁵ and the "transaction or occurrence" rule requires only "logically related events,"¹¹⁶ not the same events.¹¹⁷ This liberal joinder standard dates to 1938, when the original Federal Rules of Civil Procedure eliminated "the old formalistic approach"¹¹⁸ of strict common law and code pleading in favor of broadly joining multiple parties.¹¹⁹ Ever since, courts have granted joinder broadly to serve "principles of trial convenience and efficiency."¹²⁰ Accordingly,

110. FED. R. CIV. P. 20(a)(1).

111. FED. R. CIV. P. 24(b)(1).

112. 29 U.S.C. § 216(b) (2006).

113. FED. R. CIV. P. 20(a)(1); *see also* FED. R. CIV. P. 24(b)(1)(B) (requiring the same showing on an intervention motion; that a claim "shares with the main action a common question of law or fact").

114. *See* *Carye v. Long Beach Mortg. Co.*, 470 F. Supp. 2d 3, 8 (D. Mass. 2007) (observing that Rule 20 does "not require the precise concurrence of all factual and legal issues"); *Puricelli v. CNA Ins. Co.*, 185 F.R.D. 139, 143 (N.D.N.Y. 1999) (recognizing that commonality of one legal or factual issue is sufficient).

115. FED. R. CIV. P. 20(a)(3) (providing that each party need not seek "all the relief demanded [because] [t]he court may grant judgment to one or more" separately).

116. 7 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, *FEDERAL PRACTICE AND PROCEDURE* § 1653 (3d ed. 2001 & 2011 Supp.); *see also* *Montgomery v. STG Int'l, Inc.*, 532 F. Supp. 2d 29, 35 (D.D.C. 2008) (noting that the requirement that "claims arise from the same transaction or occurrence or series of transactions or occurrences" is met "if the claims are logically related").

117. *See* *Mosley v. Gen. Motors Corp.*, 497 F.2d 1330, 1333 (8th Cir. 1974) (noting that "[a]bsolute identity of all events is unnecessary").

118. Richard D. Freer, *Avoiding Duplicative Litigation: Rethinking Plaintiff Autonomy and the Court's Role in Defining the Litigative Unit*, 50 U. PITT. L. REV. 809, 815 (1989).

119. *Id.*; *see* John C. McCoid, *A Single Package for Multiparty Disputes*, 28 STAN. L. REV. 707, 707 (1976) (describing the public and judicial concern over repetitious litigation and inconsistency if and when several suits are handled independently).

120. *Vulcan Soc'y of Westchester Cnty. v. Fire Dep't of City of White Plains*, 82 F.R.D. 379, 384, 390 (S.D.N.Y. 1979) (citing "principles of trial convenience and efficiency" to support denying misjoinder motion in suit alleging discriminatory practices by fire departments); *see also* *United Mine Workers of Am. v. Gibbs*, 383

joinder extends to broad patterns, such as mass tort claims about defects or practices affecting many, or discrimination claims flowing from a company practice negatively impacting an entire group.¹²¹

If Rule 20 requires so little to aggregate plaintiffs' claims into one suit, then how can § 216(b), a statute *liberalizing* joinder procedure, be seen as requiring an evidentiary showing of greater commonality than traditional joinder? The simple answer is that § 216(b) should not be misinterpreted in that manner.

b. Collective actions as parallel to original Rule 23(a)(3) "spurious" opt-in classes requiring no "certification" motion

Courts incorrectly view § 216(b) collective actions as akin to modern Rule 23 classes requiring judicial oversight. Rather, §216(b) originated at a time when Rule 23 authorized no such oversight. The modern Rule 23(b), enacted in 1966, establishes three types of class actions, but the original Rule 23(a) from 1938 established a different set of three types:

(a) If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, . . . one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue . . . when the character of the right sought to be enforced [is:] . . .

(1) joint or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;

U.S. 715, 724 (1966) (describing the "weighty policies of judicial economy and fairness" as strongly supporting a broadly construed joinder rule); *Am. Ins. Co. v. St. Jude Med., Inc.*, 597 F. Supp. 2d 973, 980 (D. Minn. 2009) (determining that joining insurance broker with insurer would promote a "just, speedy, and inexpensive determination" of all issues" (citations omitted)); *In re DIRECTV, Inc.*, No. 02-5912, 2004 WL 2645971, at *3 (N.D. Cal. July 26, 2004) ("The purpose of [Rule 20] is to promote trial convenience and to expedite the final determination of disputes, thereby preventing multiple lawsuits."); *Insolia v. Philip Morris Inc.*, 186 F.R.D. 547, 549 (W.D. Wis. 1999) ("The permissive joinder doctrine is animated by several policies, including the promotion of efficiency, convenience, consistency, and fundamental fairness." (citations omitted)).

121. See *Mosley*, 497 F.2d at 1334 (holding that "the district court abused its discretion in severing the joined actions" because, though members suffered different effects, sufficient evidence of pattern of conduct and common issue existed regarding the defendant's discriminatory policy); see also *Puricelli v. CNA Ins. Co.*, 185 F.R.D. 139, 141, 143-44 (N.D.N.Y. 1999) (allowing joinder of former employees' claims of age discrimination pattern); *Diaz v. Allstate Ins. Grp.*, 185 F.R.D. 581, 589-91 (C.D. Cal. 1998) (finding sufficient evidence of conspiracy to join insurer and contractors on allegations that contractors, at insurer's behest, collusively overcharged or used inadequately cheap materials); *Kuechle v. Bishop*, 64 F.R.D. 179, 180-81 (N.D. Ohio 1974) (allowing joinder because defendant allegedly scheming with others to defraud plaintiff raised common question of duties defendant and conspirators owed).

(2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or

(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought.¹²²

The two most common types paralleled the two main joinder categories. If plaintiffs sued on shared “joint” interests under Rule 23(a)(1), the class automatically included all members—paralleling Rule 19 mandatory joinder.¹²³ But if plaintiffs sued on “several” interests, like distinct damages claims, Rule 23(a)(3) authorized what courts called a “spurious class action,”¹²⁴ covering only named plaintiffs and those who affirmatively opted in¹²⁵—paralleling Rule 20 permissive joinder and § 216(b) collective actions.¹²⁶ Hence early giants of civil procedure such as Harry Kalven and James William Moore,¹²⁷ and early courts applying Rule 23(a)(3),¹²⁸ expressed the

122. FED. R. CIV. P. 23(a) (1938).

123. See FED. R. CIV. P. 19(a) (1939) (requiring that “[s]ubject to the provisions of Rule 23 . . . persons having a *joint* interest shall be made parties” (emphasis added)).

124. See, e.g., *Martinez v. Maverick Cnty. Water Control & Improvement Dist. No. 1*, 219 F.2d 666, 672 (5th Cir. 1955) (noting that 23(a)(3) “is termed the *spurious class suit*”); *Weeks v. Bareco Oil Co.*, 125 F.2d 84, 89 n.5 (7th Cir. 1941) (calling 23(a)(3) case “the type denominated a ‘spurious’ class suit” (citation omitted)).

125. See, e.g., *Martinez*, 219 F.2d at 672 (noting that a ruling under 23(a)(3) “does not bind the class, but binds only those actually before the court”); *Oppenheimer v. F. J. Young & Co.*, 144 F.2d 387, 390 (2d Cir. 1944) (“[M]embers of the class who are not joined . . . will not be affected . . . [T]he decision will only be res judicata as to the plaintiffs and the parties who have intervened.”); 3B JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE § 23.60, at 23-439 (2d ed. 1996) (noting that “under original Rule 23 . . . in the spurious class action the judgment was conclusive only upon the parties and privies to the proceeding”).

126. See FED. R. CIV. P. 20(a) (1939) (providing that “[a]ll persons may join in one action as plaintiffs if they assert any right to relief jointly, *severally*, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences” (emphasis added)).

127. Harry Kalven, Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 703 (1941) (quoting 2 JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE § 2240 (1st ed. 1938)); see also WRIGHT, MILLER & KANE, *supra* note 116, § 1752 (“[S]ubdivision [23(a)(3)] was merely a device for permissive joinder of parties.”).

128. See, e.g., *Lipsett v. United States*, 359 F.2d 956, 959 (2d Cir. 1966) (“Rule 23(a)(3) is merely a device for permissive joinder”); *Martinez*, 219 F.2d at 672 (noting that a 23(a)(3) class, “formed solely by the presence of a common question of law or fact, is in reality a permissive joinder device”); *Weeks*, 125 F.2d at 89 n.5 (“[A]s the Federal Rules provide for permissive joinder they should also provide for the counterpart, the [23(a)(3)] class action based on a common question of law or fact.”); *Hunter v. S. Indem. Underwriters, Inc.*, 47 F. Supp. 242, 243 (E.D. Ky. 1942) (deeming 23(a)(3) “merely a ‘joinder device’” allowing those with “a common interest in the questions of law or fact . . . to participate”).

A few courts disagreed, but only in viewing Rule 23(a)(3) more liberally—as allowing automatic-inclusion, opt-out damages class actions—as under modern Rule 23(b)(3). E.g., *Union Carbide & Carbon Corp. v. Nisley*, 300 F.2d 561, 588–89 (10th Cir. 1961) (surveying whether unnamed, non-opted-in plaintiffs can participate in 23(a)(3) spurious class).

view that a spurious class suit “is a permissive joinder device.”¹²⁹

Thus, Rule 23(a)(3) spurious class actions and § 216(b) collective actions were contemporary 1938 creations that courts viewed as similar: both aggregated damages claims for only those who opted in and both were joinder liberalizations. Some courts expressly linked § 216(b) collective actions to Rule 23(a)(3) spurious class actions. For example, in *Pentland*, one of the first appellate decisions on § 216(b), the court “classif[ied] the proceeding as a spurious class suit”¹³⁰ and noted that the early district court § 216(b) cases also “classif[ied] themselves as spurious class actions.”¹³¹ Numerous other decisions, mostly from the era when original Rule 23 was in place, similarly cast § 216(b) collective actions as “spurious” class actions analogous to those of original Rule 23(a)(3).¹³²

The most critical point about § 216(b) and original Rule 23(a)(3) is that *neither required a “certification” motion of any kind.* The text of original Rule 23 required no such motion, and judicial practice at the time was that a case filed as a spurious class action, or a § 216(b) collective action, could proceed freely unless and until the defendant filed a motion challenging it. Such a motion might be styled a “motion to strike” the complaint’s class allegations or a “motion to dismiss” the allegations. Either way, the defendant had to make the motion and carry the burden. That was true in early § 216(b) collective actions:

- *McNichols v. Lennox Furnace Co.*¹³³ denied a motion to dismiss the “allegation in the complaint that the employees in whose behalf the action is maintained are ‘similarly situated.’”¹³⁴

129. Kalven & Rosenfield, *supra* note 127, at 703 (citation omitted).

130. *Pentland v. Dravo Corp.*, 152 F.2d 851, 853 (3d Cir. 1945).

131. *Id.* at 855.

132. *E.g.*, *Kinney Shoe Corp. v. Vorhes*, 564 F.2d 859, 862 (9th Cir. 1977) (“A FLSA class action under § 216(b) is ‘spurious,’ wherein the res judicata effect extends only to the named parties, while in a ‘true’ Rule 23 class action, the res judicata effect of a judgment extends to the entire class.” (citations omitted)), *abrogated by Hoffmann-La Roche, Inc. v. Sperling*, 493 U.S. 165 (1989); *Kainz v. Anheuser-Busch, Inc.*, 194 F.2d 737, 740 (7th Cir. 1952) (“[S]purious class actions . . . have been approved where separate employees join to recover compensation under the Fair Labor Standards Act.”); *McComb v. Frank Scerbo & Sons, Inc.*, 177 F.2d 137, 140 (2d Cir. 1949) (noting that 1947 enactment of opt-in rule “limited the original [§ 216(b)] provision for a representative or class action—of the so-called ‘spurious’ form, not binding upon nonappearing parties—to require a definite consent in writing . . . before [one] could be thus represented” (citing *Pentland*, 152 F.2d at 851)); *Kam Koon Wan v. E. E. Black, Ltd.*, 75 F. Supp. 553, 565 (D. Haw. 1948) (discussing “a spurious class action such as this brought under § 216 of the Fair Labor Standards Act”).

133. 7 F.R.D. 40 (N.D.N.Y. 1947).

134. *Id.* at 42 (explaining that the allegations in the complaint are sufficient

- *Pentland v. Dravo Corp.* reversed the grant of a motion “for judgment on the pleadings” against plaintiff’s lawsuit, seeking to include others similarly situated who were not yet plaintiffs.¹³⁵
- *Kam Koon Wan v. E. E. Black, Ltd.*¹³⁶ granted the defendant’s motion for partial summary judgment, but without questioning the propriety of adjudicating the claims of “[t]he 313 persons similarly situated in whose behalf the original plaintiff also sued” and who under § 216(b) “sought to and succeeded in becoming parties plaintiff.”¹³⁷

In an identical manner, in the larger body of spurious class action case law, it was up to the defendant to move to dismiss or to strike the class allegations:

- In *Lipsett v. United States*,¹³⁸ the defendant filed a “motion to strike the allegations of a class action,” which the district court had granted before the Second Circuit reversed the dismissal.¹³⁹
- In *Zahn v. Transamerica Corp.*,¹⁴⁰ the Third Circuit approved the securities class action when ruling on a motion to dismiss.¹⁴¹
- In *Kainz v. Anheuser-Busch, Inc.*,¹⁴² the defendant’s motion to dismiss targeted the class allegations and joinder of plaintiffs, with defendant moving only “that the class action be dismissed . . . [and] other plaintiffs named in the complaint be dropped.”¹⁴³

In none of these cases did any court question the procedural posture of leaving the defendant to file a motion challenging the propriety of a class action.

The original Rule 23 drew criticism for letting plaintiffs sue without judicial scrutiny of whether class actions were proper. Wright and Miller advocated judicial oversight: “the court always should be free to strike . . . references to the representation of the absent persons,

because they “detail the nature of the work performed at the defendant’s place of business by the employees, and [also] specific recurring instances where . . . employees are required to perform services for which they have not been compensated”).

135. *Pentland*, 152 F.2d at 852.

136. 75 F. Supp. 553 (D. Haw. 1948).

137. *Id.* at 564.

138. 359 F.2d 956 (2d Cir. 1966).

139. *Id.* at 958.

140. 162 F.2d 36 (3d Cir. 1947).

141. *Id.* at 38, 49–50.

142. 194 F.2d 737 (7th Cir. 1952).

143. *Id.* at 739.

and confine the litigation to those actually present, when the individual questions loom so large that convenient judicial administration will not be served by . . . a class action.”¹⁴⁴ Yet Wright and Miller noted the lack of original Rule 23 authority for such oversight: “It is not clear that this course could be followed in a federal court under the original rule.”¹⁴⁵ Similarly, in *Lipsett*, one of the last appellate class action decisions under original Rule 23, the court noted there was less rationale for judicial supervision of *spurious* class actions because they bind only those who opt in, not absent class members unaware of the case.¹⁴⁶

In sum, § 216(b) collective actions originated at a time when Rule 23 did not authorize the judicial oversight that it does today, and the similar Rule 23(a)(3) spurious class actions were particularly free of oversight. Thus, the 1966 amendment to Rule 23 creating judicial oversight of true *automatic-inclusion* class actions does not grant authority for judicial oversight of *opt-in* § 216(b) actions.

3. *How the error started: few precedents until a 1990s conflation of approving “notice” and approving collective actions themselves*

If collective action “certification” was a mistake from the start, whose bad idea was it? What case was the “patient zero,” infecting later courts with this now-pandemic error? Often there is no clear “first” case in a line of authority: several contemporaneous cases may hold similarly; or the first case may not be the most influential. But here, a clear answer exists.

For several decades after the enactment of § 216(b), there generally were no certification motions; the only collective action certification inquiries seem to be erroneous confluents of Rule 23 and § 216(b) occurring when plaintiffs pled both. Some plaintiffs just got it wrong, seeking a Rule 23 class for a § 216(b)-covered claim, and the court failed to correct the error. In *Lusardi v. Xerox Corp.*,¹⁴⁷ the plaintiffs sued “under the ADEA only on behalf of a Rule 23 class.”¹⁴⁸ The court required plaintiffs to replace Rule 23 with § 216(b) in the complaint, but it still ruled on “certification” of the § 216(b) collective action after plaintiffs filed a certification motion:

144. WRIGHT, MILLER & KANE, *supra* note 116, § 1752.

145. *Id.*

146. *Lipsett v. United States*, 359 F.2d 956, 959 (2d Cir. 1966); *see Pirrone v. N. Hotel Assocs.*, 108 F.R.D. 78, 82 (E.D. Pa. 1985) (“[B]ecause potential plaintiffs who do not opt in to an FLSA class action will not be bound by the court’s judgment, due process does not require notice to potential plaintiffs.”).

147. 99 F.R.D. 89 (D.N.J. 1983).

148. *Id.* at 93 n.7.

“Plaintiffs . . . seek certification under . . . [§ 216(b)] as an alternative to Rule 23. . . . [U]nder this authority a class action can go forward.”¹⁴⁹

Other § 216(b) “certification” inquiries arose in “hybrid” actions when plaintiffs brought one § 216(b)-covered claim (e.g., EPA wage discrimination) and another to which Rule 23 applied (e.g., Title VII gender discrimination). A hybrid could be a Rule 23 class action for one claim (e.g., Title VII) and a § 216(b) collective action opt-in action for the other (e.g., EPA),¹⁵⁰ but some courts improperly required “certification” for both. For example, in *Hubbard v. Rubbermaid, Inc.*,¹⁵¹ an EPA and Title VII hybrid,¹⁵² the court declared it would decide the propriety of a § 216(b) EPA collective action (on the EPA claim) on the same “certification motion” plaintiffs filed for the Rule 23 Title VII class: “[On] plaintiff’s ability to maintain a class action . . . under 29 U.S.C. § 216(b)[,] [t]he court will reach these questions when it considers the pending class certification motion.”¹⁵³

Despite oddities like *Lusardi* and *Hubbard*, § 216(b) “certification” inquiries were rarities for decades. A search for § 216(b) certification motions is telling¹⁵⁴: of 836 cases, only 12 were before 1990, but there were 29 cases in the 1990s and 795 cases since 2000. This sharp uptick only partly reflects the increased number of FLSA suits, which increased 348% from 1997 to 2007¹⁵⁵ for reasons that “includ[e] economic pressures [and] the increased number of plaintiffs’ [employment] lawyers.”¹⁵⁶ But the 1990s’ spike in certification inquiries also reflects the Supreme Court’s creation in *Hoffmann-La Roche* of a judicial role in supervising § 216(b) “notice.” In 1995, the Fifth Circuit became the first federal appellate court to accept the

149. *Id.* at 93.

150. *E.g.*, *Godfrey v. Chelan Cnty. PUD*, No. CV-06-00332, 2007 WL 2327582, at *2, *4 (E.D. Wash. Aug. 10, 2007) (allowing simultaneous Rule 23 class action for state-law wage claims and § 216(b) collective action for FLSA wage claims); *Ansoumana v. Gristede’s Operating Corp.*, 201 F.R.D. 81, 84 (S.D.N.Y. 2001) (same).

151. 436 F. Supp. 1184 (D. Md. 1977).

152. *Id.* at 1186.

153. *Id.* at 1186 n.1.

154. The search on Westlaw, last updated January 18, 2012, had the following parameters: ((motion mov!) /s (class collective) /s certif!) /p (“216(b)” “626(b)” (flsa /s “16(b)”)).

155. See James C. Duff, *Judicial Business of the United States Courts: 2007 Annual Report of the Director*, ADMIN. OFFICE OF THE U.S. COURTS 150 (2007), <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2007/front/JudicialBusinesspdfversion.pdf> (last visited Nov. 11, 2011) (tabulating 7310 FLSA suits in 2007); Leonidas Ralph Mecham, *Judicial Business of the United States Courts: 1997 Annual Report of the Director*, ADMIN. OFFICE OF THE U.S. COURTS 133 (1997), <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/1997/appendices/c2asep97.pdf> (last visited Nov. 11, 2011) (tabulating 1633 FLSA suits in 1997).

156. Ruan, *supra* note 44, at 735.

Court's invitation with its decision in *Mooney v. Aramco Services Co.*,¹⁵⁷ which upheld, and delineated, a use of the now-standard two-step certification approach premised on a need for a ruling on *Hoffmann-La Roche* notice:

The first determination is made at the so-called “notice stage” . . . [as to] whether notice of the action should be given to potential class members. . . . [T]his determination is made using a fairly lenient standard, and typically results in “conditional certification” . . . [and] putative class members [being] given notice . . . to “opt-in.” . . . The second determination is typically precipitated by a [defense] motion for “decertification” . . . after discovery is largely complete.¹⁵⁸

Mooney is really the first precedent for the two-stage certification process, but it cited only two district court decisions as support, both of which were weak precedents.¹⁵⁹ One spoke of certification only at the moment of “notice,” not as two stages.¹⁶⁰ The other did use a two-stage analysis but had especially little precedential value due to a tortured procedural history: different judges had the case at each “stage,” and the opinion adopting a two-stage process was reversed on other grounds.¹⁶¹

Oddly, *Mooney* is the leading precedent for a two-stage approach it “specifically [did] not endorse”: “[T]he ‘opt-in’ plaintiffs were not similarly situated. In so holding we specifically *do not* endorse the methodology employed by the district court, and *do not* sanction any particular methodology.”¹⁶² The two other precedents for applying

157. 54 F.3d 1207 (5th Cir. 1995).

158. *Id.* at 1213–14.

159. See *Sperling v. Hoffmann-La Roche, Inc.*, 118 F.R.D. 392, 412 (D.N.J. 1988) (speaking of certification only at the moment of “notice,” not as two distinct stages), *aff'd*, 862 F.2d 439 (3d Cir. 1988), *aff'd*, 493 U.S. 165 (1989); *Lusardi v. Xerox Corp.*, 118 F.R.D. 351 (D.N.J. 1987) (applying originally a two-stage process; however, the opinion adopting that process was reversed on other grounds), *mandamus granted sub nom. Lusardi v. Lechner*, 855 F.2d 1062 (3d Cir. 1988), *modified sub nom. Lusardi v. Xerox Corp.*, 122 F.R.D. 463 (D.N.J. 1988); see also *Mooney*, 54 F.3d at 1213 & n.6 (finding both *Sperling* and *Lusardi* to be examples of two-stage analysis).

160. *Sperling*, 118 F.R.D. at 412.

161. *Lusardi*, 118 F.R.D. 351. *Mooney* stated that *Lusardi* used the “two-step analysis.” *Mooney*, 54 F.3d at 1213. However, in *Lusardi*, different district judges handled each “stage,” and the declaration of a two-stage process came only in the second judge’s opinion—leaving unclear whether the analysis was purposely “two-stage” or simply a second judge reversing the first. *Lusardi*, 118 F.R.D. at 353 (Judge Lechner’s decertification decision, noting that Judge Stern’s certification decision was in 1983). Also, the *Lusardi* decertification decision declaring a two-stage process was reversed and remanded on other grounds. *Lechner*, 855 F.2d 1062. On remand, the district court simply held in a brief decision that “this case is not suitable for class treatment” because of fact differences among plaintiffs, without further discussion of a two-stage inquiry. *Lusardi*, 122 F.R.D. at 467.

162. *Mooney*, 54 F.3d at 1216.

the two-stage approach, the Tenth Circuit's *Hipp v. Liberty National Life Insurance Co.*¹⁶³ and the Eleventh Circuit's *Thiessen v. General Electric Capital Corp.*,¹⁶⁴ simply follow *Mooney*: *Hipp* cited only *Mooney* as circuit authority;¹⁶⁵ and *Thiessen* subsequently cited *Mooney* and *Hipp*.¹⁶⁶ District courts in the First,¹⁶⁷ Second,¹⁶⁸ Third,¹⁶⁹ Sixth,¹⁷⁰ Eighth,¹⁷¹ and Ninth¹⁷² Circuits cite *Mooney*, and sometimes *Hipp* and *Thiessen* too, because of the lack of controlling appellate decisions in those circuits.

Notably, the Eleventh Circuit got its analysis partly right before getting it wrong. In *Grayson v. K Mart Corp.*,¹⁷³ the court held that "section 216(b)'s 'similarly situated' requirement is less stringent than that for joinder under Rule 20(a)." ¹⁷⁴ Yet the court still required a certification motion where "plaintiffs bear the burden of demonstrating a 'reasonable basis' for their claim [through] . . . detailed allegations supported by affidavits."¹⁷⁵ In *Anderson v. Cagle's*,

163. 252 F.3d 1208 (11th Cir. 2001) (per curiam).

164. 267 F.3d 1095 (10th Cir. 2001).

165. *Hipp*, 252 F.3d at 1218–19 ("The two-tiered approach [discussed in *Mooney*] . . . appears to be an effective tool for district courts to use in managing these often complex cases, and we suggest that district courts in this circuit adopt it . . .").

166. *Thiessen*, 267 F.3d at 1102–03, 1105 (reasoning that "[a]rguably, the *ad hoc* approach is the best," and other courts' Rule 23-based analyses were incorrect because in § 216(b) cases, "Congress clearly chose not to have the Rule 23 standards apply[.] . . . instead adopt[ing] the 'similarly situated' standard").

167. See, e.g., *Kane v. Gage Merch. Servs., Inc.*, 138 F. Supp. 2d 212, 214 (D. Mass. 2001) (citing *Mooney* as primary authority supporting its decision to "apply the 'two-step' method").

168. See, e.g., *Scott v. Aetna Servs., Inc.*, 210 F.R.D. 261, 264 (D. Conn. 2002) (citing *Mooney* as primary authority and sole circuit-level authority for the proposition that "[c]ourts utilize a two-step approach to certifying collective actions under the FLSA").

169. See, e.g., *Felix De Asencio v. Tyson Foods, Inc.*, 130 F. Supp. 2d 660, 662 (E.D. Pa. 2001) (citing *Mooney* as primary authority and sole circuit authority for holding that in "FLSA representative actions, a two tier method for the burden of proving similarly situated plaintiffs has developed").

170. See, e.g., *Murton v. Measurecomp, LLC*, No. 07-3127, 2008 WL 5725631, at *2 (N.D. Ohio June 9, 2008) (citing *Mooney*, *Thiessen*, and *Hipp* in observing that "[a]lthough the Sixth Circuit has not addressed the procedure for certifying a collective action under the FLSA, the clearly prevailing approach involves a two-stage process").

171. See, e.g., *Koren v. SUPERVALU, Inc.*, No. 00-1479, 2003 WL 1572002, at *15 (D. Minn. Mar. 14, 2003) (citing *Mooney* as primary authority and sole circuit authority for the proposition that courts conduct a two-stage inquiry of "conditional certification" and "factual determination;" if plaintiffs "are not similarly situated, the district court decertifies the class").

172. See, e.g., *Wynn v. Nat'l Broad. Co.*, 234 F. Supp. 2d 1067, 1082 (C.D. Cal. 2002) (noting that "it appears the majority of courts prefer the *ad hoc*, two-tiered approach, as described in *Mooney*," and also citing *Hipp* as authority for applying the two-tiered approach).

173. 79 F.3d 1086 (11th Cir. 1996).

174. *Id.* at 1096.

175. *Id.* at 1097.

Inc.,¹⁷⁶ however, the Eleventh Circuit later joined the Tenth Circuit in rejecting a liberal joinder standard:

[T]he lenient standard we adopted in [] *Grayson* [applies to] a certification decision early in the litigation before discovery The “similarly situated” standard at the second stage is less “lenient” than at the first, as is the plaintiffs’ burden [T]he “similarly situated” standard at the second stage [is] “stricter” than that applied at the first stage [F]actors courts consider includ[e] “(1) disparate factual and employment settings of the individual plaintiffs; (2) the various defenses available to defendant[s] . . . individual to each plaintiff; [and] (3) fairness and procedural considerations.” . . . [S]imilarities . . . must extend “beyond the mere facts of job duties and pay provisions.”¹⁷⁷

The premise of the two-stage process, as elaborated by *Mooney* and repeated frequently since, is plausible enough: to order *Hoffmann-La Roche* notice, a court must deem the collective action proper; but that “notice stage” comes early in the case, so a court should revisit certification later, after discovery supports or undercuts the “similarly situated” allegations. Yet, this logic alone is not enough because courts wield only those powers granted by statute or by rule. As detailed above, given that § 216(b) was a *liberalization* of basic joinder, courts cannot disallow joinder of plaintiffs by requiring an evidentiary motion meeting a *heightened* joinder standard.¹⁷⁸ While courts properly supervise “notice,” that simple exercise of Rule 83 case management power does not authorize courts to reject an entire collective action. Thus, the only proper scrutiny a collective action faces is a Rule 12 dismissal or Rule 21 misjoinder motion, to either of which only the basic joinder requirement of a single common issue would apply.

4. *Less need for judicial scrutiny under § 216(b) than Rule 23: claims are presumptively similar, and opt-in lessens “agency” concern*

a. *The presumptively similar nature of § 216(b) claims lessens the need for judicial scrutiny of commonality*

The typical § 216(b) collective action is limited in subject-matter scope because it seeks unpaid wages by workers at the same employer.¹⁷⁹ While § 216(b) currently includes two other types of

176. 488 F.3d 945 (11th Cir. 2007).

177. *Id.* at 952–53 (citations omitted).

178. *See supra* Part II.A.2.a.

179. *See, e.g.,* *Morgan v. Family Dollar Stores, Inc.*, 551 F.3d 1233, 1239 (11th Cir. 2008) (discussing an FLSA suit for unpaid overtime wages among “[a]n opt-in class

claims—age discrimination and gender equal pay claims—§ 216(b) as enacted applied only to wage claims; the other two were added in the 1960s, and wage claims “are by far the most common” and most significant type of § 216(b) action.¹⁸⁰ Unlike Rule 23, which can apply to anything from mass tort to racism to bank fraud, § 216(b) applies only to a narrow range of subject matter, decreasing the odds that workers filing claims together are not sufficiently “similarly situated.” Accordingly, § 216(b) is a legislative determination that courts presumptively should allow aggregation into one lawsuit of claims filed under the same statute against the same employer.

Occasionally, workers’ § 216(b) claims may vary too widely for a collective action. While the typical § 216(b) collective action alleges that a certain pay practice affected all workers in a certain job category,¹⁸¹ a lawsuit conceivably could claim an adventurously wide array of FLSA violations. An early § 216(b) opinion gave a dated example of claims that might vary too much: “the claims of a plumber or a window washer or a scrub woman, each based on a separate contract of employment, might involve differing questions of law and of fact.”¹⁸² More modern examples of overly varied claims include delivery workers’ claims of sub-minimum wages,¹⁸³ store salespeople’s claims that managers “manipulate employee time cards so as to avoid paying for wages earned during rest breaks or overtime,”¹⁸⁴ and white-collar human resources or financial planning officers’ claims of being denied overtime under the FLSA administrative employee exemption.¹⁸⁵ Less conceivably, wage plaintiffs might file jointly with age discrimination plaintiffs, though no such bizarre efforts are known to have ever occurred.

The “similarly situated” requirement allows for denial of collective action status when plaintiffs’ claims vary too widely; however, as detailed above, the possibility of an overly broad § 216(b) action does

of 1,424 store managers” employed by the same discount retail store); *Archuleta v. Wal-Mart Stores, Inc.*, 543 F.3d 1226, 1228 (10th Cir. 2008) (considering an FLSA suit filed by a class of pharmacists all employed by Wal-Mart Stores, Inc.).

180. *Dorris supra* note 8, at 1251.

181. *See, e.g., Liu v. Jen Chu Fashion Corp.*, No. 00 Civ.4221 RJH AJP, 2004 WL 33412, at *1–2 (S.D.N.Y. Jan. 7, 2004) (claiming that both hourly workers and piece workers worked overtime without receiving overtime pay); *Ansoumana v. Gristede’s Operating Corp.*, 255 F. Supp. 2d 184, 190–91 (S.D.N.Y. 2003) (alleging that three supermarket corporations misclassified all of their delivery workers).

182. *Lofther v. First Nat’l Bank of Chi.*, 45 F. Supp. 986, 988 (N.D. Ill. 1941).

183. *See Ansoumana*, 255 F. Supp. 2d at 186 (distinguishing between delivery workers who make deliveries on foot and delivery workers who utilize different means).

184. *Alix v. Wal-Mart Stores, Inc.*, 868 N.Y.S.2d 372, 375 (App. Div. 2008).

185. *Deng v. Searchforce, Inc.*, No. 11-00254, 2011 WL 940828, at *1 (N.D. Cal. Mar. 17, 2011).

not justify Rule 23-style judicial scrutiny that courts are not authorized to undertake and that Congress never envisioned as a part of § 216(b) adjudication. Rather, as detailed in Part III below, courts can redress too-broad § 216(b) actions on defense motions arguing misjoinder or seeking to dismiss collective action allegations.

b. Lack of agency problems because § 216(b) requires opt-in, not automatic inclusion

Ultimately, the key question is whether § 216(b) actions feature the “principal-agent problem” that justifies close judicial scrutiny of class actions: that class counsel, with the named plaintiffs’ collusion or indifference, can sell out or neglect the interests of the masses of unnamed class members.¹⁸⁶ Jonathan Macey and Geoffrey Miller give a classic summary of the agency problem:

[P]laintiffs’ class . . . attorneys function essentially as entrepreneurs who bear a substantial amount of the litigation risk and exercise nearly plenary control over all important decisions in the lawsuit. The absence of client monitoring raises the specter that the entrepreneurial attorney will serve her own interest at the expense of the client. . . . [E]xisting regulations are extraordinarily ineffective at aligning the interests of attorney and client¹⁸⁷

Such agency problems may arise innocently, as class members defer to counsel for various reasons: counsel’s greater expertise and cultivation of the client relationship; named plaintiffs’ receipt of court-authorized “incentive payments” making them disproportionately pleased with the case outcome;¹⁸⁸ and the disparity between counsel’s heavy stake and each member’s modest stake.¹⁸⁹ Less innocently, because of unlawful “kickbacks” from attorneys,

186. PINDYCK & RUBINFELD, *supra* note 15, at 609.

187. Macey & Miller, *supra* note 17, at 3; *see* Coffee, *supra* note 17, at 292 (asserting that class actions “confer[] vast discretion on plaintiffs’ attorneys,” “creating principal-agent problems that remain intractable despite repeated efforts by Congress and the courts to curb highly visible abuses”); Alexandra Lahav, *Fundamental Principles for Class Action Governance*, 37 IND. L. REV. 65, 65 (2003) (criticizing class actions as “governed by [plaintiffs’] attorneys with limited judicial oversight”); *cf.* Beisner et al., *supra* note 17, at 1451 (noting plaintiff attorneys’ responses to charges that they take on class actions only to reap large profits).

188. *See* Nantiya Ruan, *Bringing Sense to Incentives: An Examination of Incentive Payments to Named Plaintiffs in Employment Discrimination Class Actions*, 10 EMP. RTS. & EMP. POL’Y J. 395, 411–25 (2006) (discussing why incentive payments are appropriate for named plaintiffs based on, among other considerations, the disproportionate amount of risk they assume compared to unnamed members of a class).

189. *See* Lahav, *supra* note 187, at 126 (asserting that “direct and active class member participation” in class actions seeking small per-person recoveries is infeasible because “participation is too expensive in relation to the interests at stake”).

named plaintiffs may allow high legal fees such as those paid by the now-notorious, but once well-respected, plaintiff-side class action firm Milberg Weiss.¹⁹⁰

Rule 23 has always granted judges unusual powers to police the decisions of class members and attorneys on matters courts normally have no authority to scrutinize. Even original Rule 23's modest requirements included judicial scrutiny of settlements;¹⁹¹ the far stricter modern Rule 23 requires plaintiffs to file a class certification motion proving that: (1) their class is numerous enough to make joinder impractical; (2) members' claims are similar enough; and (3) class counsel are sufficiently qualified.¹⁹² Academics persuaded of agency problems, though, propose even more class action restrictions:

- using opt-in for Rule 23 classes,¹⁹³ because opt-in cases create “competition” as multiple firms “litigate opt-in class[es] . . . with the same defendants”¹⁹⁴ and are “less likely to overwhelm defendants”;¹⁹⁵
- creating “guardians ad litem to represent the interest[s]” of small-claims class members and to assure scrutiny of settlements and fees;¹⁹⁶
- stressing class member “exit” rights (i.e., opt-out) more than “voice” rights (i.e., lead plaintiffs' influence), because exit “encourage[s] a competition that directly benefits the class member,” while “voice . . . cause[s] counsel to curry favor with a limited number” of plaintiffs;¹⁹⁷
- requiring more detailed class disclosures so members can police counsel better as to settlements¹⁹⁸—or, in the view of other critics, requiring *less* disclosure because its cost risks

190. See Jonathan D. Glater, *Class-Action Lawyer Given a 30-Month Prison Term for Hiding Kickbacks*, N.Y. TIMES, June 3, 2008, at C3 (reporting that a federal district judge sentenced Melvyn I. Weiss to 30 months in prison, fined him \$250,000, and ordered him to pay \$9.8 million in forfeitures following Weiss's conviction for covering up illegal plaintiff kickbacks).

191. See FED. R. CIV. P. 23(c) (1938) (“A class action shall not be dismissed or compromised without the approval of the court.”).

192. FED. R. CIV. P. 23(a).

193. See, e.g., John Bronsteen & Owen Fiss, *The Class Action Rule*, 78 NOTRE DAME L. REV. 1419, 1447 (2003) (advocating for Rule 23 opt-in due to the “public character of adjudication as opposed to settlement”).

194. Coffee, *supra* note 17, at 338.

195. *Id.* at 344.

196. Macey & Miller, *supra* note 17, at 4; see Lahav, *supra* note 187, at 128 (proposing judicial appointment of a “devil's advocate” to scrutinize settlements otherwise lacking adversarial scrutiny).

197. Coffee, *supra* note 17, at 328–29.

198. Lahav, *supra* note 187, at 123.

the competing agency problem of under-incentivizing attorneys;¹⁹⁹ and

- holding court-run “auction[s] for plaintiffs’ claims, under which attorneys (and others) could bid for the right to bring the litigation and gain the benefits,” in order to create a more competitive market for serving classes.²⁰⁰

Others see agency cost fears as overblown or insufficient to justify restrictions that can stifle reform-minded class actions.²⁰¹

Nonetheless, arguments for restricting class actions have the upper hand, with politicians blasting class action lawyers for betraying their clients,²⁰² and Congress continuing to enact restrictions.²⁰³

In two critical ways, however, § 216(b) collective actions lack the key agency concerns that justify judicial scrutiny of Rule 23 class actions. First, under § 216(b), only those who affirmatively opt in are participants; only opt-ins are bound by any judgment, are party to any settlement, or otherwise have rights at stake in the decisions of class counsel.²⁰⁴ Second, § 216(b) opt-ins are actual “party plaintiff[s],” not just unnamed class members.²⁰⁵ Not only must each potential plaintiff individually decide to join a collective action, but typically each must personally participate in discovery.²⁰⁶ In *Krueger v. New York*

199. See Macey & Miller, *supra* note 17, at 4 (“The high cost of notifying absent class members when potential recovery is very small deters entrepreneurial attorneys from bringing meritorious suits. Thus, the rule harms, rather than protects, absent class members.”).

200. *Id.* at 6.

201. See, e.g., Merritt B. Fox, *Why Civil Liability for Disclosure Violations When Issuers Do Not Trade?*, 2009 WIS. L. REV. 297, 331–32 (defending controversial “fraud-on-the-market class-action lawsuit[s]” by arguing that “[d]espite the weakness of its compensatory justification, the cause of action serves important deterrence functions that are unlikely to be equally well performed by public enforcement”); Gilles & Friedman, *supra* note 17, at 104–05 (“Where the conventional wisdom has gone wrong, however, is in condemning [the conflict between class action plaintiffs’ lawyers’ profits and their clients’ interests] as a bad thing and proposing reforms for class action practice designed to correct this conflict by increasing the compensation of absent class members.”); Ruan, *supra* note 188, at 421–22 (defending incentive payments to named plaintiffs, at least in public interest litigation, where collusion risk is lower while benefit of litigation is higher).

202. See SEN. ORRIN HATCH, THE CLASS ACTION FAIRNESS ACT OF 2003, S. REP. NO. 108-123, at 32 (2003) (“Abusive class action settlements in which plaintiffs receive promotional coupons or other nominal damages while class counsel receive large fees are all too commonplace.”).

203. Class Action Fairness Act of 2005, Pub. L. 109-2, 119 Stat. 4 (codified at 28 U.S.C. § 1332(d) (2006)) (codifying a “consumer class action bill of rights” and expanding federal diversity jurisdiction to take many class actions out of state courts, based on concerns with forum-shopping, unscrupulous class action attorneys, and so-called professional plaintiffs).

204. 29 U.S.C. § 216(b) (2006).

205. *Id.*

206. *Id.*

Telephone Co.,²⁰⁷ for example, the court noted that, because “each” of the 156 opt-in plaintiffs “freely chose[] to participate and . . . ha[d] relevant information,” each had to participate in written discovery (including interrogatory questions and document demands), and one-quarter of them had to give deposition testimony.²⁰⁸ Where there are fewer than one hundred plaintiffs, courts have allowed written discovery and depositions of each individual opt-in plaintiff.²⁰⁹ Indeed, on certification motions, plaintiffs regularly offer sworn testimony from opt-ins on their individual claims.²¹⁰

Because § 216(b) collective actions litigate the rights of only named plaintiffs and those who affirmatively opt in, there simply are no § 216(b) class members unknown to the court, unaware of the case, or unwilling to participate. To be sure, in a large collective action, some of the hundreds or thousands of opt-ins might pay little more attention than the average Rule 23 class member. But the absent-plaintiff problem in Rule 23 classes occurs when a plaintiff is unaware of the case or, though nominally aware, too uninformed to make a decision about participation. In contrast, “opt-in class members, having elected to participate, are unlikely to be so indifferent” as unnamed Rule 23 class members²¹¹ because, among other things, these opt-in plaintiffs typically face individualized discovery.

A § 216(b) opt-in plaintiff who pays little attention to the case is no different from a plaintiff in a one-party lawsuit who defers to counsel rather than actively participating in the litigation process. Federal

207. 163 F.R.D. 446 (S.D.N.Y. 1995).

208. *Id.* at 449 (requiring 39 of the 156 plaintiffs to appear for depositions).

209. *See, e.g.*, *Rosen v. Reckitt & Colman Inc.*, No. 91 Civ. 1675, 1994 WL 652534, at *1–4 (S.D.N.Y. Nov. 17, 1994) (allowing defendants to demand documents and depositions from each member of a fifty-plaintiff ADEA collective action); *Kaas v. Pratt & Whitney*, No. 89-8343, 1991 WL 158943, at *1, *3–5 (S.D. Fla. Mar. 18, 1991) (allowing interrogatories, document demands, and depositions from each opt-in plaintiff in an approximately one hundred-member ADEA collective action).

210. *See, e.g.*, Declaration of Justin M. Swartz in Support of Plaintiffs’ Motion for Conditional Certification & Court-Authorized Notice Pursuant to Section 216(b) of the FLSA at 5, 7, *Cruz v. Hook-Superx, LLC*, No. 09-7717, 2010 WL 3069558 (S.D.N.Y. Nov. 6, 2009) (listing declarations of seven opt-in plaintiffs); Declaration of Anjana Samant in Support of Plaintiffs’ Motion for Conditional Certification & Court-Authorized Notice Pursuant to Section 216(b) of the FLSA at 5, *Mohney v. Shelly’s Prime Steak, Stone Crab & Oyster Bar*, No. 06-4270, 2008 WL 7863650 (S.D.N.Y. Aug. 7, 2007) (attaching excerpts of depositions of two opt-in plaintiffs); Declaration of Justin M. Swartz in Support of Plaintiffs’ Motion for Conditional Certification as an FLSA Collective Action & for Court-Authorized Notice Pursuant to Section 216(b) of the FLSA at 2–6, *Hens v. ClientLogic Operating Corp.*, No. 05-00381, 2006 WL 2795620 (W.D.N.Y. Dec. 29, 2005) (listing declarations of forty-nine opt-in plaintiffs).

211. *Coffee*, *supra* note 17, at 333.

rules do not require personal participation by plaintiffs, nor do they protect those who remain uninformed; only Rule 23 so protects, and it only protects unnamed class members at the risk of having their rights abrogated in lawsuits they neither filed nor affirmatively joined.

When claims are aggregated only by affirmative opt-in, rather than by automatic inclusion in a class action, “[t]here is really no question of adequacy of representation.”²¹² In *Lipsett v. United States*, the court explained that more judicial scrutiny is unnecessary when a class includes only those who affirmatively opt into the case:

[B]ecause Rule 23(a)(3) is merely a device for permissive joinder, there should be little, if any, inquiry into whether the class is of appropriate size Unlike the “true” class action, . . . non-party members are not bound by the judgment [I]n fact there is no representation at all, of non-party members.²¹³

At least one § 216(b) decision has made the same point. The district court in *Pirrone v. North Hotel Associates*²¹⁴ addressed a narrower issue, but it held “notice to potential plaintiffs” unnecessary based on the same rationale that opt-in actions pose no threat to class members who do not affirmatively join: “because potential plaintiffs who do not opt into an FLSA class action will not be bound by the court’s judgment, due process does not require notice to potential plaintiffs.”²¹⁵

Thus, courts and commentators who think that Rule 23 safeguards apply to § 216(b) collective actions are missing a key distinction: § 216(b) actions do not feature the agency problem of class counsel selling out unaware members, which is the rationale for such safeguards in class actions. Agency problems certainly may exist to some degree in a § 216(b) case when clients have low stakes, low education, or unethical attorneys, but such problems, which are always possible in individual and multi-party litigation alike, can and should be redressed by existing ethics and court rules, as detailed below.²¹⁶

B. Serious Consequences of the Erroneous Certification Motion Process

It is no mere ministerial error of procedure when, on a § 216(b) collective action, courts require a collective action “certification” motion and apply a heightened Rule 23 analysis rather than a simple

212. *Lipsett v. United States*, 359 F.2d 956, 959 (2d Cir. 1966).

213. *Id.*

214. 108 F.R.D. 78 (E.D. Pa. 1985).

215. *Id.* at 82.

216. *See infra* Part III.B.3.

joinder inquiry. These stricter requirements have serious consequences for collective actions. Without rehashing the entire debate over whether procedure should, or even can, be kept separate from claim substance or merits,²¹⁷ the § 216(b) collective action procedure is a procedural device predominantly for FLSA minimum and overtime wage rights. Therefore, courts' procedural errors are inextricably linked with the wage rights they prevent from being vindicated.

1. *The high stakes: widespread, high-dollar wage violations*

Studies and reported cases alike show workers are routinely denied statutory workplace rights,²¹⁸ especially low-wage workers' wage rights. Workers in construction,²¹⁹ garment factories,²²⁰ nursing homes,²²¹ agriculture,²²² poultry processing,²²³ and restaurants²²⁴ have suffered

217. See, e.g., Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 DUKE L.J. 1251, 1282–83 (2002) (arguing that depicting “a sharp divide between procedure and substance . . . ignores decades of judicial frustration grappling with the procedure/substance dichotomy”); Robert M. Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718, 732–33 (1975) (disputing the view “that the procedural needs of a complex antitrust action . . . and an environmental class action . . . are sufficiently identical to be usefully encompassed in a single set of [procedural] rules which makes virtually no distinctions [between them]”); Scott A. Moss, *Litigation Discovery Cannot Be Optimal but Could Be Better: The Economics of Improving Discovery Timing in a Digital Age*, 58 DUKE L.J. 889, 918 (2009) (“Accurate cost-benefit analysis of the value of evidence is impossible without considering case merits, because the benefit of evidence (helping a plaintiff prove a case) is highest when the plaintiff’s claim has enough merit that the factfinder is permitted, but not compelled, to rule for the plaintiff.”).

218. See Annette Bernhardt et al., *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America’s Cities*, UNPROTECTEDWORKERS.ORG, 9 (2009), <http://www.nelp.org/page/-/brokenlaws/BrokenLawsReport2009.pdf?nocdn=1> (explaining that the authors have found numerous violations of workplace laws and warning that existing protections are not meeting the needs of workers in low-wage industries).

219. See *Strouse v. J. Kinson Cook, Inc.*, 634 F.2d 883, 884–86 (5th Cir. Unit B 1981) (per curiam) (granting construction workers attorneys’ fees on winning FLSA claims); *Marroquin v. Canales*, 236 F.R.D. 257, 258, 262 (D. Md. 2006) (certifying FLSA action by day laborers denied daily wages for cleaning Hurricane Katrina debris).

220. See, e.g., *Zeng Liu v. Donna Karan Int’l, Inc.*, 207 F. Supp. 2d 191, 192–93 (S.D.N.Y. 2002) (precluding discovery of immigration status of workers seeking unpaid wages).

221. See, e.g., *Hamelin v. Faxton-St. Luke’s Healthcare*, No. 6:08-CV-1219, 2009 U.S. Dist. LEXIS 9793, at *32–34 (N.D.N.Y. Jan. 26, 2009) (certifying FLSA action by health care employees claiming compulsion to work during unpaid breaks).

222. See, e.g., *Reich v. Tiller Helicopter Servs., Inc.*, 8 F.3d 1018, 1022, 1024–27 (5th Cir. 1993) (discussing history and scope of FLSA agricultural exemption).

223. See, e.g., *Perez v. Mountaire Farms, Inc.*, 610 F. Supp. 2d 499, 502–03, 528 (D. Md. 2009) (entering judgment on poultry processing plant workers’ claim of unpaid work-time required to don and doff personal protective equipment), *aff’d in part, vacated in part*, 650 F.3d 350 (4th Cir. 2011).

224. See, e.g., *Long John Silver’s Rests., Inc. v. Cole*, 514 F.3d 345, 347, 353–54 (4th Cir. 2008) (declining to vacate arbitration award for employees not paid overtime

systematic unlawful wage losses. One survey of workers in low-wage industries²²⁵ in the three largest United States cities found 26% were paid below minimum wage, and over 75% were not paid overtime due the previous week.²²⁶ The magnitude of violations shown by that study is substantial: the workers lost, and the employers illegally retained, an average of \$56.4 million dollars per week.²²⁷ Another study reports similar findings: annually, “[b]illions of dollars in wages are being illegally stolen from millions of workers.”²²⁸ In short, workers who can ill-afford wage loss are losing a great deal. As detailed below, such wage violations, primarily affecting low-wage workers, go without remedy when courts disallow collective actions.

2. *Aggregate litigation is the sole feasible enforcement mechanism for masses of individually small claims*

Aggregating claims can be the only realistic redress for multiple claims too small for individual litigation, as the Supreme Court has noted repeatedly in Rule 23 cases.²²⁹ Employment claims typically seek modest individual damages,²³⁰ especially wage claims alleging

wages).

225. See Bernhardt et al., *supra* note 218, at 2, 4 (explaining that the survey of 4387 workers in Chicago, Los Angeles, and New York City captured violations often going underreported in a variety of low-wage jobs, including in the garment industry, domestic work, restaurants, and retail).

226. *Id.* at 21, 33.

227. *Id.* at 50.

228. KIM BOBO, WAGE THEFT IN AMERICA 6 (2009).

229. See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (“[Class actions] overcome the problem that small recoveries do not provide incentive for any individual to bring a solo action . . . by aggregating the relatively paltry potential recoveries into something worth . . . [the] labor.” (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997)) (internal quotation marks omitted)); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985) (“Class actions . . . permit the plaintiffs to pool claims which would be uneconomical to litigate individually.”); *Deposit Guar. Nat’l Bank v. Roper*, 445 U.S. 326, 339 (1980) (“Where it is not economically feasible to obtain relief within . . . a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class action device.”); see also ALBA CONTE & HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS § 24:64 (4th ed. 2002) (noting that class actions produce larger fee awards by creating substantial recovery funds).

230. Even employment discrimination claims, typically about terminations from five-figure jobs rather than just wage underpayments, yield modest recoveries. See Laura Beth Nielsen & Robert L. Nelson, *Rights Realized? An Empirical Analysis of Employment Discrimination Litigation as a Claiming System*, 2005 WIS. L. REV. 663, 705–06 (explaining that a study using statistics from the year 2001 showed that of the small fraction (3.8%) of race-based discrimination cases proceeding to trial verdicts, plaintiffs lost 61.9%; when they won, the median verdict was just \$130,500); see also Minna J. Kotkin, *Outing Outcomes: An Empirical Study of Confidential Employment Discrimination Settlements*, 64 WASH. & LEE L. REV. 111, 144 & n.134 (2007) (observing that employment discrimination settlements, though far more common than trials, yield even less—a median of \$30,000, well below the personal injury case median (\$181,500)).

that hundreds or thousands of individuals were underpaid a small amount per hour.²³¹ The modest damages make most wage claims prohibitively costly to prosecute individually²³²: an individual case worth a few thousand dollars is not worth the attorney time necessary for the required discovery and motions;²³³ it hardly is even worth the thousands of dollars in out-of-pocket costs for witness transcripts alone.²³⁴ A chance at statutory attorneys' fees provides insufficient incentive in individual cases, as the typically modest settlement amounts do not leave much for fees and courts routinely reduce even prevailing attorneys' fees.²³⁵

Moreover, individual litigation requires one plaintiff to shoulder all litigation costs and risks herself. This includes not only out-of-pocket

231. See, e.g., *Phelps v. 3PD, Inc.*, 261 F.R.D. 548, 563 (D. Or. 2009) (recognizing superiority of class actions in employment cases due to typically small size of individual awards); *Chase v. AIMCO Props., L.P.*, 374 F. Supp. 2d 196, 198 (D.D.C. 2005) (“[I]ndividual wage and hour claims might be too small in dollar terms to support a litigation effort”); *Sav-On Drug Stores, Inc. v. Superior Court*, 96 P.3d 194, 209 (Cal. 2004) (“[T]he class suit . . . provides small [overtime] claimants with a method of obtaining redress for claims which would otherwise be too small to warrant individual litigation.” (citation omitted) (internal quotation marks omitted)). See generally Catherine K. Ruckelshaus, *Labor's Wage War*, 35 FORDHAM URB. L.J. 373, 385–86 (2008) (discussing factors that limit workers' access to the court system, including the small size of individual claims).

232. See *Jarvaize v. Rand Corp.*, 212 F.R.D. 1, 4 (D.D.C. 2002) (suggesting that a class action would be “superior” to other litigation alternatives in the case because it would prevent judicial waste and ensure that those unable to afford attorneys in individual suits will have “their day in court”); see also *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997) (noting that attorneys do not take contingency cases with low potential payouts); *Scott v. Aetna Servs., Inc.*, 210 F.R.D. 261, 263, 268 (D. Conn. 2002) (deeming class action the superior method for overtime claims partly because “cost of individual litigation is prohibitive”); *Ansoumana v. Gristede's Operating Corp.*, 201 F.R.D. 81, 85–86 (S.D.N.Y. 2001) (noting individual suits may be infeasible given workers' lack of “adequate financial resources,” “access to lawyers,” “fear of reprisals,” and “the transient nature of their work”); Juliet M. Brodie, *Post-Welfare Lawyering: Clinical Legal Education and a New Poverty Law Agenda*, 20 WASH. U. J.L. & POL'Y 201, 248–49 (2006) (“[T]he wage and hour cases of the working poor . . . tend to involve relatively small dollar figures, prohibitively small for a private attorney.”).

233. Discovery and legal fees are less costly than commonly assumed, but still well above what is feasible for individual wage claims. See Emery G. Lee III & Thomas E. Willging, *Defining the Problem of Cost in Federal Civil Litigation*, 60 DUKE L.J. 765, 769–70 (2010) (reporting that a survey of federal cases in 2008 showed “median litigation costs, including attorneys' fees, of \$15,000 for plaintiffs and \$20,000 for defendants” “[i]n cases in which one or more types of discovery was reported”).

234. A one-day deposition rarely costs under a thousand dollars for court reporter transcription services because a transcript of 300–500 pages typically costs about \$3.50 per page. See, e.g., *What Are Your Corporate Rates?*, NAPLES REPORTING, <http://www.naplesreporting.com/faq/rates/> (last visited Nov. 16, 2011) (providing further that digital reporters cost \$2.75 per page).

235. See, e.g., *Arbor Hill Concerned Citizens Neighborhood Ass'n v. Cnty. of Albany*, 522 F.3d 182, 183–84 (2d Cir. 2007) (opining on attorney fee motion that “[the] court (unfortunately) bears the burden of disciplining the market, stepping into the shoes of the reasonable, paying client, who wishes to pay the least amount necessary to litigate the case effectively”).

litigation expenses, which attorneys are reluctant to bear for modest claims, but also, especially for low-wage workers, a risk of employer retaliation²³⁶ and costly time off from hourly-paying work (often involving a job with long or inflexible hours) to help craft allegations, review facts, etc.²³⁷ Due to the limited prospect of individual litigation, employers inclined to violate wage laws face little financial incentive to comply.

Furthermore, government enforcement is not sufficiently widespread or aggressive for substantial deterrence. The agencies enforcing employment laws lack the resources to investigate many individual cases.²³⁸ Even when filed, government actions rarely achieve full damages or industry-wide relief.²³⁹ For example, investigators at the federal Department of Labor Wage and Hour Division are instructed not to include the double damages permitted by law in negotiations with employers, and to seek back pay for just two years of the three that the statute of limitations allows.²⁴⁰ Also,

236. See Ruan, *supra* note 188, at 410–11 (describing potential forms of retaliation such as job loss, “being assigned to less favorable tasks,” “ostraci[sm] from co-workers” and even being “black list[ed]” by their industries).

237. See *Braun v. Wal-Mart, Inc.*, No. 19-CO-01-9790, 2003 WL 22990114, at *12 (D. Minn. Nov. 3, 2003) (“[M]embers of the class have little practical ability to prosecute their claims in separate actions, in light of the substantial cost associated with gathering and presenting the evidence [I]ndividual claimants effectively would be denied any remedy because the expense of prosecuting individual claims likely would vastly exceed the [recovery] amount”); *Bell v. Farmers Ins. Exch.*, 9 Cal. Rptr. 3d 544, 570 (Ct. App. 2004) (noting that any recovery may be reduced by expenses such as “travel expenses and time off from work”); see also Ruckelshaus, *supra* note 231, at 387 (“As the fight in court against the employer progressed, the individual worker would have to continue to make period fee payments [to his lawyer], pay for discovery, preliminary discovery motions, and any substantive legal motions filed by either side.”).

238. See, e.g., U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-09-458T, DEPARTMENT OF LABOR: WAGE AND HOUR DIVISION’S COMPLAINT INTAKE AND INVESTIGATIVE PROCESSES LEAVE LOW WAGE WORKERS VULNERABLE TO WAGE THEFT 9 (2009) (reporting that Department of Labor staff admitted to being short on resources, and that as a result not all reported cases are adequately addressed); Elizabeth J. Kennedy, *The Invisible Corner: Expanding Workplace Rights for Female Day Laborers*, 31 BERKELEY J. EMP. & LAB. L. 126, 153 (2010) (“The underfunding of labor and employment law enforcement agencies has perpetuated an informal domestic work economy with minimum consequences for employers who ignore the few workplace rights that domestic workers do possess.”); *Just Pay: Improving Wage and Hour Enforcement at the United States Department of Labor*, NAT’L EMP’T LAW PROJECT 15 (2010), www.nelp.org/page/-/Justice/2010/JustPayReport2010.pdf?nocdn=1 (advocating that Wage and Hour Division “develop a tiered triage system to sort worker complaints into high-, medium-, and low-priority levels”).

239. See Joseph A. Seiner, *The Failure of Punitive Damages in Employment Discrimination Cases: A Call for Change*, 50 WM. & MARY L. REV. 735, 772–73 (2008) (arguing that EEOC fails to secure full damages available under anti-discrimination law).

240. See *Just Pay: Improving Wage and Hour Enforcement at the United States Department of Labor*, *supra* note 238, at 10 (“[T]he [Wage and Hour Division]’s Field Operations Handbook . . . instructs WHD investigators only to seek up to two years of back

because most government investigations are driven by a particular claim, investigators are not required to expand their investigations to include a claimant's similarly-situated coworkers, even though employers typically subject all workers in a job category to the same pay practices.²⁴¹

Wage claims thus make far more economic sense to litigate in aggregate rather than individual private lawsuits. Collective actions limit the above-detailed burdens on any one worker and increase the amount in controversy, justifying an attorney's investment of time and out-of-pocket expense, especially because litigation costs do not increase proportionately with the number of workers participating. Courts may assess back wages based on statistical or representative evidence,²⁴² because liability evidence (e.g., that a certain job is not exempt) typically does not require testimony from every worker,²⁴³ and because sample testimony suffices for the estimates needed in wage violation cases.²⁴⁴

3. *Importance of notification for workers unaware of violations*

Employees are often unaware their rights have been violated,²⁴⁵

wages, and not liquidated damages, which are nearly universally awarded under the statute, and does not instruct them to consider whether the violations are willful and subject to a three-year statute of limitations.”).

241. *Cf. id.* at 9–10 (recommending that the government “identify industries marked by rampant employment law violations” and target those industries through proactive investigations instead of solely following up on individual complaints).

242. *See, e.g.,* *Martin v. Tony & Susan Alamo Found.*, 952 F.2d 1050, 1052 (8th Cir. 1992) (considering when back pay is to be awarded “to the nontestifying employees based on the fairly representative testimony of the testifying employees”).

243. *See, e.g.,* *Grochowski v. Phoenix Constr.*, 318 F.3d 80, 88 (2d Cir. 2003) (recognizing that “not all employees need testify in order to prove FLSA violations or recoup back-wages”); *Reich v. Gateway Press, Inc.*, 13 F.3d 685, 701 (3d Cir. 1994) (condoning the use of testimony of twenty-two of seventy employees because “[c]ourts commonly allow representative employees to prove violations with respect to all employees”); *McLaughlin v. Ho Fat Seto*, 850 F.2d 586, 589 (9th Cir. 1988) (disagreeing with the defendant’s contention that no pattern of FLSA violations could be proven because only five of twenty-eight employees testified); *Donovan v. Simmons Petroleum Corp.*, 725 F.2d 83, 86 (10th Cir. 1983) (holding that the testimony of twelve employees supported award to all workers after clarifying that not all injured workers need to testify to establish a prima facie case); *Donovan v. New Floridian Hotel, Inc.*, 676 F.2d 468, 472 (11th Cir. 1982) (upholding district court’s use of twenty-three employees’ testimony to support award to 207 employees).

244. *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687–88 (1946) (noting that hours may be proven by oral testimony because “[e]mployees seldom keep . . . records [of their hours] themselves”).

245. *See* *Gentry v. Superior Court*, 165 P.3d 556, 566 (Cal. 2007) (“[I]ndividual employees may not sue because they are unaware that their legal rights have been violated.”); *Muhammad v. Cnty. Bank of Rehoboth Beach, Del.*, 912 A.2d 88, 100 (N.J. 2006) (“[W]ithout the availability of a class-action mechanism, many consumer-fraud victims may never realize that they may have been wronged.”).

especially the low-wage, often immigrant workers²⁴⁶ disproportionately comprising the pool of workers paid sub-minimum wages.²⁴⁷ Employers may declare workers exempt from minimum and overtime wage rules by misinterpreting FLSA exemptions²⁴⁸ or misclassifying both full-time and part-time workers as independent contractors.²⁴⁹ Some wage violations can be hidden from even sophisticated workers: gender wage discrimination often is proven only by statistical analysis comparing workers' pay data;²⁵⁰ and irregular commissions may be payable only if the employer receives the customer payment, not when the employee makes the sale.²⁵¹

246. See, e.g., JENNIFER GORDON, *SUBURBAN SWEATSHOPS: THE FIGHT FOR IMMIGRANT RIGHTS* 15 (2005) (observing that many immigrants will spend time working for less than minimum wage); Keith Cunningham-Parmeter, *Redefining the Rights of Undocumented Workers*, 58 AM. U. L. REV. 1361, 1362 (2009) ("American demand for inexpensive goods draws international migrants to our factories and fields."); Noah D. Zatz, *The Minimum Wage As A Civil Rights Protection: An Alternative to Antipoverty Arguments?*, 2009 U. CHI. LEGAL F. 1, 4.

247. Poverty law scholars have noted the "[d]issonance between the rhetoric of supporting work and the reality of denying work's rewards." See Julie A. Nice, *Forty Years of Welfare Policy Experimentation: No Acres, No Mule, No Politics, No Rights*, 4 NW. J.L. & SOC. POL'Y 1, 1-2, 4 (2009) (explaining that policy efforts to reduce welfare dependence have not successfully addressed the need for livable wages); see also JOEL F. HANDLER & YEHESEKEL HASENFELD, *BLAME WELFARE, IGNORE POVERTY AND INEQUALITY* 6-7 (2007) (arguing that America has "demonized welfare" while those who "play[] by the rules" cannot make it because of stagnant wages in the low-wage labor market); Peter B. Edelman, *Changing the Subject: From Welfare to Poverty to a Living Income*, 4 NW. J.L. & SOC. POL'Y 14, 14, 16-17 (2009) (documenting history of America's simultaneous rhetoric against welfare and lack of support for higher wages).

248. See *Misra v. Decision One Mortg. Co.*, 673 F. Supp. 2d 987, 991 (C.D. Cal. 2008) (explaining that plaintiffs accuse defendants of having misrepresented to employees that they were exempt and not entitled to overtime pay); *Kamens v. Summit Stainless, Inc.*, 586 F. Supp. 324, 328 (E.D. Pa. 1984) (providing that plaintiffs alleged sufficient affirmative misrepresentations by employer to toll the statute of limitations for their claims); *Gentry*, 165 P.3d at 567 ("The likelihood of employee unawareness is even greater when, as alleged in the present case, the employer does not simply fail to pay overtime but affirmatively tells its employees that they are not eligible for overtime.").

249. See, e.g., *Ling Nan Zheng v. Liberty Apparel Co.*, 556 F. Supp. 2d 284, 286-88, 295 (S.D.N.Y. 2008) (denying defendants' motion for summary judgment against garment workers claiming employers misclassified them as independent contractors to claim unlawful wage deductions); *Ansoumana v. Gristede's Operating Corp.*, 255 F. Supp. 2d 184, 185-86 (S.D.N.Y. 2003) (granting delivery workers partial summary judgment as to liability on unpaid minimum and overtime wage claims and holding that workers were not independent contractors and thus that defendants were "liable to [plaintiffs] for violations of the FLSA and New York Labor law"); *Lopez v. Silverman*, 14 F. Supp. 2d 405, 406-08 (S.D.N.Y. 1998) (finding as a matter of law that garment industry "jobber" and garment manufacturer jointly employed plaintiffs).

250. See, e.g., *Velez v. Novartis Pharm. Corp.*, 244 F.R.D. 243, 259-64 (S.D.N.Y. 2007) (describing plaintiff's use of statistical evidence to attempt to prove defendant's gender discrimination bias in performance evaluations, pay, and promotions, as well as discrimination on account of pregnancy).

251. See, e.g., *Dwyer v. Burlington Broadcasters Inc.*, 744 N.Y.S.2d 55, 56 (App. Div. 2002) (noting that by contract plaintiff was entitled to commissions on her sales only

Collective actions increase awareness of workplace abuses, whether through court-supervised employee notification or through plaintiffs' attorneys' own efforts to find and to notify additional workers—efforts that become more cost-effective when counsel has assurance that the case will qualify as a collective action.²⁵² Timely notification also helps workers who might not otherwise become aware that their wage rights were violated until it is too late: unlike in Rule 23 class actions, where all statutes of limitations are tolled until the court grants or denies class certification, the FLSA expressly states that limitations periods keep running for each individual until he or she opts in as a plaintiff.²⁵³ The notice process also points workers to class counsel for legal advice and lets them know they are not alone in challenging violations.²⁵⁴

Plaintiffs need not file collective actions, of course; they can sue alone, or in a small group, in which case § 216(b) opt-in, notification, and certification processes are irrelevant. But when plaintiffs choose to broaden their wage cases into opt-in collective actions, they typically need to notify other potential members; such notice is hindered by courts' restrictive “certification” standards.

4. *The impact of certification motions: litigation cost; delay as limitations periods run and fewer attorneys available*

Even where courts grant certification, the motion process imposes substantial costs. First, because courts demand substantial evidentiary showings on certification motions, attorneys must devote significant time to the following efforts: procuring dozens of worker affidavits; taking multiple depositions; requesting and reviewing discovery documents; and writing the motion itself.²⁵⁵ Second, as with any

“when the customer paid,” not as soon as she made the sale).

252. *Cuzco v. Orion Builders, Inc.*, 477 F. Supp. 2d 628, 635 (S.D.N.Y. 2007) (“[F]or the intended benefits of the collective action[,] including allowing plaintiffs to pool resources and enabling courts to efficiently resolve multiple similar claims . . . , employees must receive ‘accurate and timely notice . . . so that they can make informed decisions about whether to participate.’” (quoting *Hoffmann-La Roche v. Sperling*, 493 U.S. 165, 170 (1989))).

253. *See* 29 U.S.C. § 256 (2006) (providing that opt-in plaintiff's claim commences for limitations purposes not on lawsuit's filing but “on the subsequent date . . . written consent is filed”).

254. *See* David Weil & Amanda Pyles, *Why Complain? Complaints, Compliance, and the Problem of Enforcement in the U.S. Workplace*, 27 *COMP. LAB. L. & POL'Y J.* 59, 91 (2005) (discussing studies showing workers “are more likely to exercise rights where they have an agent that assists them in use of those rights”); *see also* *Pentland v. Dravo Corp.*, 152 F.2d 851, 853 (3d Cir. 1945) (noting collective actions “bring[] something of the strength of collective bargaining” to suits risking employer retaliation).

255. *See, e.g.,* *Damassia v. Duane Reade, Inc.*, No. 04 Civ. 8819(GEL), 2006 WL 2853971, at *4–8 (S.D.N.Y. Oct. 5, 2006) (examining in detail the dueling affidavits of plaintiffs' and defendants' witnesses, as well as multiple transcripts of deposition

major motion, the attorneys can spend months briefing and arguing the motion, plus additional months waiting for the court's decision. During this time, the two-year statute of limitations period "clock" keeps ticking for each potential member until she joins the action, resulting in unrecoverable lost wages.²⁵⁶ Third, because the certification process increases both litigation costs and the risk of lost claims due to delay,²⁵⁷ a few private law firms tend to dominate wage collective actions to the exclusion of small firms and non-profit lawyers who could also advocate well for workers.²⁵⁸

In short, the cumbersome process, regardless of whether a court grants or denies a motion to certify, substantially impedes workers attempting to vindicate their statutory rights. This situation is especially troubling because, as discussed below, the entire endeavor of scrutinizing cases for collective action certification is misguided.

III. COURTS SHOULD ALLOW PLAINTIFFS TO FILE COLLECTIVE ACTIONS FREELY, WITHOUT CERTIFICATION MOTIONS

While Part II argued against courts' prevailing two-step, Rule 23-style "certification" process for collective actions, this Part details a different way courts should handle collective actions. Part III.A begins by surveying existing scholarship critiquing § 216(b): some commentaries argue for broader willingness to certify collective actions; others call for tighter application of Rule 23 standards, perhaps even a repeal of § 216(b); but no scholarship argues that requiring an evidentiary "certification" motion lacks the textual authorization or agency-cost rationale that justifies requiring certification of Rule 23 class actions.

Part III.B details this Article's prescription in three parts, one for each player in a collective action lawsuit—the plaintiff, the defendant, and the court. In short, plaintiffs could file and opt in to

testimony, after lengthy briefing of both parties).

^{256.} 29 U.S.C. § 256.

^{257.} See Macey & Miller, *supra* note 17, at 4 ("The high cost of notifying absent class members when potential recovery is very small deters entrepreneurial attorneys from bringing meritorious suits. Thus, the rule harms, rather than protects, absent class members.").

^{258.} For information regarding impact worker rights litigation by non-profits, see, for example, *Reyes v. Remington Hybrid Seed Co.*, 495 F.3d 403, 404–05 (7th Cir. 2007) (involving a FLSA action for migrant farmworkers' unpaid wages, brought by the National Employment Law Project (NELP)); *Moon v. Kwon*, 248 F. Supp. 2d 201, 203 (S.D.N.Y. 2002) (involving an action for hotel workers' unpaid wages, brought by the Asian American Legal Defense & Education Fund (AALDEF)); *Ansoumana v. Gristede's Operating Corp.*, 201 F.R.D. 81, 83 (S.D.N.Y. 2001) (naming NELP as one of the plaintiffs' attorneys in an action for supermarket delivery workers' unpaid wages).

collective actions freely without any certification motion, while defendants would bear the burden of challenging collective actions in Rule 21 misjoinder or Rule 12 dismissal motions. Courts, although lacking Rule 23 gatekeeping powers, would still wield three basic powers: deciding defense motions; supervising requested notice to potential opt-ins; and policing whatever modest asymmetric information and principal-agent problems may arise in multiple-plaintiff representation, by enforcing ethics rules on avoiding conflicting interests and ensuring clients remain informed decision makers. Finally, Part III.C notes that this prescription would not only bring judicial practice into compliance with federal statutes and rules, but also decrease litigation costs, speed up litigation, and facilitate vindication of important rights in collective actions.

A. *Existing Calls for Reform: Stricter Scrutiny Versus Broader Certification—But No Questioning of the Premise*

The academic commentary on § 216(b) is sparse but features varied calls for reform. Of those commentators who have written on the issue, many dislike § 216(b) entirely, preferring the tougher Rule 23 criteria. One “urges Congress to abolish collective actions by repealing § 216(b),” leaving wage actions governed by Rule 23 because “§ 216(b) was drafted during the infancy of group litigation and is an antiquated vestige.”²⁵⁹ Another argues that the prevailing “two-stage, ad hoc approach” to certification “fails to provide courts with proper guidance in determining whether plaintiffs [are] similarly situated,” and that courts should apply Rule 23 standards to § 216(b) collective actions.²⁶⁰

Others, though noting that § 216(b) originated as a mere joinder device,²⁶¹ believe courts should undertake a more “rigorous analysis”²⁶² that more routinely rejects collective actions—even where workers are “similarly situated.”²⁶³ They further argue that, unless the plaintiffs’ common issues are substantial enough to “expressly permit common answers” for each, “the court must . . . determine if it is fair and efficient to try the case in one proceeding, notwithstanding that those initially joining the action may be ‘similarly situated.’”²⁶⁴ This view parallels the Supreme Court’s holding in *Wal-Mart Stores* that the

259. Lopez, *supra* note 20, at 278–79.

260. Fraser, *supra* note 20, at 122.

261. King & Ozumba, *supra* note 19, at 281.

262. *Id.* at 281, 300–01.

263. *Id.* at 273.

264. *Id.* (emphasis omitted).

class action commonality requirement is stricter than the joinder requirement of one common issue.²⁶⁵

Others call for broader permission for § 216(b) collective actions but still assume a judicial power to condition such cases on an evidentiary motion for certification. One commentator asserts that the “opt-in feature raises a presumption of active, informed” class members, an argument with three implications: (1) it “sav[es] courts from having to conduct detailed inquiries into whether each . . . member’s interests are adequately represented,” (2) it “better justif[ies] a conditional certification,” and (3) it justifies “plac[ing] the burden upon any party . . . challeng[ing] class certification on grounds of insufficient plaintiff protections.”²⁶⁶ Yet that commentator still accepts courts’ “managerial responsibility” to scrutinize “evidence that opt-in members’ interests are not being adequately represented or protected.”²⁶⁷

Two others believe courts should more liberally certify collective actions, even where workers’ claims vary, by using sampling techniques.²⁶⁸ For instance, courts could “select a test group of plaintiffs . . . and opt-ins” for limited discovery and early dispositive motions.²⁶⁹ As another option, courts could preside over “a representative trial as in a class action,” with a defense victory ending the case or a plaintiff’s victory allowing a plaintiffs’ motion for partial summary judgment “on the basis of non-mutual offensive issue preclusion . . . [to] extend[] the trial rulings” to other plaintiffs.²⁷⁰

Surprisingly, no commentary appears to argue that a requirement of proving “certification” lacks the textual authorization or agency-cost rationale that exists for Rule 23 class actions. The difficult question is what would replace the current scheme; following is what this Article offers as a preferable alternative.

B. The Prescription: Allow Plaintiffs to File Together, Leaving the Burden on Defendants to Challenge Similarity, Without Judicial “Gatekeeping” Power

This Article prescribes that courts apply a streamlined method when assessing the propriety of collective actions, but that they should generally refrain from making such an assessment at all, except under certain circumstances. This subpart elaborates upon

265. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011).

266. *Gates*, *supra* note 20, at 1554–55 (emphasis omitted).

267. *Id.* at 1555.

268. *Borgen & Ho*, *supra* note 19, at 155–56.

269. *Id.*

270. *Id.* at 156.

this streamlined method by considering in turn the proper roles of plaintiffs, defendants, and courts.

1. *Plaintiff's role: to file collective actions at will, in the same manner as multiple-plaintiff captions under joinder rules*

Plaintiffs should have a recognized right to bring a collective action upon pleading that other workers are similarly situated—and those other workers should have a recognized right to file an opt-in consent without having to file any motion seeking judicial approval. Such a rule would be a vast departure from existing practice, but one district court so held in 1946 when it found that § 216(b) grants:

[a] right to intervene . . . [that] appears to be unconditional because the statute expressly indicates that one or more employees similarly situated can jointly originate such an action . . . regardless of the ordinary requirements of law as to proper joinder [I]t would be an excessively strict construction which would say that parties who have an absolute right to join as plaintiffs have less than an absolute right . . . to become plaintiffs after its commencement.²⁷¹

No courts have cited this decision in decades, but its approach is correct: plaintiffs pressing claims as “similarly situated” could opt in freely, absent the sort of motion, detailed below, challenging the propriety of their joinder.

2. *Defendant's role: to file misjoinder or dismissal motions, with the burden of disproving sufficient commonality for joinder*

A defense motion is the proper method of redress when plaintiffs try to aggregate § 216(b)-covered claims that vary too widely for the workers to be considered “similarly situated.” Some § 216(b) claimants may well be too varied for a collective action,²⁷² but that does not mean the plaintiffs must be the ones filing motions or be held to heightened evidentiary proof of commonality. Because Rule 20 is far more relevant to § 216(b) cases than Rule 23, courts should handle challenges to § 216(b) collective action status like they handle challenges to Rule 20 joinder of multiple plaintiffs' claims. Specifically, the two rules allowing challenges to Rule 20 joinder should apply equally to issues of collective action status under § 216(b).

First, Rule 21 “misjoinder”: in circumstances such as those where

271. *Tenn. Coal, Iron & R. Co. v. Muscoda Local 123*, 5 F.R.D. 174, 176 (N.D. Ala. 1946).

272. *See supra* notes 182–185 and accompanying text.

discovery undercuts the allegations that initially justified joinder, “[o]n motion . . . the court may at any time, on just terms, add or drop a party.”²⁷³ Such an order would then wholly undo the Rule 20 joinder by dividing the plaintiffs’ claims into independent cases.

Second, Rule 42(b) “severance”: a court may keep the parties joined but order separate trials for each plaintiff, or for various groups of plaintiffs, if it deems doing so necessary “[f]or convenience, to avoid prejudice, or to expedite and economize [the proceedings].”²⁷⁴ One 1946 decision, though not citing Rule 42, noted that plaintiffs may be “similarly situated” enough to satisfy § 216(b) but still need separate trials:

while the claims . . . are similar in certain respects and enough . . . [to be] similarly situated . . . still . . . it will be necessary for the cases to be tried separately to determine whether . . . [each] particular person [is] within the [FLSA] provisions²⁷⁵

That decision has drawn no citations for decades, but it is exactly the result many modern courts denying “certification” should reach: plaintiffs sharing FLSA claims against the same employer are amply “similarly situated” even if their claims vary enough for each plaintiff, or subgroups of plaintiffs, to justify separate trials under Rule 42.

Modern courts typically do not wait for defendants to challenge aggregation. As detailed above, though, it was how courts entertained challenges to original Rule 23(a)(3) spurious class actions, which are the closest analogues to § 216(b) cases. For example, in *Lipsett v. United States*, the court recognized that:

the striking of the allegations of a spurious class action ought generally to be improper unless the court knows no intervention is possible. . . . Since the spurious class action *is a mere device for permissive joinder*, the proper procedure is to leave the allegation standing to facilitate . . . intervention. “If it shall *later* appear that the plaintiffs are not able within a reasonable time to obtain others to intervene in the class action it may properly be dismissed as a class action.”²⁷⁶

273. FED. R. CIV. P. 21.

274. FED. R. CIV. P. 42(b); *Gaffney v. Riverboat Servs. of Ind., Inc.*, 451 F.3d 424, 442 (7th Cir. 2006); *see also Kedra v. City of Philadelphia*, 454 F. Supp. 652, 662 (E.D. Pa. 1978) (allowing plaintiffs to proceed through discovery with joined claims despite potential prejudice, with court “retain[ing] flexibility to sever portions of [claims] or to take other remedial actions, if necessary,” later in the case). *See generally* WRIGHT, MILLER & KANE, *supra* note 116, § 1660 (“The general philosophy of the joinder provisions . . . is to allow virtually unlimited joinder at the pleading stage but to give the district court discretion to shape the trial . . .”).

275. *Wright v. U.S. Rubber Co.*, 69 F. Supp. 621, 623 (S.D. Iowa 1946).

276. *Lipsett v. United States*, 359 F.2d 956, 959 (2d Cir. 1966) (emphasis added) (quoting *Oppenheimer v. F. J. Young & Co.*, 144 F.2d 387, 390 (2d Cir. 1944)).

3. *Court's role: to decide parties' motions and police ethics violations*

By requiring each member to opt in, § 216(b) collective actions avoid the substantial agency problems of Rule 23 class actions. An opt-in action is little different from a standard case with five or thirty plaintiffs in the caption: whether each is well-informed, or actively involved, depends on issues such as education level, language barriers, and attorney honesty. So, the threat of plaintiffs' lawyers neglecting opt-ins is not different in kind from ethical concerns arising in any case, individual or aggregate. Accordingly, courts in collective actions not only lack the authority Rule 23 grants over the decisions of plaintiffs and counsel, but also the agency rationale that would make such powers a normatively sound idea.

The fact that collective actions do not raise substantial agency concerns, however, does not mean courts have no role. Courts have two critical roles to fulfill in collective actions, each detailed below: (a) deciding parties' motions on the propriety of collective actions and of court-ordered notice; and (b) policing violations of ethics rules about jointly representing multiple plaintiffs.

a. Deciding parties' motions on the propriety of collective actions and court-ordered notice

Despite lacking the power to "certify" a collective action and to require plaintiffs to file motions seeking such certification, courts remain empowered to decide the propriety of a § 216(b) collective action. As Part III.B.2 above details, courts would decide whether workers are "similarly situated" on defendants' motions for Rule 12 dismissal or Rule 21 misjoinder—but the standard would be simple joinder, not the more searching "commonality" inquiry.

Further, courts would decide whether court-ordered notice is proper—but the inquiry would extend only to the propriety and contents of the notice, not to the whether the entire collective action should proceed. Should the court wish to address the "similarly situated" issue contemporaneously with its "notice" decision, the joinder rules remain the proper vehicle: Rule 21 allows a court "on its own," to consider whether there is "misjoinder;" the court simply must apply the joinder standard, not the current heightened commonality standard.

(emphasis added)).

b. Policing violations of ethics rules when jointly representing multiple plaintiffs

Although fewer agency problems exist in collective actions, collective actions raise enough ethical issues to suggest a watchdog role for courts.²⁷⁷ First, especially in large cases, many opt-in plaintiffs participate little if at all: they may lack voice in major decisions like class-wide settlements or attorneys may not fully apprise them of case events. Second, plaintiffs may have conflicting interests, such as if a group of assistant managers seeks overtime pay, while a second group worked off-the-clock because their timesheets were altered by the first group. Third, clients may be unaware when their attorneys lack the experience or resources for major § 216(b) collective actions. Legal ethics rules²⁷⁸ address these three problems:

- attorneys must allow each client to exercise decision-making authority over major decisions like filing suit, responding to a settlement offer, or ending the case on other terms,²⁷⁹ each of which requires keeping clients informed;²⁸⁰
- where attorneys represent multiple clients, they must procure informed consent if the clients' interests may

277. See *supra* Part II.A.4.b.

278. While no single binding set of attorney ethics rules exists, the ABA Model Rules of Professional Conduct (Model Rules) are “the primary model for the ethics rules governing . . . the overwhelming majority of American lawyers.” Lucian T. Pera, *Grading ABA Leadership on Legal Ethics Leadership: State Adoption of the Revised ABA Model Rules of Professional Conduct*, 30 OKLA. CITY U. L. REV. 637, 637 (2005). The Model Rules were adopted by over 40 states and are “influential . . . in states that had chosen *not* to adopt them.” *Id.* at 640. Discussion herein will thus cite the Model Rules and state cases based on those rules.

279. MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2007) (“[A] lawyer shall abide by a client’s decisions concerning the objectives of representation and . . . consult with the client as to the means by which they are pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation [and] shall abide by a client’s decision whether to settle a matter.”); see *id.* R. 1.2 cmt. 1 (“Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation The decisions specified in paragraph (a), such as whether to settle a civil matter, must also be made by the client.”).

280. MODEL RULES OF PROF'L CONDUCT R. 1.4(a)(2)–(4) (“A lawyer shall . . . (2) reasonably consult with the client about the means by which the client’s objectives are to be accomplished; (3) keep the client reasonably informed about the status of the matter; [and] (4) promptly comply with reasonable requests for information”); see *id.* R. 1.4 cmt. 1 (providing that “[r]easonable communication between lawyer and client is necessary for the client effectively to participate in the representation”); *In re Grievance Proceeding*, 171 F. Supp. 2d 81, 84 (D. Conn. 2001) (“Implicit in Rule 1.2(a)’s requirement that a lawyer ‘shall abide by a client’s decision . . .’ [is] a requirement to communicate all settlement offers to the client.”); see also Carranza v. Fraas, 763 F. Supp. 2d 113, 125–26 (D.D.C. 2011) (applying D.C. Rule and observing that “[w]ithholding . . . information [regarding settlement offers] precludes a client’s ability to participate . . . in decisions that go to the core of the attorney-client relationship”).

conflict²⁸¹ and must withdraw if the interests conflict too deeply,²⁸² and attorneys should litigate cases competently, and in complex or specialized fields, with adequate experience.²⁸³

Because collective action motions do not presumptively pose agency problems like Rule 23 class actions, courts do not need to impose a collective action certification motion as a prophylactic measure. Rather, courts could police ethics problems on motions filed by defendants or by *sua sponte* court orders.

As a limited prophylactic measure, however, courts should require plaintiffs' counsel to provide opt-in plaintiffs with notice and an opportunity to participate in major case events, based on the ethics rules requiring counsel to keep the client reasonably informed and reasonably consult with the client on significant tactics.²⁸⁴ The "reasonably" qualifier provides attorneys and courts with some discretion about what measures are practical; the determination will depend on factors including the number of plaintiffs and the substantiality of the particular decision in question.²⁸⁵

If courts apply the ethics rules requiring plaintiffs' counsel to

281. Unless the client gives informed consent, in addition to other requirements, a lawyer shall not represent a client if the representation involves a concurrent conflict of interest . . . [which] exists if: (1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client . . .

MODEL RULES OF PROF'L CONDUCT R. 1.7(a)-(b).

282. See, e.g., *FDIC v. U.S. Fire Ins. Co.*, 50 F.3d 1304, 1317 (5th Cir. 1995) (affirming district court ruling that attorney "will likely be compelled to furnish testimony that may be substantially adverse to his client" because he "is a necessary witness").

283. "A lawyer shall provide competent representation[, which] requires the legal knowledge, skill, thoroughness and preparation reasonably necessary . . ." MODEL RULES OF PROF'L CONDUCT R. 1.1.

[F]actors include the relative complexity and specialized nature of the matter . . . [,] the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

Id. R. 1.1 cmt. 1; see also *Fed. Grievance Comm. v. Spat*, No. 3:99 GP 23 (JBA), 2006 WL 1050039, at *1 & n.3 (D. Conn. Apr. 20, 2006) (analyzing, under Connecticut rule identical to Model Rule 1.1, attorney's failure to review a file prior to appearing); *In re Dean*, 401 B.R. 917, 925 (Bankr. D. Idaho 2008) (analyzing attorney's behavior under Idaho rule identical to Model Rule 1.1).

284. MODEL RULES OF PROF'L CONDUCT R. 1.4(a)(2)-(4).

285. For example, with 100,000 plaintiffs, requiring attorneys to notify plaintiffs of every motion would be impractical unless the process were as easy as sending a single email. But with twenty plaintiffs, ethical representation would entail the same level of attorney-client communication as in a single-plaintiff case.

consult with clients and keep them reasonably informed, that would suffice to assure adequate representation—as much as it can be assured in any case. A more thorough Rule 23(a)(4) inquiry into plaintiffs' counsel is not justified by the agency and asymmetric information problems that justify it for Rule 23 class actions. Without such express authority as Rule 23(a)(4) provides for class actions, courts cannot claim a power over choice of counsel because of the principle that “a party's right to representation by the attorney of its choice . . . is a valued right and any restrictions must be carefully scrutinized.”²⁸⁶

C. Ramifications of the Prescription: Fewer Costly Motions and Improper Denials; Minimal Risk of Excessive Collective Actions

Is there much difference between maintaining the current § 216(b) certification practice and, instead, presumptively allowing collective actions while permitting defendants the option to challenge collective status? The difference is in the details, but it is quite substantial.

First, there is a significant difference between a motion about one common issue—the joinder standard that this Article argues should apply—and the seven-part Rule 23 certification motion. After *Wal-Mart Stores*, the once-modest Rule 23(a) commonality requirement is now strictly construed to demand that “claims must depend upon a common contention,” defined as not just any common issue, but an issue so fundamental 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.”²⁸⁷ Virtually all collective actions that courts reject because of differing job duties or supervisors²⁸⁸ would amply meet the proper joinder standard, so long as plaintiffs share a single common issue of law or fact. Any claims that the same employer violated the same statutory provision (e.g., the overtime pay requirement) would meet the joinder requirement, absent extenuating circumstances like identical statutory claims relying on entirely different factual evidence and legal doctrines.²⁸⁹

Second, if the applicable standard is the simple joinder requirement of one common issue, some defendants would choose not to make a motion against collective action status. Where a

286. *S & S Hotel Ventures Ltd. P'ship v. 777 S.H. Corp.*, 508 N.E.2d 647, 650 (N.Y. 1987).

287. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011).

288. See *supra* notes 75–85 and accompanying text.

289. See *supra* notes 182–185 and accompanying text.

motion would be futile, some lawyers might be ignorant or unethical enough to file one anyway, but experience with dispositive motions shows defendants may decline to make even high-stakes motions when doing so would be futile. Despite the increased prevalence and success of dispositive motions in recent decades, as the Supreme Court broadened the grounds for both Rule 12 dismissal²⁹⁰ and Rule 56 summary judgment,²⁹¹ defendants sometimes decline to make Rule 12 or 56 motions.²⁹² Not all, but many, wage cases are ideal for aggregate treatment because of the obvious, substantial similarity of the claims;²⁹³ under this Article's proposal, defense motions challenging collective action status in such cases would be unsuccessful.

Third, even if there is a defense motion, it likely would be one motion rather than two as under existing practice—thus halving motion costs and lessening motion-imposed delay.²⁹⁴ To be sure, some defendants could try to file one motion early (e.g., on the complaint) and one later (e.g., on evidence adduced in discovery)—but not always, and even so, such motions would likely merge with dismissal or summary judgment motions the defendant was already filing.

Fourth, federal courts try to weed out hopeless motions in advance,

290. See Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 829–30 (2010) (discussing the Supreme Court's radical changes to the law on pleading starting in 2007, when the Court "added a requirement for claimants that goes above and beyond having to give notice" and a "requirement that at the pleading stage the plaintiff has the burden of establishing . . . the complaint's plausibility as to liability on the merits" (citing *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009))).

291. See Samuel Issacharoff & George Loewenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73, 73 (1990) (observing that "docket pressures on the federal judiciary have prompted dramatic revisions in federal procedure," and discussing a 1986 "trilogy of cases . . . [that] significantly expanded the applicability of summary judgment under Rule 56").

292. There of course are no citations to judicial decisions on summary judgment motions that parties never file, but the docket reports in various cases show an absence of a summary judgment motion. See, e.g., *Hens v. ClientLogic Operating Corp.*, No. 05-0381 (W.D.N.Y.) (docket reflecting no dispositive motions, with final approval of settlement Dec. 21, 2010); *Clark v. Ecolab, Inc.*, No. 07-8623 (S.D.N.Y.) (docket reflecting no dispositive motions, with final approval of settlement May 19, 2010); *Mohney v. Shelly's Prime Steak, Stone Crab & Oyster Bar*, No. 06-4270 (S.D.N.Y.) (docket reflecting no dispositive motions, with final approval of settlement Dec. 8, 2009).

293. See, e.g., *Shain v. Armour & Co.*, 40 F. Supp. 488, 490 (W.D. Ky. 1941) ("The evident purpose of the [FLSA] is to provide one law suit in which the claims of different employees, different in amount but all arising out of the same character of employment, can be presented and adjudicated, regardless of the fact that they are separate and independent of each other.").

294. As detailed earlier, avoiding delay is particularly important for workers whose claims diminish under the statute of limitations until they opt in, especially low-wage workers with great need for all wages they earn. See *supra* Part II.B.3.

such as by requiring short pre-motion letters—typically no longer than three pages—before the filing of certain types of motions.²⁹⁵ Under this Article’s proposal, defense decertification motions would likely require summarized pre-motion letters to the court. Many courts’ rules requiring pre-motion letters for Rule 12 dismissal and Rule 56 summary judgment motions²⁹⁶ already would cover decertification motions filed under those rules.

Finally, as a policy matter, this is an area where false negatives are more worrisome than false positives. False negatives—improper rejections of collective actions—are a major problem because, as detailed above, disallowing a collective action is a death knell for workers seeking to vindicate important statutory rights.²⁹⁷ In contrast, false positives—allowing collective actions to proceed when doing so is overly costly or unfair to defendants—is less of a concern. Most collective actions are wage claims, which, even if borderline as to commonality, are simple enough to litigate together. For example, in a case where employees in four different job categories each experienced different wage violations, the plaintiffs would just need to show evidence of the four fact patterns, not litigate a full individual trial for each member.

Age or equal pay claims more often may lack sufficient commonality than wage claims; but, as some of the leading ADEA collective actions illustrate, many age collective actions do focus on a single common retirement or reduction-in-force decision applicable to all plaintiffs.²⁹⁸ Ultimately, where claims vary too much for collective adjudication—whether FLSA, ADEA, or EPA claims—defendants should prevail on their misjoinder or dismissal motions. This Article’s proposal still lets courts reject collective actions for too-

295. *E.g.*, E.D.N.Y. LOC. CIV. R. 37.3 (requiring that before any discovery motion, party must file a “letter not exceeding three pages in length outlining the nature of the dispute and attaching relevant materials,” which may yield a “[d]ecision of the [c]ourt” before any formal motion).

296. *See, e.g., Individual Motion Practice and Rules of Judge Joseph F. Bianco, E.D.N.Y., R. III(A)*, available at <http://www.nyed.uscourts.gov/pub/rules/JFB-MLR.pdf> (last visited Dec. 20, 2011) (requiring, before filing dismissal or summary judgment motion, “the moving party shall submit a letter not to exceed three pages in length setting forth the basis for the anticipated motion,” with opponent entitled to file letter as well).

297. *See supra* Part II.B.

298. *See Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, 168 (1989) (deciding ADEA discrimination claim under § 216(b) involving a single “reduction in work force [that] discharged or demoted some 1,200 workers”); *Thiessen v. Gen. Elec. Capital Corp.*, 267 F.3d 1095, 1100 (10th Cir. 2001) (considering ADEA claim under § 216(b) in which plaintiffs alleged that new management determined older workers were “blocking” the advancement of younger, newly recruited employees,” and requested human resources to “prepare severance worksheets” and terminate older employees (citation omitted) (internal quotation marks omitted)).

varied claims—so long as courts do so on properly filed defense motions, rather than by imposing on plaintiffs the current improper requirements of evidentiary motions and heightened commonality standards.

IV. WHY COURTS MAKE THESE ERRORS: INNOCENT AND LESS INNOCENT EXPLANATIONS

When courts err, why do they err? Two possible explanations exist for courts' misinterpretations of § 216(b), one relatively innocent and the other less so. While some may credit one over the other, each likely carries some truth.

A. *Path Dependence: In a Complex, Once-Obscure Field, Relying on Precedent That Proves Misguided*

As detailed above, there is a curious history to the now-prevailing idea that § 216(b) collective actions require a certification motion by plaintiffs and a two-stage judicial inquiry. In 1995, the Fifth Circuit in *Mooney* detailed the two-stage certification process,²⁹⁹ but that process was based on weak precedent and the court did not actually endorse it. Tenth and Eleventh Circuit decisions then purported to follow *Mooney* in endorsing that process,³⁰⁰ and district courts nationwide cite those three circuit decisions in applying that process.³⁰¹

The stare decisis doctrine of adhering to precedent “provid[es] both continuity and predictability,”³⁰² but comes with a downside on vivid display in the § 216(b) case law. Basing decisions on precedent, rather than de novo analysis, can lock in past error by making law “path-dependent”³⁰³: each “precedent influences subsequent legal decisions [that] . . . ‘when decided . . . become, in turn, a part of the legal framework.’”³⁰⁴ With decisions basing on precedent, “the

299. *Mooney v. Aramco Servs. Co.*, 54 F.3d 1207, 1213–14 (5th Cir. 1995).

300. See *supra* notes 163–166 and accompanying text.

301. See *supra* notes 167–172 and accompanying text.

302. William J. Aceves, *The Economic Analysis of International Law: Transaction Cost Economics and the Concept of State Practice*, 17 U. PA. J. INT’L ECON. L. 995, 1063 (1996).

303. For analysis on how stare decisis yields path-dependence and lock-in, see, for example, Daria Roithmayr, *Barriers to Entry: A Market Lock-in Model of Discrimination*, 86 VA. L. REV. 727, 742 (2000) (observing that “even small historical events, particularly those that occur early in the formation of an industry, can have unexpectedly long-lasting effects . . . [and] produce a path far different from the one taken in the[ir] absence”); Robert L. Scharff & Francesco Parisi, *The Role of Status Quo Bias and Bayesian Learning in the Creation of New Legal Rights*, 3 J.L. ECON. & POL’Y 25, 37 (2006) (noting that “[w]here stare decisis is the rule, path dependence is the inevitable result”).

304. Aceves, *supra* note 302, at 1062–63 (quoting DOUGLASS C. NORTH, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE 97 (1990)); see also Maxwell L. Stearns, *Standing Back from the Forest: Justiciability and Social Choice*, 83

evolution of . . . doctrine will depend, to a large extent, upon the order in which cases are presented or, in the language of social choice, will be ‘path dependent.’”³⁰⁵

Thus when early case law gets something wrong, the status of that erroneous decision as precedent can perpetuate the holding in future case law. A party certainly can argue against, or a judge can reject, a bad precedent, but the doctrine of *stare decisis* places a thumb on the scale in favor of a precedent-supported argument over a new argument. In sum, the tendency of path dependence to lock in the sub-optimal is an information market failure. What prevails is not the best idea among a marketplace of freely competing ideas, but the idea enjoying a privileged status because of its early adoption.

Further, collective action procedure since the mid-1990s is a prime area in which judges would be strongly disposed to place a thumb on the scale in favor of following precedent. Even if courts have over-interpreted *Hoffmann-La Roche* “notice” as supporting complex certification processes, that case certainly changed matters, forcing courts to innovate. That need to innovate arose in a field where courts had little experience because § 216(b) was a unique process, varying the joinder and class action rules judges applied far more frequently. A rarely-faced issue imposes high information costs, making reliance on path-dependent shortcuts, like following precedent, entirely rational.³⁰⁶ However, this can also lead to missteps like relying on weak precedents such as *Mooney*.

Furthering judges’ path-dependent reliance upon precedent is that judicial decision-making is short on big-picture theory. Some judges blast academics for being disengaged, focusing on big-picture theory, and neglecting the nuts and bolts of how law really works.³⁰⁷ Merits of this criticism aside, judges certainly can err the other way, not spending time contemplating the big picture because of docket

CALIF. L. REV. 1309, 1412 (1995) (describing path dependence as a “negative, and unintended, consequence” of *stare decisis*).

305. Stearns, *supra* note 304, at 1309.

306. See Charles M. Yablon, *Judicial Drag: An Essay on Wigs, Robes and Legal Change*, 1995 WIS. L. REV. 1129, 1149 (noting that path-dependence can arise when “seemingly rational actors . . . adopt arguably suboptimal behaviors which they continue to follow because moving to a better system would involve unacceptable expense in terms of transition costs, information costs, and/or risk”); Scharff & Parisi, *supra* note 303, at 28 (“[W]hen an individual is faced with a new situation (such as the existence of a new legal right) . . . [t]he rational desire to avoid these adjustment costs can result in an exaggerated preference for the status quo.”);

307. See generally Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992) (describing issues that have arisen in legal education and practice that “call[] into question our status as an honorable profession”).

pressures and case-specific focus.³⁰⁸ Judges' understandable aversion to big-picture theory may explain why they follow readily available, on-point precedent like *Mooney*, rather than critically analyzing how varied aggregate litigation types relate and differ—such as how one type (collective actions) presents less principal-agent difficulty than another (class actions).

Path dependence may not, however, completely explain how early § 216(b) precedents established a locked-in bad practice. Stare decisis is just a thumb on the scale in favor of the argument precedent supports, but precedents erode when judges are sufficiently convinced. That is why “[s]tare decisis is a tendency rather than a rule,” for “if it were a rule, one would get strict path dependence, which no one wants.”³⁰⁹ So the question is why erroneous § 216(b) precedents are the sort that remain followed; it could be just unfortunate coincidence, or the following additional explanation may provide the answer.

B. Hostility to Litigation As a Tool of Dispute Resolution and Social Reform

As Andrew Siegel argues in constitutional law, the organizing theme of the modern Supreme Court is not federalism, originalism, textualism, or judicial restraint, but hostility to litigation as a tool of dispute resolution and social reform.³¹⁰ Justices who are generally pro-states' rights aggressively rein in state litigation by broadly preempting state law with federal law;³¹¹ while originalist and textualist Justices reject those methods when ahistorical, atextual

308. See, e.g., Pierre Schlag, *Spam Jurisprudence, Air Law, and the Rank Anxiety of Nothing Happening (A Report on the State of the Art)*, 97 GEO. L.J. 803, 816 (2009) (noting that judges “may be interested in ‘truth’ or ‘edification’ . . . not as an end itself . . . but only to the extent that these serve the end of reaching a decision, a holding, an order and decree” because their focus must be on “the resolution of disputes, the rendition of decisions, . . . and the clearing of dockets”).

Or as Judge Constance Baker Motley told one of us (Moss) when, as a law clerk, he handed her an unreasonably long draft judicial opinion (roughly 15,000 words) that took far too long to write: “We decide cases here; we don’t write law review articles.”

309. Frank H. Easterbrook, *Some Tasks in Understanding Law Through the Lens of Public Choice*, 12 INT’L REV. L. & ECON. 284, 288 (1992).

310. See generally Andrew M. Siegel, *The Court Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court’s Jurisprudence*, 84 TEX. L. REV. 1097 (2006).

311. “One might expect a Court committed to protecting state autonomy and limiting federal regulatory authority to be sympathetic to arguments that state laws should not easily be overridden by federal laws”—but the modern Court “has consistently rejected” that approach and “overwhelmingly sided with those advocating the invalidation of state regulation.” *Id.* at 1166. In opinions joined by “Justices who have in other contexts been the champions of state autonomy,” the modern Court is “finding preemption in over two-thirds of the cases.” *Id.* at 1166–67.

Eleventh Amendment interpretations eliminate a range of employment lawsuits.³¹²

One of us has similarly argued that hostility to litigation explains certain statutory and rule interpretation, not just constitutional interpretation.³¹³ In discretionary interpretations of matters not detailed in statutory text, such as how to apply vicarious liability or limitations periods, the Court makes pro-defense rulings premised on inconsistent policy arguments, requiring plaintiffs to delay suit in some cases (on penalty of dismissal for failing to use internal dispute resolution³¹⁴), but requiring immediate lawsuits in others (on penalty of dismissal under strictly construed limitations periods³¹⁵). Further evidencing hostility to litigation are decisions disallowing consumer³¹⁶ or employee³¹⁷ suits against companies that insert mandatory arbitration clauses in preprinted materials, and the *Wal-Mart Stores* decision that, “[b]y critically examining and rejecting the employees’ statistical, anecdotal, and social science evidence, . . . raised the bar for [commonality] evidence.”³¹⁸

Federal district and appellate courts are even more hostile to litigation; the Supreme Court issued several unanimous rulings for employment plaintiffs in the 2000s³¹⁹ not because it is pro-plaintiff,

312. See *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 73 (2000) (holding that though Eleventh Amendment text bars only citizens’ suits against *other states*, that amendment also bars citizens from suing *their own states* because the Court has “understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition . . . which it confirms” (citation omitted)).

313. Scott A. Moss, *Fighting Discrimination While Fighting Litigation: A Tale of Two Supreme Courts*, 76 FORDHAM L. REV. 981, 984 (2007).

314. *Faragher v. City of Boca Raton*, 524 U.S. 775, 806–07 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998).

315. *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 623–24 (2007), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (to be codified in scattered sections of 29 U.S.C. and 42 U.S.C.); *Nat’l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 104–05 (2002); see also Moss, *supra* note 313, at 1008–12 (arguing that a “discovery rule is necessary . . . because good employees may be slow to conclude that they have suffered discrimination”).

316. See *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1749, 1753 (2011) (rejecting applicability of state-law unconscionability defense to arbitration provision).

317. See *14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456, 1461, 1474 (2009) (holding that arbitration could bar federal lawsuit on statutory rights).

318. Cathleen S. Yonahara, *Landmark Supreme Court Ruling Blocks Class-Action Discrimination Suit*, 21 CAL. EMP. L. LETTER 1, 4 (2011).

319. See *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 61–64 (2006) (reversing circuits deeming only certain retaliatory acts “adverse” enough to be actionable); *Ash v. Tyson Foods, Inc.*, 546 U.S. 454, 456 (2006) (per curiam) (reversing decision on what remarks are probative of discrimination and other matters); *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 92, 101 (2003) (holding that “direct” evidence is not required for certain analyses of whether discrimination was a “motivating factor”); *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 153–54 (2000) (reversing circuits’ pretext-plus rule that disproving employer’s

but to reverse adventurously pro-defense circuits. For example, in *Desert Palace, Inc. v. Costa*,³²⁰ the Court reversed as “inconsistent with the text” cases imposing a “heightened showing” of “direct” rather than circumstantial evidence for certain claims.³²¹ Furthermore, in *Ash v. Tyson Foods, Inc.*,³²² the Court had to inform the Eleventh Circuit that even if the term “boy” *could* be nondiscriminatory, “it [is] not . . . *always* benign” given “context, . . . local custom, and historical usage”³²³: a white Alabama poultry plant supervisor called “boy” the same African-Americans he rejected for jobs.³²⁴

In sum, courts’ hostility to litigation, shown by their pattern of pretrial dismissals, may be the most powerful explanation for the problem this Article diagnoses: judges’ improper self-empowerment to dismiss collective actions by requiring a high-threshold evidentiary motion unauthorized by statute, rule, historical practice, or agency theory.

CONCLUSION

This Article has attempted to explain from various perspectives how and why courts’ handling of § 216(b) collective actions has been fundamentally incorrect. As a matter of textual interpretation, courts are unauthorized to impose in § 216(b) cases the sort of certification motion requirement and strict commonality inquiry that only Rule 23 requires. As a matter of economic theory, § 216(b) cases do not feature the asymmetric information and principal-agent problems that justify the Rule 23 provisions empowering judges to act as gatekeepers of the filing, representation, and counsel decisions parties ordinarily make themselves. As a policy matter, the certification motion and strict commonality requirements prevent vindication of important statutory rights that are regularly violated, but rarely litigated individually. And as a matter of pragmatism, the labyrinthine two-stage procedure is no necessary evil, given this Article’s offer of a feasible alternative. From all these perspectives, the case law is equally wrong, regardless of whether it arose from innocent path-dependent lock-in of erroneous precedent or whether it arose from judicial hostility to individual rights litigation. Either way, § 216(b) collective actions have risen from a once-obscure field

explanation cannot prove discrimination).

320. 539 U.S. 90 (2003).

321. *Id.* at 98 (citing 42 U.S.C. § 2000e-2(m) (2006)).

322. 546 U.S. 454 (2006) (per curiam).

323. *Id.* at 456 (emphasis added).

324. *Id.*

to a major area of high-impact litigation, making courts' mishandling of them a troubling error warranting correction.