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Solving Fair Labor Standards Act Collective Action Law

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SOLVING FAIR LABOR STANDARDS ACT COLLECTIVE ACTION LAW

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I. INTRODUCTION

The Fair Labor Standards Act ("FLSA"), among other things, regulates the

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minimum hourly wage and overtime for covered, non-exempt employees.[1] Those employees are entitled to receive an earnings amount for a workweek that, divided by the hours of work in that week, at least equals the minimum wage. Covered, non-exempt employees are entitled to overtime—one and one-half times the regular rate of pay for all hours worked over forty in a particular workweek.[2] FLSA minimum wage and overtime law is a critical part of the regulation of employment compensation law in this country.[3] Many workers are entitled to rights under the FLSA and, with respect to overtime, deserve the additional compensation required by federal law for the burden of working an excessive workweek.[4] However, determining whether a particular employee is entitled to FLSA protections may be quite complicated for several reasons. First, only actual employees, as opposed to independent contractors, are entitled to the benefits of the FLSA.[5] Accordingly, worker classification issues arise frequently in FLSA litigation.[6] Second, a labyrinth of possible exemptions to the FLSA overtime requirements may arise in FLSA litigation depending on the industry the employee works in, how the employee is paid, their compensation level, and their job duties.[7] The so-called "white collar" exemptions provide exemptions from these requirements for certain executive,

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1. 29 U.S.C. § 206(a)(1); 29 C.F.R. §§ 778.113, 778.114; 29 U.S.C. § 207(a)(1).

2. 29 U.S.C. § 206(a)(1)(C):

> Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the following rates: (1) except as otherwise provided in this section, not less than . . . (C) $7.25 an hour.

Id.; 29 U.S.C. § 207(a)(1):

> Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed . . . .

Id.

3. MARK A. ROTHSTEIN ET AL., EMPLOYMENT LAW (HORNBOOK SERIES) § 4.1 at 442–43 (6th ed. 2019) (tracing the development of regulation of wage and hour law from colonial times to the passage of the FLSA in 1938 and subsequent amendments to the Act).

4. *See* Overnight Motor Transp. Co. v. Missel, 316 U.S. 572, 578 (1942) (explaining that one of the purposes of the FLSA was to provide "additional pay to compensate [employees] for the burden of a workweek beyond the hours fixed in the act.").

5. 29 U.S.C. § 203(d), (e)(1), (g). An "employer" is "any person acting directly or indirectly in the interest of an employer in relation to an employee." *Id.* An "employee" is "any individual employed by an employer." And "employ" means "to suffer or permit to work." *Id.* The United States Department of Labor has traditionally applied a totality-of-the-circumstances "economic realities" test to distinguish employees from independent contractors. On May 6, 2021, the United States Department of Labor ("DOL") published its final rule withdrawing the Trump Administration's January 7, 2021 Independent Contractor rule narrowing the DOL'S interpretation of an "employee" under the FLSA. On March 14, 2022, Judge Crone ruled that the Biden Administration's withdrawal of the Trump Administration's Independent Contractor rule violated the Administrative Procedure Act. *See* Coal. for Workforce Innovation v. Walsh, No. 1:21-CV-130, 2022 U.S. Dist. LEXIS 68401, at *49 (E.D. Tex. Mar. 14, 2022). The case is currently on appeal to the Fifth Circuit Court of Appeals. Appeal filed (May 16, 2022), Case No. 22-40316.

6. ROTHSTEIN, *supra* note 3, at 444 ("The most common dispute over employee status involves the distinction between employees and independent contractors.").

7. *Id.* at 462–70.

administrative, professional, outside sales, and computer employees.[8] Third, issues often arise concerning what constitutes "hours worked" by employees for purposes of a minimum wage or overtime suit.[9]

Beyond the substance of the FLSA entitlement, Section 216(b) of the Act provides a unique mechanism that permits employees to join together in a suit to vindicate their rights under a collective action.[10] The FLSA collective action provision has been interpreted by many courts to have procedures and standards that are different than a Rule 23 class action.[11] For economic and procedural reasons, attorneys in this area of the law are incentivized to try and certify FLSA suits as collective actions.[12] Courts have pieced together FLSA collective action procedural law over time like a puzzle.[13] Interestingly, these procedural pieces have not always been connected to the statutory language of Section 216(b). In this article, I advocate for both procedural and substantive changes to the dominant approach and framework for certifying FLSA claims as a collective action.

In short, courts should decide the certification decision in a streamlined process after targeted discovery that allows for a more complete understanding of the factual and legal issues involved in the workers' suits than generally exists with the currently-dominant

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8. 29 U.S.C. § 213(a)(1); 29 C.F.R. pt. 541.

9. The FLSA does not provide a comprehensive definition of what constitutes hours worked or compensable time. However, there are various statutory provisions that address the hours worked concept. A key provision is the Portal-to-Portal Act, a 1947 amendment to the FLSA that excludes from hours worked "walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which [the] employee is employed to perform" and "activities which are preliminary to or postliminary to . . . principal . . . activities." 29 U.S.C. § 254(a). In essence, activities are divided into three phases: principal activities, which are compensable, and preliminary and postliminary activities, which are not compensable, unless the activities during those periods are considered an integral and indispensable part of the principal activities. *See* IBP, Inc. v. Alvarez, 546 U.S. 21 (2005); *see generally* Integrity Staffing Sols., Inc. v. Busk, 135 S. Ct. 513 (2014).

10. 29 U.S.C. § 216(b):

> An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought . . . .

Id.

11. Federal Rule of Civil Procedure 23 class action prerequisites are:

> One or more members of a class may sue or be sued as representative parties on behalf of all members only if: (1) the class is so numerous that joinder of all claims 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 representative parties will fairly and adequately protect the interests of the class.

Id. In addition to those prerequisites, the Rule 23(b)(3) class action requires that the court find "that the questions of law or fact common to the class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Rule 23(b)(3) class actions are opt-out as opposed to the FLSA collection action's opt-in requirement. FED. R. CIV. P. 23(c)(2)(B). *See also* Woods v. New York Life Ins. Co., 686 F.2d 578, 580 (7th Cir. 1982) (noting that the difference between a Rule 23 class action and an FLSA collective action is "in the latter the class member must opt in to be bound, while in the former he most opt out not to be bound.").

12. Hoffmann-La Roche v. Sperling, 493 U.S. 165, 170 (1989) ("A collective action allows . . . the advantage of lower individual costs to vindicate rights by the pooling of resources. The judicial system benefits by efficient resolution in one proceeding of common issues of law and fact arising from the same alleged [unlawful] activity.").

13. *See Infra* Part II.

two-step process. Second, Section 216(b) statutory language should be interpreted (or the statute should be amended) to require a high level of commonality among the putative collective action members' claims to meet the "similarly situated" certification standard.[14] This standard should effectively mirror the Rule 23(b)(3) requirement for certification of class actions—that common issues must predominate over individualized issues.[15] Procedural changes to how and when certification decisions are made—as well as adherence to a stringent substantive standard for what meets the "similarly situated" standard—will ensure that collective actions move forward with a high degree of commonality among the members' claims. A high level of commonality is important to ensuring that the collective action is both an efficient and fair system for resolving wage-and-hour claims.[16] However, traditional joinder rules would still allow plaintiffs to join together to bring wage-and-hour claims without stringent certification requirements, and those claims would be judged under a liberalized commonality standard.[17]

This article is divided into six parts. Part II provides an overview of the FLSA collective action provision and the law that has developed regarding FLSA collective action certification decisions. Part III explains why courts should leave the dominant two-step *Lusardi* framework for deciding FLSA collective action certification, and instead adopt a streamlined one-step approach. Part IV explains why courts should apply a heightened commonality standard for FLSA collective action certification decisions. Part V advocates for statutory changes to provide greater uniformity on the commonality issue among employment law class/collective actions. Finally, Part VI summarizes the key points of the article.

II. FLSA COLLECTIVE ACTION OVERVIEW—A COMPLICATED JURISPRUDENCE

FLSA collective action law starts with the statute. The crucial portion of the statute states that an action may be brought by "one or more employees . . . on behalf of himself and themselves and other employees *similarly situated*," and no employee may be a party to such action unless "he gives his consent in writing to become such a party and the consent is filed in the court in which such action is brought"—the opt-in requirement.[18] Interestingly, the statute does not define what "similarly situated" means.[19] From this limited language, a complicated jurisprudence has sprung up in the federal district courts and intermediate appellate courts regarding the certification of FLSA collective actions.

A. Supreme Court Holdings on FLSA Collective Actions

While the U.S. Supreme Court has weighed in on FLSA collection action law on several occasions, its decisions have generally not gone to the heart of the law regarding

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14. The term "similarly situated"—as stated in Section 216(b)—is not defined in the FLSA, and, as shall be discussed *infra*, courts have varied in their interpretation of the term. 29 U.S.C. § 216(b).

15. FED. R. CIV. P. 23(b)(3) (certification requires the court to find that "the questions of law or fact common to the class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.").

16. *See Infra* Part V.A.

17. *See Infra* Part V.B.

18. 29 U.S.C. § 216(b).

19. *Supra* note 14.

the procedure and standard for determining whether to certify a case as an FLSA collective action. Three U.S. Supreme Court decisions—*Hoffman-La Roche, Inc. v. Sperling*,[20] *Genesis Healthcare Corp. v. Symczyk*,[21] and *Tyson Foods, Inc. v. Bouaphakeo*[22]—focus on discrete FLSA collective action issues, but dance around the most fundamental aspects of collective action certification law.

In *Hoffman-La Roche, Inc. v. Sperling*, the U.S. Supreme Court held that it was appropriate for a district court to send notices to employees of the company-defendant—potential collective action plaintiffs—in an Age Discrimination in Employment Act ("ADEA") lawsuit.[23] This holding applies to FLSA actions as well because the Court interpreted the Section 216(b) provision in the FLSA.[24] The Court stressed that the Section 216(b) collective action provision and the federal procedural rules provide considerable authority for district courts to manage ADEA actions.[25] Moreover, this provision reveals that district courts must have flexibility to manage these actions to achieve the orderly and fair administration of justice.[26] One aspect of judicial authority is a court's ability to provide notice to potential ADEA/FLSA collective action members as a case-management tool; however, the Court made clear that district courts must not use notice as a means of soliciting claims.[27]

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20. 493 U.S. 165 (1989).

21. 569 U.S. 66 (2013).

22. 577 U.S. 442 (2016).

23. *Hoffman-La Roche*, 493 U.S. at 169 ("We hold that district courts have discretion, in appropriate cases, to implement 29 U.S.C. § 216(b) (1982 ed.), as incorporated by [the ADEA], in ADEA actions by facilitating notice to potential plaintiffs.").

24. *Id.* Section 7(b) of the ADEA incorporates the FLSA's enforcement provisions, which includes the collective action provision. *See* 29 U.S.C. § 626(b) ("The provisions of [the ADEA] shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of [the FLSA], and subsection (c) of this section."). Therefore, ADEA collective actions may be pursued under Section 216(b). In addition, Section 216(b) includes a provision that allows for Equal Pay Act ("EPA") collective actions. *See* Collins v. Dollar Tree Stores, Inc., 788 F. Supp. 2d 1328, 1330–31 (N.D. Ala. 2011):

> Plaintiffs assert their EPA claims on behalf of those similarly situated pursuant to FLSA § 216(b), which includes a provision for employees to bring collective actions against employers who violate any of the provisions of § 206 or § 207, which includes the EPA, by "any one or more employees for and in behalf of himself and other employees similarly situated."

Id. The Equal Pay Act of 1963, an amendment to the Fair Labor Standards Act of 1938, prohibits sex-based pay discrimination. *See* 29 U.S.C. § 206(d)(1):

> No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility . . . .

Id. In its totality, Section 216(b) collective actions may be brought under the FLSA, ADEA, and EPA.

25. *Hoffman-La Roche*, 493 U.S. at 172–73.

26. *Id.* at 169–74.

27. *Id.* at 174:

> Court intervention in the notice process for case management purposes is distinguishable in form and function from the solicitation of claims. In exercising the discretionary authority to oversee the notice-giving process, courts must be scrupulous to respect judicial neutrality. To that end, trial courts must take care to avoid even the appearance of judicial endorsement of the merits of the action.

Id.

In *Genesis Healthcare Corp. v. Symczyk*, the Court considered a justiciability question—whether a defendant's use of a Rule 68 "offer of judgment" mooted an individual plaintiff's FLSA overtime claim after the plaintiff refused to accept the settlement offer.[28] In this action, the plaintiff sought certification of a Section 216(b) collective action; but at the time of the unaccepted settlement offer the suit had not been "conditionally certified" as a collective action by the court and no other employees had joined the suit.[29] The majority supported the Third Circuit's view that an unaccepted settlement offer mooted the plaintiff's individual claims, and then extrapolated from that point to find that the lower court lacked subject matter jurisdiction over the case because no other employees had joined the suit.[30] The majority speculated that even if the district court was permitted to make a "conditional certification" finding on remand, mootness on the individual claim would still exist, since conditional certification under the FLSA does not produce a "class with an independent legal status."[31] The dissenters argued that this was a one-off case with no practical, real-world application.[32] In actuality, the dissenters argued, the Third Circuit was incorrect to hold that an unaccepted settlement offer should moot an individual FLSA plaintiff's claim.[33] Under this reasoning, future FLSA claims in similar scecarios would never be mooted by an unaccepted settlement offer, and the proposed collective action would be able to proceed.[34] Notably, the Court never addressed the exact procedural contours of how collective action certification works, nor did it grapple with the meaning of "similarly situated."[35]

In *Tyson Foods, Inc. v. Bouaphakeo*, employees at a pork processing plant spent time during the workday donning and doffing special gear.[36] They argued that the employer failed to properly pay them overtime because the uncompensated donning and doffing time took them over the forty-hour overtime threshold.[37] The plaintiffs sought certification of the FLSA claims as a collective action and sought certification of the state law claims under an Iowa wage payment law as a Federal Rule of Civil Procedure 23 class

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28. *Genesis*, 569 U.S. at 69–71.

29. *Id.* at 70.

30. *Id.* at 73:

> In the absence of any claimant's opting in, respondent's suit became moot when her individual claim became moot because she lacked any personal interest in representing others in this action. While the FLSA authorizes an aggrieved employee to bring an action on behalf of himself and 'other employees similarly situated,' the mere presence of collective-action allegations in the complaint cannot save the suit from mootness once the individual claim is satisfied.

Id.

31. *Id.* at 75.

32. *Genesis*, 569 U.S. at 79 (Kagan, J., dissenting).

33. *Id.*

34. *Id.* at 79–87.

35. In footnote eleven, the Court gave a generic warning about the propriety of using Rule 23 class-action nomenclature in Section 216(b) collective actions and noted that significant differences exist between certification under Federal Rule of Civil Procedure 23 and the joinder process under Section 216(b). *Id.* at 70 n.11. The majority found Rule 23 class action precedent on the mootness issue to be unpersuasive because certified Rule 23 class actions have an independent legal status, while Section 216(b) collection actions do not. *Id*. at 74.

36. Tyson Foods, Inc. v. Bouaphakeo, 577 U.S. 442, 442 (2016).

37. *Id.* at 447–48.

action.[38] The district court certified the case as both an FLSA collective action and a Rule 23 class action.[39] The number of employees in the FLSA collective action was lower than the Rule 23 class action because of the FLSA collective action requirement that employees must opt in and formally join the action.[40] The Court's opinion focused on whether the plaintiffs' use of representative evidence at trial to prove class-wide liability in a Rule 23 class action was proper.[41] The majority opinion focused on Rule 23 class action law and relied on an older FLSA case in determining that the use of the statistical evidence was proper in this case.[42] A vigorous dissent argued that the district court failed to do the required rigorous analysis under Rule 23 to ensure that the representative evidence was probative enough of the individual issue to make it acceptable class-wide proof.[43] The evidence showed wide variations among class members on the individualized issue that actually mattered in the case: how long each employee spent donning and doffing gear each day.[44] Therefore, the dissent posited that the majority's decision essentially did away with the Rule 23 predominance inquiry and created a problematic special evidentiary rule just for the FLSA.[45]

While there is much to analyze regarding the *Tyson* Court's interpretation of Rule 23 class action requirements and the use of representative proof at trial for class actions, the Court's opinion does not specifically address FLSA collective action procedures other than to say "conditional certification" means a court sending out notice to potential plaintiffs.[46] The Court also failed to address the "similarly situated" collective action standard and assumed, without deciding, that "the standard for certifying a collective action under the FLSA is no more stringent than the standard for certifying a class under the Federal Rules of Civil Procedure" because that is what the parties had agreed to for purposes of the case.[47]

B. Lusardi v. Xerox *is Crucial to Understanding FLSA Collective Action Procedure*

Although U.S. Supreme Court cases on collective actions are important, the driving force in FLSA collective action procedure for three decades has been *Lusardi v. Xerox*.[48] In *Lusardi*, the court utilized a two-step process to determine whether an ADEA case

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38. *Id.* at 448.
39. *Id.* at 449.
40. *Id.*
41. *Tyson*, 577 U.S. at 452–60.
42. *Id.* at 456–57 (citing Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680 (1946)).
43. *Id.* at 467–80 (Thomas, J., dissenting).
44. *Id.* at 453–54.
45. *Id.* 469–70.
46. *Tyson*, 577 U.S. at 449.
47. *Id.* at 452:

> The parties do not dispute that the standard for certifying a collective action under the FLSA is no more stringent than the standard for certifying a class under the Federal Rules of Civil Procedure. This opinion assumes, without deciding, that this is correct. For purposes of this case then, if certification of respondents' class action under the Federal Rules was proper, certification of the collective action was proper as well.

Id.

48. 118 F.R.D. 351 (D.N.J. 1987), *vacated in part on other grounds on remand*, 122 F.R.D. 463 (D.N.J. 1988).

should be certified as a Section 216(b) collective action.[49] Many courts have adopted this process for ADEA, FLSA, and EPA collective actions, and it is considered the dominant procedural practice in FLSA collective action law.[50] Although courts that follow *Lusardi* may vary slightly from this process, the basics of the two-step approach are as follows.

At the initial "notice" step, a district court looks at the plaintiff's allegations in the pleadings and determines whether there are other employees similarly situated to the plaintiff. "Similarly situated" is judged at a very low level of generality and is viewed as a very lenient standard.[51] If this step is satisfied, the FLSA action is conditionally certified as a collective action, and notice of the collective action is sent by the court to potential plaintiffs—other employees in the organization whose FLSA rights may have been violated—in accordance with *Hoffman-La Roche* so that those employees can evaluate whether to "opt-in" to the collective action.[52] A denial of conditional certification precludes the court's dissemination of such notice. If the court views the "similarly situated" requirement as unsatisfied when denying conditional certification, the denial precludes the case from moving forward as a collection action, and if any opt-in plaintiffs had already joined the action, their claims would be dismissed without prejudice so that each plaintiff could refile.[53] The original named plaintiff is left to litigate in the action.[54]

The second step occurs when the defendant-employer files a motion to decertify the collective action. At this point, the record of the case regarding the commonality of the collective action plaintiffs should be more developed from discovery. The district court must re-examine the certification question and decide the similarly situated issue in light of the conditional-certification related discovery.[55] Factors to consider in deciding whether to decertify the collective action "may include the (1) disparate factual and employment settings of the individual plaintiffs; (2) defenses available to the defendants which appear to be individual to the plaintiff; and (3) fairness and procedural

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49. *Id.* at 352–59.

50. *See* Campbell v. City of Los Angeles, 903 F.3d 1090, 1100 (9th Cir. 2018) (describing the two-step *Lusardi* certification process as the "near universal practice."). The two-step process has been formally approved by the Second, Third, Sixth, Tenth, and Eleventh Circuit Courts of Appeals. *See* Glatt v. Fox Searchlight Pictures, Inc., 811 F.3d 528, 540 (2d Cir. 2016); Camesi v. Univ. of Pittsburgh Medical Center, 729 F.3d 239, 243 (3rd Cir. 2013); Comer v. Wal-Mart Stores, Inc., 454 F.3d 544, 546–47 (6th Cir. 2006); Thiessen v. GE Capital Corp., 267 F.3d 1095, 1102–1105 (10th Cir. 2001); *and* Morgan v. Family Dollar Stores, Inc., 551 F.3d 1233, 1260–61 (11th Cir. 2008). District courts in the other circuits have also identified it as the dominant practice. *See* Mamadou Alpha Bah v. Enterprise Rent-A-Car Co. of Boston, LLC, 560 F. Supp. 3d 366, 372 (D. Mass. 2021); Rottman v. Old Second Bancorp, Inc., 735 F. Supp. 2d 988, 990–91 (N.D. Ill. 2010); Houston v. URS Corp., 591 F. Supp. 2d 827, 831 (E.D. Va. 2008); Kautsch v. Premier Commc'ns, 504 F. Supp. 2d 685, 688 (W.D. Mo. 2007); Encinas v. J.J. Drywall Corp., 265 F.R.D. 3, 6 (D.D.C. 2010); Leuthold v. Destination Am., Inc., 224 F.R.D. 462, 467 (N.D. Cal. 2004); *and* Dominick v. U.S., 135 Fed. Cl. 714, 716 (2017).

51. *See* 1 MCLAUGHLIN ON CLASS ACTIONS § 2:16 (14th ed. 2017); Morgan v. Family Dollar Stores, Inc., 551 F.3d 1233, 1260–61 (11th Cir. 2008); *and* Thiesen v. GE Capital Corp., 267 F.3d 1095, 1102 (10th Cir. 2001).

52. *See* Genesis Healthcare Corp. v. Symczyk, 569 U.S. 66, 75 (2013) (noting that the "sole consequence" of a successful motion for conditional certification is "the sending of court-approved written notice" to employees who might want to join the litigation as individual plaintiffs).

53. *See* Mickles v. Country Club, Inc., 887 F.3d 1270, 1276 (11th Cir. 2018).

54. *Id.* at 1280.

55. *See* 1 MCLAUGHLIN ON CLASS ACTIONS § 2:16 (14th ed. 2017); Hipp v. Liberty Nat'l Life Ins. Co., 252 F.3d 1208, 1218 (11th Cir. 2001); *and* Camesi v. Univ. of Pittsburgh Med. Ctr, No. 09-85J, 2011 U.S. Dist. LEXIS 146067, at *5–8 (W.D. Pa. Dec. 20, 2011).

considerations" that favor or weigh against collective action certification.[56] If the plaintiffs are similarly situated, the district court allows the action to proceed to trial as a collective action.[57] If the plaintiffs are not similarly situated, the district court decertifies the class, and the opt-in plaintiffs are dismissed without prejudice.[58] The original named plaintiff then proceeds to trial on their own claims.[59]

It is generally understood that a court should more carefully scrutinize the similarity issue at the second step of the certification analysis, and should impose a stricter burden on the plaintiff to demonstrate that the similarities of the plaintiffs' claims merit collective action treatment.[60] However, many courts, following *Lusardi,* still leave the "similarly situated" test at the second step relatively undefined and merely follow ad-hoc principles of fairness and judicial economy in making the decision.[61]

In essence, the *Lusardi* approach has two key features. The first feature is procedural rigidity in following the aforementioned two-step process for certifying an FLSA collective action.[62] Second, the *Lusardi* approach tends to lead to loose, ad-hoc, case-by-case interpretation of what it means for party plaintiffs to be "similarly situated" for FLSA purposes.[63]

III. LEAVING *LUSARDI*: A NEW CERTIFICATION PROCEDURE

It is time for courts to leave both aspects of *Lusardi*—its procedural rigidity and the loose, ad-hoc understanding of what "similarly situated" means in the FLSA collective action context.[64] Cutting through all of the complicated *Lusardi* jurisprudence, the reality is that Section 216(b) is more of a blank slate than courts have typically understood. Neither the *Lusardi* two-step certification process nor the ad-hoc test that interprets "similarly situated" at a high level of abstraction are statutorily required by Section 216(b).[65] For good reason, some courts are beginning to move away from both the *Lusardi*

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56. *See* Scott v. Chipotle Mexican Grill, Inc., 954 F.3d 502, 517 (2d Cir. 2020), *cert. denied*, 142 S. Ct. 639 (U.S. December 21, 2021); Halle v. West Penn Allegheny Health Sys., 842 F.3d 215, 226 (3d Cir. 2016); *and* Anderson v. Cagle's, Inc., 488 F.3d 945, 953 (11th Cir. 2007).

57. *Halle*, 842 F.3d at 226.

58. *Id.*

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

60. *See Anderson*, 488 F.3d at 953; *Thiessen*, 267 F.3d at 1103.

61. *See Mooney*, 54 F.3d at 1213:

> *Lusardi* and its progeny are remarkable in that they do not set out a definition of 'similarly situated', but rather they define the requirement by virtue of the factors considered in the 'similarly situated' analysis. In other words, this line of cases, by its nature, does not give a recognizable form to an ADEA representative class, but lends itself to *ad hoc* analysis on a case-by-case basis.

Id.

62. *See generally* Lusardi v. Xerox Corp., 118 F.R.D. 351 (D.N.J. 1987).

63. *Id.*; *Mooney*, 54 F.3d at 1213.

64. *See supra* Part II.B.

65. *See* Campbell v. City of L.A., 903 F.3d 1090, 1108 (9th Cir. 2018):

> [T]he FLSA leaves the collective action procedures—beyond the requirement of a written opt-in—open. As here relevant, the FLSA does not establish a process for evaluating the propriety of the collective mechanism as litigation proceeds. It does not provide a definition of 'similarly situated'—the requirement that largely determines the viability of a collective action.

Id.

understanding of the certification process and its ad-hoc "similarly situated" test.[66] FLSA collective action law should be modified to give district courts discretion regarding the timing and evidence reviewed in their certification decisions. In addition, the term "similarly situated" under Section 216(b) should be interpreted to include a "predominance" requirement.[67]

A. The Swales *Approach is Superior to the* Lusardi *Method*

The path forward to changing the two-step certification procedure is best illustrated by the course recently charted by the Fifth Circuit Court of Appeals.[68] In *Swales v. KLLM Transportation Services, L.L.C.*, the Fifth Circuit rejected *Lusardi* and its adherence to a two-step certification process.[69] The court ruled that there is no requirement that a court must decide whether an FLSA action is "conditionally certified" as a collective action and then later decide whether to decertify the collective.[70] Section 216(b) and Supreme Court precedent simply require that notice goes out to potential plaintiffs only if the district court determines that workers are "similarly situated."[71] In a key portion of its opinion, the court articulated a streamlined approach to the "similarly situated" decision: the district judge decides "at the outset of the case, what facts and legal considerations will be material to determining whether a group of 'employees' is 'similarly situated,'" and then "authorize[s] preliminary discovery accordingly."[72] After appropriate discovery, the judge makes the "similarly situated" decision—whether the case is allowed to proceed as a collective—by reviewing not just general allegations in pleadings, but evidence that has been developed by the parties after a targeted discovery process tailored to the nature of the case.[73]

The *Swales* court's flexible approach is much better than the *Lusardi* two-step method. With *Lusardi*, courts are given the initial opportunity, through conditional certification, to give a cursory look at the allegation that employees' FLSA claims have a common issue.[74] Without discovery, the limited information on which the judge has to make the initial certification decision could lead to initial certifications where

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66. *See infra* Parts II and III.

67. *See* discussion *infra* Part III.

68. *See generally* Swales v. KLLM Transp. Servs., L.L.C., 985 F.3d 430 (5th Cir. 2021).

69. *Id.* at 439 (stating that "now that the question is squarely presented, we reject *Lusardi*.").

70. *Id.* at 440 (explaining that, although the two-stage certification of Section 216(b) collective actions may be common practice, nothing in the FLSA or Supreme Court precedent "requires or recommends (or even authorizes) any 'certification' process.").

71. *Id.* (clarifying that "the district court's job is ensuring that notice goes out to those who are 'similarly situated,' in a way that scrupulously avoids endorsing the merits of the case.").

72. *Id.* at 441.

73. *Swales*, 985 F.3d at 441:

> Instead of adherence to *Lusardi*, or any test for 'conditional certification,' a district court should identify, at the outset of the case, what facts and legal considerations will be material to determining whether a group of 'employees' is 'similarly situated.' And then it should authorize preliminary discovery accordingly. The amount of discovery necessary to make that determination will vary case by case, but the initial determination must be made, and as early as possible. In other words, the district court, not the standards from *Lusardi*, should dictate the amount of discovery needed to determine if and when to send notice to potential opt-in plaintiffs.

Id.

74. *See generally* Lusardi v. Xerox Corp., 118 F.R.D. 351 (D.N.J. 1987).

commonality is clearly lacking. All conditional certification may accomplish is placing settlement pressure on the defendants early on in the case without a valid basis.[75] Without discovery and without firmly deciding the "similarly situated" question at the outset of the litigation, there is a high risk that notices to join the action will go out to workers who are not "similarly situated" and, accordingly, do not have rights to join the collective action.[76] This would go against the *Hoffman-La Roche* court's admonition that notice to potential opt-in plaintiffs should not cross the line to judicial claims solicitation.[77]

Arbitration agreements and the employee misclassification issue provide two examples of how the *Swales* approach to certification is preferred to *Lusardi*. In *In re JPMorgan Chase & Co.*, the district judge conditionally certified a collective action and sent notice to workers about the collective action.[78] The problem was that many of the notices went to employees who had signed arbitration agreements and, therefore, were not potential participants in the FLSA collective action.[79] Following *Lusardi*, some district courts had waited until the second step, at the decertification stage, to evaluate the applicability of arbitration agreements based on the notion that merits-based issues—like the applicability of an arbitration agreement—are not to be evaluated at the first step.[80]

The Fifth Circuit correctly determined that this was the wrong way to go.[81] The court held that it was improper for the trial court to not consider evidence about arbitration agreements before sending notice because notice can only properly go to employees who can actually be potential plaintiffs under the law.[82] As the court stated, "alerting those who cannot ultimately participate in the collective 'merely stirs up litigation,' which is what *Hoffman-La Roche* flatly proscribes."[83]

In *Swales*, the plaintiffs and potential plaintiffs in the FLSA suit were truck drivers.[84] These included the original plaintiffs, the opt-in plaintiffs who joined before the conditional certification decision, and the potential opt-ins to whom the court authorized notice after it granted conditional certification.[85] Many of the truck drivers had independent contractor agreements with the hiring company and even hired their own employees to help operate the equipment.[86] In the litigation, dispositive legal issues arose concerning whether certain truck drivers were actually employees who had rights under

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75. *Swales*, 985 F.3d at 435–36 (stating that collective actions pose "the opportunity for abuse (by intensifying settlement pressure no matter how meritorious the action)," and that "the leniency of the stage-one standard, while not so toothless as to render conditional certification automatic, exerts formidable settlement pressure.").

76. *Id.* at 442.

77. *Id.*

78. *In re* JPMorgan Chase & Co., 916 F.3d 494, 498 (5th Cir. 2019).

79. *Id.* at 502–03.

80. *See* Esparza v. C&J Energy Servs., Inc., No. 5:15-CV-850, 2016 U.S. Dist. LEXIS 58137, at *7 (W.D. Tex. May 2, 2016); Green v. Plantation of La., L.L.C., No. 2:10-0364, 2010 U.S. Dist. LEXIS 133449, at *3 (W.D. La. Dec. 15, 2010); *and* Villatoro v. Kim Son Rest., L.P., 286 F. Supp. 2d 807, 811 (S.D. Tex. 2003).

81. *JPMorgan*, 916 F.3d at 502–04.

82. *Id.*

83. *Id.* at 502 (quoting *Hoffman-La Roche*, 493 U.S. at 174).

84. Swales v. KLLM Transp. Servs., L.L.C., 985 F.3d 430, 433 (5th Cir. 2021).

85. *Id.* at 433, 437–39, 442–43.

86. *Id.* at 438, 442.

the FLSA, or independent contractors who did not.[87] Yet, the district court concluded that at the first step of *Lusardi*—conditional certification—it could not consider all of the evidence and information available regarding the dissimilarities among truck drivers because it was a merits question.[88]

Once again, the Fifth Circuit ruled that this was the incorrect approach.[89] All available and relevant evidence must be considered when the court decides the "similarly situated" question—whether this is called certification or something else.[90] Additionally, notice cannot go out until the court decides the "similarly situated" question in favor of the plaintiffs based on the available evidence.[91] Whether the truck drivers are "employees" allowed to bring an FLSA claim is a "threshold question" that must be evaluated based on all of the evidence available to the court even if such question is intertwined with the "merits of the case."[92] It is acceptable if the same facts that go to these threshold questions are also relevant when later deciding the merits of the case.[93]

The Fifth Circuit's approach in *Swales* hit the proverbial nail on the head. *Lusardi* must not be used as a cover to prevent the court from evaluating threshold matters that affect the "similarly situated" analysis until the decertification stage—when the court has already provided notice to potential opt-ins and facilitated the collective action. Courts must enforce the FLSA's similarly situated requirement at the outset of the litigation based on all relevant evidence gathered through discovery.[94] Moreover, a rigorous "similarly situated" standard—not a lenient one—must be satisfied before notice goes to potential opt-ins.[95] Courts may utilize a one-step process, because nothing in Section 216(b) requires the two-step process—conditional certification and then later decertification consideration—when it distracts from the ultimate issue of satisfying the statutory "similarly situated" standard.[96] However, with this new process there should be flexibility for district courts who find the "similarly situated" standard to be satisfied to later revoke that decision when dissimilarities among the plaintiffs are presented at trial, and there is no way to fairly try the case as a collective. The *Swales* approach should be followed because it is more fair to both FLSA plaintiffs and defendants and makes it more likely that cases that proceed collectively actually possess the required level of commonality to fairly and efficiently resolve the case. Too many cases are initially certified to proceed as an FLSA collective when the plaintiffs only make general allegations of commonality in

87. *Id.*

88. *Id.* at 441.

89. *Swales*, 985 F.3d at 441.

90. *Id.* at 440–42.

91. *Id*. at 442.

92. *Id*. at 441.

93. *Id*. at 442–43.

94. To be sure, the factual nature of the FLSA overtime case will inform the amount, if any, and type of discovery needed by the district court to make the "similarly situated" determination. The *Swales* court opined that in a donning and doffing case where all of the plaintiffs had the same job description and the allegations involved the same aspect of the job the district court could make the "similarly situated" determination based on the pleadings and limited preliminary discovery. *Swales*, 985 F.3d at 441–42.

95. *Id.* at 434.

96. *Id.* at 441 (*Lusardi's* two-step certification procedure's "rigidity distracts district courts from the ultimate issue before it.").

a cursory way by pointing to a common plan, policy, or scheme of the employer.[97]

B. The Initial Response to Swales

Since the Fifth Circuit's *Swales* decision in January 2021, litigants have presented similar arguments to courts outside the Circuit arguing for changes to the two-step certification process and a rejection of *Lusardi*.[98] The two-step certification process, however, persists. Of course, district courts in the Fifth Circuit are now following *Swales*;[99] however, courts outside the Fifth Circuit have generally continued to follow the traditional two-step approach.[100] As of the publication of this article, no other federal court of appeals has yet to adopt *Swales* and specifically reject the two-step approach.

Courts have made a variety of arguments to resist *Swales*. First, some courts point to the *Lusardi* two-step process's long history and its prevalence throughout the country as a reason to maintain it.[101] Second, some courts argue that *Swales* is distinguishable from their cases because *Swales* dealt with a threshold "employee" status question that is not present in their cases.[102] Finally, some courts argue that when numerous employees have already opted in to the lawsuit without judicial intervention or oversight through the notice process, the *Swales* rationale should not apply.[103] Instead, a district court should

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97. *See*, *e.g.*, Ison v. Markwest Energy Partners, L.P., No. 3:21-0333, 2021 U.S. Dist. LEXIS 241741, at *13 (S.D.W. Va. Dec. 17, 2021) (modest factual showing that plaintiffs and potential opt-in plaintiffs are victims of a common policy or plan that violated the law is all that is required at step one of *Lusardi*).

98. *See* Branson v. All. Coal, LLC, No. 4:19-CV-00155-JHM 2021, U.S. Dist. LEXIS 75707, at *9 (W.D. Ky. Apr. 20, 2021) (defendant-employer requested the district court to follow the *Swales* court's rejection of the two-step certification procedure); Piazza v. New Albertson's, LP, No. 20-cv-03187, 2021 U.S. Dist. LEXIS 20573, at *14 n.6 (N.D. Ill. Feb. 3, 2021) (defendant-employer advocated for the district court to deviate from the "well-established" two-step certification process and allow extensive discovery based on Swales).

99. *See* Cotton-Thomas v. Volvo Grp. N. Am., No. 3:20-CV-113-RP, 2021 U.S. Dist. LEXIS 99752, at *3–6 (N.D. Miss. May 25, 2021); Birdwell v. Lencho Oilfield Servs., Inc., No. SA-20-CV-00855, 2021 U.S. Dist. LEXIS 98488, at *1–4 (W.D. Tex. May 25, 2021); Verrett v. Pelican Waste & Debris, L.L.C., No. 20-1035, 2021 U.S. Dist. LEXIS 84071, at *4 (E.D. La. May 3, 2021); Scott v. Mobilelink La., L.L.C., No. 20-826-SDD, 2021 U.S. Dist. LEXIS 71575, at *5 (M.D. La. Apr. 13, 2021); Gaona v. Flowco Prod. Sols., L.L.C., No. 20-CV-144-DC, 2021 U.S. Dist. LEXIS 126446, at *3–4 (W.D. Tex. Apr. 9, 2021); *and* Young v. Energy Drilling Co., 534 F. Supp. 3d 720, 723–26 (S.D. Tex. Mar. 31, 2021).

100. The following courts acknowledged *Swales* but declined to follow it: *In re* New Albertsons, Inc., No. 21-2577, 2021 U.S. App. LEXIS 26966, at *3–6 (1st Cir. Aug. 30, 2021) (holding that the district court did not abuse its discretion in following two-step certification process instead of following *Swales* approach); Thomas v. Maximus, Inc., No. 3:21cv498, 2022 U.S. Dist. LEXIS 35126, at *10–12 (E.D. Va. Feb. 28, 2022); Clark v. Sw. Energy Co., No. 4:20-cv-00475, 2022 U.S. Dist. LEXIS 61191, at *8 (E.D. Ark. Mar. 31, 2022); Branson v. All. Coal, L.L.C., No. 4:19-CV-00155, 2021 U.S. Dist. LEXIS 75707, at *9–12 (W.D. Ky. Apr. 20, 2021); McCoy v. Elkhart Prods. Corp., No. 5:20-CV-05176, 2021 U.S. Dist. LEXIS 26069, at *5 (W.D. Ark. Feb. 11, 2021); Moreau v. Medicus HealthCare Sols., L.L.C., No. 20-cv-1107, 2021 U.S. Dist. LEXIS 44780, at *4–6 (D.N.H. Mar. 10, 2021); Wright v. Waste Pro U.S., Inc., No. 0:19-cv-62051, 2021 U.S. Dist. LEXIS 68471, at *14–17 (S.D. Fla. Apr. 6, 2021); Droesch v. Wells Fargo Bank, N.A., No. 20-cv-06751, 2021 U.S. Dist. LEXIS 87123, at *11 (N.D. Cal. May 6, 2021); *and* Santos v. E&R Servs., No. 20-2737, 2021 U.S. Dist. LEXIS 244897, at *8–12 (D. Md. Dec. 23, 2021).

101. *See* Wright v. Waste Pro U.S., Inc., No. 0:19-cv-62051, 2021 U.S. Dist. LEXIS 68471, at *14–15 (S.D. Fla. Apr. 6, 2021) (emphasizing the two-step approach's long history in the Eleventh Circuit and how the Circuit has endorsed it and recognized its effectiveness for decades); *McCoy*, 2021 U.S. Dist. LEXIS 26069, at *5 (stating that the court will follow the "historical, two-stage approach" because it has proven to be efficient over time).

102. *See Santos*, 2021 U.S. Dist. LEXIS 244897, at *10–12; *Piazza*, 2021 U.S. Dist. LEXIS 20573, at *14 n.6.

103. *See, e.g.*, *Thomas*, 2022 U.S. Dist. LEXIS 35126, at *13–14; *Branson*, 2021 U.S. Dist. LEXIS 75707, at *10–12.

conditionally certify if the low standard is met, and send out the notice to potential opt-ins anyway.[104] The point seems to be from a case-management perspective that the litigation will run smoother if the court oversees the notice and joinder of parties now that a lot of plaintiffs are already involved in the litigation.[105]

None of these responses are convincing. First, a practice that is not rooted in the statute and improperly balances the interests of both parties should not necessarily continue, even if it is an ongoing one that has persisted for many years. Second, although the underlying FLSA issue in the *Swales* opinion was a threshold "employee" coverage issue, the rationale for the new approach is not necessarily based on the presence of any specific FLSA issue.[106] Instead, the idea is for the trial judge to figure out early on in the litigation what facts and law impact the FLSA's "similarly situated" question so that the determination can be made based on the most reliable and relevant information in fairness to both parties.[107] The new process—more targeted discovery and typically an earlier, evidence-based determination for proceeding on the basis of a collective—cuts across the variety of FLSA contexts of coverage issues, exemption issues, and what constitutes compensable time.

Finally, while it is true that in FLSA collective action cases plaintiffs' counsel is often able to opt-in plaintiffs to the litigation without any judicially approved notice, this does not mean the court should still follow the first step of *Lusardi*. The judiciary should not be used to facilitate notice to potential plaintiffs until the bar of "similarly situated" is reached based on a fuller understanding of the evidence—one that goes beyond the pleadings—related to this question. The proper role of the judge is to ensure that there truly are common issues of fact and law that can be efficiently and fairly resolved through a collective proceeding.[108] In cases where the "similarly situated" determination can be made by the judge expeditiously after targeted discovery, the fact that numerous opt-ins have occurred and that new consents will likely continue to be filed prior to the court's determination should not preclude the use of the *Swales* approach. The amount of opt-ins should not unnecessarily complicate the case, and the trade-off of making the "similarly situated" determination based on more complete information is worth the complication of any case-management strain caused by possible additional pre-notice opt-ins.

C. The Way Forward

Although the *Swales* approach to move away from two-step certification has not gotten much traction yet outside the Fifth Circuit, the District Court for the Northern District of Alabama recently used the *Swales* approach in an effective way.[109] The court's use of the approach demonstrates how the decision to employ the *Swales* one-step over the *Lusardi* two-step can produce meaningfully different outcomes in certain cases. Therefore,

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104. *See* cases cited *supra* note 103.

105. *Id.*

106. *See* cases cited *supra* note 102.

107. Swales v. KLLM Transp. Servs., L.L.C., 985 F.3d 430, 440–43 (5th Cir. 2021).

108. *Id.* at 434.

109. Broome v. CRST Malone, Inc., No. 2:19-cv-01917, 2022 U.S. Dist. LEXIS 11329 (N.D. Ala. Jan. 21, 2022).

it helps to see what the court did in that case so that future courts can judge whether to use the *Swales* approach in the appropriate case.

In *Broome v. CRST Malone, Inc.*, the plaintiff, a long-haul truck driver, sued the defendant, a transportation company, for failure to pay the federal minimum hourly wage under the FLSA.[110] The plaintiff alleged that the transportation company failed to pay the plaintiff for non-driving time.[111] He contended that the non-driving time should count as "hours worked" under the statute, and by failing to do so the defendant violated the plaintiff's right to the minimum wage.[112] The plaintiff constructed the minimum wage argument based on a combination of the defendant's failure to reimburse the plaintiff for certain business expenses and the allegation that 29 C.F.R. § 785.22(a) imposes an obligation to pay drivers for all non-driving time when on the road for over twenty-four hours.[113] A focus of the lawsuit was whether federally-mandated rest time for the drivers and other non-driving/non-productive time would count as compensable time under the FLSA.[114] If such time was not compensable, then no minimum wage violation would take place against the drivers, given their stipulated compensable hours and income.[115] The plaintiff ultimately sought collective action treatment for *all* drivers who worked during trips of twenty-four hours or more.[116]

Notably, the drivers were not all the same. The defendant's 680 drivers broke down into three categories: 290 drivers who participated in the defendant's lease purchasing program with defendant's affiliate; 200 drivers who drove for one of the defendant's agents; and approximately 190 drivers who owned their own trucks.[117] The defendant had a primary legal argument that all of the drivers were independent contractors.[118] If this was correct, the plaintiffs would not have minimum wage rights under the statute.[119] Thus, the employee/independent contractor status determination was a crucial aspect of this litigation.

Imagine hypothetically how the FLSA collective action determination would work under *Lusardi*. The district judge would review the plaintiff's pleadings that allege the trucking company has a pattern and practice of misclassifying their drivers as independent contractors and failing to compensate them properly under the FLSA. The judge would review the allegations that the plaintiffs were not being paid for non-driving/non-productive work time and were the victims of a single, similarly applied compensation policy.[120] Of utmost importance, the judge would probably *not* have information about the different categories of drivers used by the defendant. Under *Lusardi*'s lenient first step, the judge would likely conditionally certify a collective action of all drivers paid on a

110. *Id.* at *1.

111. Second Amended Complaint at 1–9, Broome v. CRST Malone, Inc., U.S. Dist. LEXIS 11329 (N.D. Ala. Jan. 21, 2022) (No. 2:19-cv-01917), https://bit.ly/3RBCneP.

112. *Broome*, 2022 U.S. Dist. LEXIS 11329, at *6.

113. *Id.*

114. *Id.* at *15–16.

115. *Id.*

116. *Id.* at *11.

117. *Broome*, 2022 U.S. Dist. LEXIS 11329, at *12–13.

118. *Id.* at *14–15.

119. *Id.* at *15.

120. *Supra* note 111, at *6.

piece-rate basis and classified as independent contractors. Notice would go out to all the 680 drivers. Settlement pressure on the defendant would ensue and (if the case does not settle) a motion to decertify the collective action would be filed by the defendant later in litigation.

The *Broome* court took a different approach. The court followed the more efficient and fairer *Swales* process.[121] Earlier on in the litigation, the court set a two-month time frame for "notice" discovery.[122] The plaintiff received responses to twenty-five written discovery requests, and the parties exchanged 1,225 pages of documents.[123] Defendant's counsel deposed the plaintiff.[124] The plaintiff's attorney conducted an FRCP 30(b)(6) deposition of the defendant's corporate designee.[125] That discovery presented the court with the aforementioned evidence regarding the categories of truck drivers that operated under the defendant's supervision.[126]

The court was then in a much better position to properly evaluate whether the plaintiff and other drivers were actually similarly situated. The court identified two general common issues of law and fact regarding liability: (1) the independent contractor issue and (2) whether federal-mandated rest periods count as compensable time.[127] However, the court rejected the plaintiff's contention that the plaintiff was similarly situated to *every* driver "who worked during trips of 24 hours or more" for purposes of allowing a broad collective action to proceed.[128] Significant differences existed among the categories of drivers that precluded a collective of all 680 drivers.[129] For example, the defendant treated lease-purchase drivers differently than owner-drivers regarding payroll deductions, and such deductions would be relevant in evaluating whether the defendant violated the FLSA.[130]

Accordingly, not all drivers were included in the collective.[131] The court determined that only the 290 lease-purchasing agreement drivers were "similarly situated" to the plaintiff, and ruled that the collective action could only proceed with respect to this sub-category of workers.[132] The lease-purchase drivers, like the plaintiff, shared job titles, job

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121. *Broome*, 2022 U.S. Dist. LEXIS 11329, at *11–12.
122. *Id.*
123. *Id.* at *12.
124. *Id.*
125. *Id.* at *11–12.
126. *Broome*, 2022 U.S. Dist. LEXIS 11329, at *12–14.
127. *Id.* at *15–16.
128. *Id.* at *16.
129. *Id.*

> [T]he evidence does not establish that Mr. Broome is similarly situated to every [defendant corporation] driver 'who worked during trips of 24-hours or more.' Were the court to authorize notice to all 680 drivers who deliver loads for Malone, the Court likely would not be able to determine on a collective basis whether the drivers are independent contractors or employees. The differences among drivers who carry loads under contracts with agents, Malone drivers who operate trucks they own, and Malone drivers who operate under a lease-purchase agreement would preclude collective resolution of Mr. Broome's minimum wage claim.

Id. (internal citations omitted).

130. *Broome*, 2022 U.S. Dist. LEXIS 11329, at *18 n.8.
131. *Id.* at *16.
132. *Id.* at *16–17.

responsibilities, work restrictions, and pay provisions (including deductions), and were all subject to the defendant's disciplinary policies.[133] The economic realities of the lease-purchase drivers and the plaintiff—a critical issue for purposes of FLSA "employee" status—were sufficiently similar to make collective action treatment of those workers feasible and practical.[134] Whether federally-mandated breaks taken by lease-purchase drivers were compensable hours, and whether lease-related deductions were lawful for lease-purchase drivers, were properly the subject of collective determinations.[135]

To review, the *Lusardi* method in this case would have likely produced conditional certification of a larger category of workers not "similarly situated" for FLSA collective action purposes—one that would have to be undone through decertification years down the road (assuming the case does not settle in the interim).[136] The *Swales* approach in this case produced—through a more efficient, fairer process—a manageable collective action of plaintiffs who were actually "similarly situated" because the court allowed limited discovery, focused on the relevant factual and legal issues earlier on in the litigation, and considered evidence in making the "similarly situated" determination. The *Swales* approach should be part of the universe of collective action law procedure moving forward.

IV. LEAVING *LUSARDI*: "SIMILARLY SITUATED" REQUIRES *DUKES*-TYPE COMMONALITY

Whether courts follow the *Swales* approach or the *Lusardi* two-step method, it is clear that employees being "similarly situated" is the crucial requirement that must be satisfied for an FLSA action to proceed as a collective.[137] But, the statute does not define the term and it is startling that, for a statutory term that was enacted in 1938, there is no established test or clear authority for understanding what the term means in the FLSA context.[138] Many courts addressing the question have focused on negatively defining the term—by saying what the term does not mean and does not incorporate—instead of

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133. *Id.* at *12–14.

134. *Id.* at *16–17:

> The Court can eliminate significant differences among drivers by providing notice to a subcategory of drivers who, like Mr. Broome, operate for Malone pursuant to a uniform lease-purchase program. Lease-purchase drivers like Mr. Broome share job titles, job responsibilities, work restrictions, and pay provisions (including deductions) and are subject to Malone's disciplinary scheme. Lease-purchase drivers are in sufficiently similar—though not identical—positions to Mr. Broome with respect to the economic realities of their relationship with Malone such that collective determination of their status is feasible and practicable for all involved—the lease purchase drivers, Malone, and the Court.

Broome, 2022 U.S. Dist. LEXIS 11329, at *16–17.

135. *Id.* at *17:

> The issue of whether federally-mandated breaks taken by lease-purchase drivers are compensable hours may be determined collectively because the [Independent Contractor Operating Agreement] mandates these breaks, and federal regulations dictate the duration of the breaks. 49 C.F.R. § 395.3(a). Finally, the issue of which lease-related deductions Malone may lawfully take from compensation may be determined collectively for lease-purchase drivers.

Id.

136. *See* discussion *supra* Part II.B.

137. *See* Campbell v. City of L.A., 903 F.3d 1090, 1111 (9th Cir. 2018) (stating that "being 'similarly situated' is the key condition for proceeding in a [FLSA] collective.").

138. *Id.* (expressing surprise that there is no established definition or test of the FLSA's "similarly situated" requirement).

focusing on a common-sense interpretation of the language.[139]

The dominant view of what "similarly situated" means in the FLSA context starts with the fact that the term cannot incorporate Rule 23 standards.[140] The end point for the dominant view is that commonality must be defined at a very low level to further the remedial goals of the FLSA and vindicate broad worker protections.[141] The next part of this article will outline the dominant view's argument for interpreting "similarly situated" in a way that scrupulously avoids the incorporation of Rule 23 class action law. For now, I will briefly summarize why the dominant view misses the mark.

My argument is that it matters not whether Section 216(b) is properly analogized to Rule 23 such that all Rule 23 standards should be incorporated into the "similarly situated" determination. What matters is that there is no getting away from the reality that FLSA collective actions proceed as *collectives* just like Rule 23 class actions do.[142] In order for the FLSA collective action law to work fairly, it is not enough that there is any similarity between employees on an FLSA factual or legal issue. There must be substantial similarities between the employees, such that treating the employees as a collective will generate common factual and legal answers to the FLSA claims that will efficiently drive the resolution of the litigation.[143] Those substantial similarities among employees who create common answers to the important FLSA legal and factual questions must outweigh dissimilarities among employees who create individualized answers to FLSA questions. Otherwise—in the words of the statute—those employees are not "similarly situated."[144] This must be a "rigorous" standard analogous to the "commonality" test in *Wal-Mart Stores, Inc. v. Dukes*.[145] A hundred years of collective action and class action law teaches that this level of commonality must be satisfied to have a fair, efficient collective.

A. The Dominant View: Section 216(b) and Rule 23 Are Separate

The dominant, majority view is that Rule 23 requirements for certifying a class action are unrelated to the requirements for "similarly situated" employees to proceed in a

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139. *See* Morgan v. Family Dollar Stores, Inc., 551 F.3d 1233, 1260 n.38 (11th Cir. 2008) (ad hoc approach focuses on "what the term 'similarly situated' does *not* mean—not what it does."); Kern v. Siemens Corp., 393 F.3d 120, 128 (2d Cir. 2004) ("similarly situated" requirement is "independent of, and unrelated to" Rules 23's requirements).

140. FED. R. CIV. P. 23. *See also* Calderone v. Scott, 838 F.3d 1101, 1104 (11th Cir. 2016); O'Brien v. Ed Donnelly Enterprises, 575 F.3d 567, 584–85 (6th Cir. 2009); Thiessen v. GE Capital Corp., 267 F.3d 1095, 1105 (10th Cir. 2001); *and* LaChapelle v. Owens-Illinois, Inc., 513 F.2d 286, 289 (5th Cir. 1975).

141. *See Campbell*, 903 F.3d at 1113–14; Scott v. Chipotle Mexican Grill, Inc., 954 F.3d 502, 521 (2d Cir. 2020).

142. 29 U.S.C. § 216(b); FED. R. CIV. P. 23.

143. *See* Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350 (2011) (the raising of a multitude of "common questions" is not what matters but rather what matters is "the capacity of a class-wide proceeding to generate common *answers* apt to drive the resolution of the litigation.").

144. 29 U.S.C. § 216(b).

145. *Dukes*, 564 U.S. at 352 (there must be "some glue holding [together] the alleged *reasons*" for millions of employment decisions or "it will be impossible to say that examination of all the class members' claims will produce a common answer to the crucial question" in Title VII litigation) (emphasis in original); *Campbell*, 903 F.3d at 1115 ("what matters [in the FLSA collective action context] is not just any similarity between party plaintiffs, but a legal or factual similarity material to the resolution of the party plaintiffs' claims, in the sense of having the potential to advance these claims, collectively to some resolution.").

collective action under Section 216(b).[146] Therefore, courts should not equate Rule 23 requirements with those of Section 216(b) when determining whether named plaintiffs are "similarly situated" to opt-in plaintiffs or potential opt-in plaintiffs under the FLSA.[147]

The argument for the dominant view goes like this: first, the language and structure of Section 216(b) and Rule 23 are very different. Section 216(b) does not include the Rule 23(b)(3) requirements of predominance or superiority.[148] The Section 216(b) collective action is not a representative action like a class action; therefore, the Rule 23 requirements of adequacy and typicality—which are there to protect the due process rights of absent class members—are not relevant to a Section 216(b) collective action.[149] Notably, Congress amended Section 216(b) through the Portal-to-Portal Act to do away with representational litigation for Section 216(b) claims, and specifically imposed the opt-in requirement for such claims.[150] Moreover, in 1966—when Rule 23 was amended to include the requirements of commonality, typicality, numerosity, and adequacy of representation, as well as predominance and superiority for Rule 23(b)(3) actions—the Rule 23 drafters omitted the opt-in requirement of the then-"spurious" class action, and replaced Rule 23(b)(3) with an opt-out requirement.[151] The advisory committee's notes to the 1966 amendment state that "the present provisions of [§ 216(b)] are not intended to be affected," which means the advisory committee reaffirmed an intentional choice by Congress that Section 216(b) operate separately from Rule 23 standards.[152]

Second, the policies and purposes underlying Rule 23 and Section 216(b) are different. Rule 23 is not created by a statute, nor specifically tailored to any substantive rights or remedial schemes.[153] It is a general procedural rule designed to resolve class-wide claims based on the discretion of the court.[154] On the other hand, the FLSA is a remedial statute specifically crafted to protect employee's federal wage-and-hour rights and provide broad employee protections.[155] Finally, there is the contention that the Section 216(b) "similarly situated" standard is not only lower than the Rule 23 standard, but is lower than the permissive joinder standard and consolidation standard under Federal Rules

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146. *See* Calderone v. Scott, 838 F.3d 1101, 1104 (11th Cir. 2016); O'Brien v. Ed Donnelly Enterprises, 575 F.3d. 567, 584–85 (6th Cir. 2009); Thiessen v. GE Capital Corp., 267 F.3d 1095, 1105 (10th Cir. 2001); *and* LaChapelle v. Owens-Illinois, Inc., 513 F.2d 286, 289 (5th Cir. 1975).

147. *See* cases cited *supra* note 145.

148. 29 U.S.C. § 216(b); FED. R. CIV. P. 23(b)(3).

149. Campbell v. City of L.A., 903 F.3d 1090, 1112 (9th Cir. 2018); Scott v. Chipotle Mexican Grill, Inc., 954 F.3d 502, 519 (2d Cir. 2020).

150. *Compare* Fair Labor Standards Act of 1938, ch. 676, 52 Stat. 1060, 1069 (1938) (codified at 29 U.S.C. § 216(b)) (providing that employees proceeding under Section 216(b) may "designate an agent or representative to maintain such action for and in behalf of all employees similarly situated"), *with* Portal to Portal Act of 1947, Pub. L. No. 80-49, 61 Stat. 84, 87 (1947) (codified at 29 U.S.C. § 216(b)) (banning representative actions and providing that "[n]o employee shall be a party plaintiff to any such action unless he gives consent in writing to become such a party and such consent is filed in the court in which such action is brought"). *See also Scott*, 954 F.3d at 519.

151. *Scott*, 954 F.3d at 519.

152. *See* FED. R. CIV. P. 23 advisory committee's note to 1966 amendment; *Campbell*, 903 F.3d at 1113; *and Scott*, 954 F.3d at 519.

153. *See* FED. R. CIV. P. 23.

154. FED. R. CIV. P. 23 advisory committee's note to 2003 amendment.

155. *Campbell*, 903 F.3d at 1112–13; *Scott*, 954 F.3d at 519.

of Civil Procedure 20 and 42.[156]

If Section 216(b) and Rule 23 are not interrelated, the question remains of how to define the "similarly situated" standard. Some courts, having discarded Rule 23 as a viable option for informing the meaning of "similarly situated," adopt a loose, ad-hoc flexible definition of "similarly situated" that defines commonality at a very low level.[157] For example, the Ninth Circuit Court of Appeals held in *Campbell v. City of Los Angeles* that the "similarly situated" standard only requires that "party plaintiffs . . . share a similar issue of law or fact material to the disposition of their FLSA claims."[158] In *Scott v. Chipotle Mexican Grill, Inc.*, the Second Circuit Court of Appeals also held that the "similarly situated" standard is satisfied when named plaintiffs and opt-in plaintiffs "share one or more similar questions of law or fact material to the disposition of their FLSA claims."[159] In summary, these courts hold that "similarly situated" means merely that employees must share one common question of law or fact material to an FLSA claim—an extremely low bar indeed—and, if they do, the court has to allow the case to proceed as a collective action.

B. Critiquing the Dominant View

Courts are slowly but surely critiquing the dominant view that Rule 23 commonality standards have no place in Section 216(b) "similarly situated" jurisprudence and disputing whether the term must be defined at a low level of commonality.[160] For many years, the minority approach has been to treat FLSA collective actions the same as Rule 23(b)(3) class actions, except that the FLSA collective action is opt-in—consistent with Rule 23 "spurious" class actions before the pre-1966 amendment.[161] Some courts following this approach require all Rule 23(b)(3) requirements to be satisfied: numerosity, commonality, typicality, adequacy, predominance, and superiority.[162] The Seventh Circuit Court of Appeals has appeared to graft the Rule 23(b)(3) "predominance requirement" into Section 216(b) collective actions.[163] The Fifth Circuit Court of Appeals in *Swales* posed the question of how stringently district courts should enforce Section 216(b)'s "similarly situated" mandate, and stated that the similarity requirement is something that courts should "rigorously enforce."[164] In the upcoming years, we are likely to see a trend of courts that are more receptive to arguments that incorporate a more rigorous analysis into

156. *Campbell*, 903 F.3d at 1112.

157. *See generally Campbell*, 903 F.3d 1090; *Scott*, 954 F.3d 502.

158. *Campbell*, 903 F.3d at 1117.

159. *Scott*, 954 F.3d at 521.

160. *See* Shushan v. Univ. of Colo. at Boulder, 132 F.R.D. 263 (D. Colo. 1990); Bayles v. Am. Med. Response of Colo., Inc., 950 F. Supp. 1053 (D. Colo. 1996); Alvarez v. City of Chicago, 605 F.3d 445 (7th Cir. 2010); Espenscheid v. DirectSat USA, LLC, 705 F.3d 770 (7th Cir. 2013); *and* Swales v. KLLM Transp. Servs., L.L.C, 985 F.3d 430 (5th Cir. 2021).

161. *See Shushan*, 132 F.R.D. at 265–69 (holding that Section 216(b) follows Rule 23 requirements except that it is opt-in).

162. *See Bayles*, 950 F. Supp. at 1061 (explaining the *Shushan* holding).

163. *See Alvarez*, 605 F.3d at 449 ("If common questions predominate, the plaintiffs may be similarly situated even though the recovery of any given plaintiff may be determined by only a subset of those questions."); *Espenscheid*, 705 F.3d at 772 (Section 216(b) and Rule 23 standards are "largely merged . . . though with some terminological differences.").

164. *Swales*, 985 F.3d at 443.

the "similarly situated" determination.

There is also academic commentary that casts doubt on the dominant view and specifically questions the clear-cut view that Congress intended for Section 216(b) to be independent of Rule 23.[165] One commentator did a comprehensive review of the enactment of Section 216(b) in 1938, the adoption of Rule 23 in 1938, and the subsequent amendment to Rule 23 in 1966.[166] Several persuasive points emerge from this. First, the "similarly situated" language used by Congress in 1938 likely lacked a reference to Rule 23 because there was a lack of uniformity among state procedural rules in 1938.[167] Second, the FLSA and the original version of Rule 23 became effective right around the same time in 1938.[168] Congress had a passive role in adopting the Federal Rules of Civil Procedure, and may not have been aware of Rule 23 as it was drafting Section 216(b) of the FLSA.[169] Third, when Congress amended Section 216(b) to add the opt-in requirement in 1947 it could have easily taken steps to distinguish between Rule 23, but it did not do so. The likely reason for not doing so is that the opt-in amendment was consistent with how the "spurious" class action procedure worked under Rule 23 at the time.[170] Finally, with respect to the 1966 amendments to Rule 23 and the Advisory Committee's note excluding Section 216(b) from the provision, the reasons for the committee's actions are unclear.[171]

The upshot of this historical information is that Congress may have assumed that Section 216(b) would operate like federal class action devices, and was agnostic on the details of how the term "similarly situated" would be interpreted other than to generally fit within class action law as it developed. There is nothing in the legislative history or plain language of the statute to definitively answer the question of whether Congress intended the term "similarly situated" to depart from Rule 23 principles, other than the fact that an FLSA collective action requires opt-in.[172] The idea that Section 216(b) is completely divorced from Rule 23 or general class action principles may be more of a historical accident than anything else.

In summary, the FLSA does not define the meaning of "similarly situated" in Section 216(b).[173] The historical record—produced by the U.S. Congress and the Supreme Court Advisory Rules Committee—is unclear as to how, if at all, Section 216(b) and Rule 23 connect.[174] Therefore, there is flexibility for courts to interpret the meaning of the term. While a Section 216(b) action is not a representative action like a class action, it functions similarly to a class action in the sense that it is a mass action allowing aggrieved workers to pool their resources and capitalize on efficiencies of scale.[175] It stands to reason that

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165. James M. Fraser, *Opt-In Class Actions Under the FLSA, EPA, and ADEA: What Does it Mean to be "Similarly Situated"?*, 38 SUFFOLK UNIV. L. REV. 95 (2004).

166. *Id.* at 99–122.

167. *Id.* at 114.

168. 29 U.S.C. § 216(b); FED. R. CIV. P. 23.

169. Fraser, *supra* note 165, at 114–15.

170. *Id.* at 115–16.

171. *Id.* at 116.

172. 29 U.S.C. § 216(b) (West) (note the prior versions of § 216 on the Westlaw page under the "History" tab).

173. *See supra* note 14 and accompanying text.

174. *See supra* Part III.B.

175. *See* Campbell v. City of L.A., 903 F.3d 1090, 1105 (9th Cir. 2018) (FLSA collective action is not a

class action principles are appropriate considerations for interpreting the meaning of "similarly situated" under Section 216(b). Courts should be able to consider such principles when interpreting that term without having to adopt or incorporate Rule 23 as a whole. In doing so, it is proper for courts to interpret "similarly situated" under Section 216(b) to require *Dukes*-style commonality and reject the low-level commonality threshold articulated by the Second and Ninth Circuits.[176]

C. Dukes-*Type Commonality*

In *Wal-Mart Stores, Inc. v. Dukes*,[177] the U.S. Supreme Court was presented with one of the most expansive class actions ever attempted under Rule 23.[178] The named plaintiffs brought the case as a Title VII sex discrimination suit, alleging that the employer discriminated against them on the basis of their sex by denying them equal pay and promotions.[179] The intermediate appellate court approved the district court's certification of a Rule 23 class comprising about one-and-a-half-million female employees.[180] The plaintiffs alleged that the discretion exercised by local supervisors over pay and promotion matters violated Title VII.[181]

In making promotion decisions, store managers and other management officers exercised considerable discretion and were able to utilize subjective criteria.[182] The named plaintiffs and class members alleged the local managers' discretion over pay and promotion disproportionately aided male employees and disproportionately impacted female employees.[183] The representative plaintiffs argued that the employer's knowledge of the subjective nature of the decision-making and the failure to require managers to follow more objective criteria constituted disparate treatment.[184] Therefore, the plaintiffs raised Title VII disparate impact claims and Title VI systemic disparate treatment claims.[185]

The majority analyzed the certification of the class under Rule 23(a)(2), which is the minimum commonality threshold for establishing a Rule 23 class that requires plaintiffs to show "there are questions of law or fact common to the class."[186] The majority concluded that plaintiffs failed to demonstrate commonality because there was no "glue" that held together all of the alleged reasons for millions of different employment decisions

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representative action but "is more accurately described as a kind of mass action, in which aggrieved workers act as a collective of *individual* plaintiffs with *individual* cases—capitalizing on efficiencies of scale, but without necessarily permitting a specific, named representative to control the litigation, except as the workers may separately so agree.").

176. *See* cases cited *supra* note 149.
177. 564 U.S. 338 (2011).
178. *Id.* at 342.
179. *Id.* at 343.
180. *Id.* at 342.
181. *Id.* at 343.
182. *Dukes*, 564 U.S. at 343.
183. *Id.* at 344.
184. *Id.*
185. *Id.* at 344–45.
186. *Id.* at 349.

by company supervisors spread throughout the country.[187] Without any proof of a company-wide discriminatory pay and promotion policy, the variety of reasons for the failure to promote did not present a common question for classwide resolution.[188] The crucial part of the majority's opinion is its explanation of what it means to actually have the required level of commonality.[189]

The Supreme Court noted that it is easy in Title VII litigation—or other types of litigation, including FLSA actions—to raise a common question of law or fact, such as whether managers have discretion over all employees' pay.[190] However, raising common questions of law or fact does nothing to demonstrate how using a class-wide proceeding productively or fairly drives resolution of litigation.[191] As the majority articulated, common questions have to be capable of classwide resolution, which means the answers to those questions will resolve issues that are central to the validity of each one of the claims.[192] Also, dissimilarities within the proposed class make it more difficult to get common answers to dispositive questions in the litigation.[193]

The *Dukes* majority opinion presents a rigorous view of commonality.[194] The *Dukes* dissenters critiqued the majority, arguing that the majority's focus on dissimilarities between putative class members improperly blended Rule 23(a)(2)'s commonality requirement with Rule 23(b)(3)'s requirement that common questions "predominate" over individual ones.[195] Indeed, there are shades of the predominance inquiry in the *Dukes* approach.[196] The thrust of the overall Rule 23 commonality standard as articulated in *Dukes* is clearly a rigorous and demanding standard.

It is appropriate to import this *Dukes* view of Rule 23 commonality into the Section 216(b) "similarly situated" inquiry. It is also appropriate to go a step further to clearly require that common questions of law or fact must outweigh the individual issues for an action to properly proceed as a collective. Employees are not similarly situated when the alleged common FLSA factual and legal questions raised will not generate common

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187. *Dukes*, 564 U.S. at 352–59.

188. *Id.* at 359.

189. *Id.* at 349–60.

190. *Id.* at 349.

191. *Id.* at 350.

192. *Dukes*, 564 U.S. at 350.

> [Title VII] claims must depend upon a common contention—for example, the assertion of discriminatory bias on the part of the same supervisor. That common contention, moreover, must be of such a nature that it is 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.

Id.

193. *Dukes*, 564 U.S. at 350.

> What matters to class certification . . . is not the raising of common 'questions'—even in droves—but, rather, the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers.

Id. (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 132 (2009)).

194. *Id.* at 342.

195. *Id.* at 358.

196. *Id.*

answers to productively drive the resolution of the litigation.[197] Too many individualized issues and dissimilarities between plaintiffs and opt-in plaintiffs will not permit the common answers that make the collective action an effective statutory mechanism. Furthermore, FLSA collective treatment when there are dissimilarities among individual plaintiffs makes it fundamentally unfair to defendants, because they will not be able to raise their individualized defenses and arguments against the individual, dissimilar plaintiffs.

It is appropriate for courts to look to underlying Rule 23 *Dukes*-style commonality principles in deciding whether employees are "similarly situated" under Section 216(b), and they can do so without directly importing all of Rule 23 into FLSA collective action law. The opposite approach used by the Second and Ninth Circuits—expansively interpreting "similarly situated" to force a district court to certify an FLSA collective when there is a single common issue of law or fact material to the FLSA litigation[198]—should be rejected. Those courts are improperly incorporating a Rule 20 joinder standard into FLSA collective action law.[199] The following is an example of a district court that properly denied an FLSA collective under the approach I have articulated *supra*.

D. Applying Dukes*-type Commonality to the "Similarly Situated" Inquiry*

The district court's opinion in *Scott v. Chipotle Mexican Grill*[200] is an excellent example of a district court getting it right in terms of understanding that Rule 23 principles should help to decide the "similarly situated" inquiry and applying heightened scrutiny to a FLSA collective action determination. In *Scott*, the plaintiffs—a group of current and former "apprentices"—sued their nationwide employer for failing to pay overtime under the FLSA and a number of state laws that largely mirrored the FLSA.[201] Apprentices were alleged to perform managerial functions in stores as training to ultimately become general managers in stores.[202] The gist of the plaintiffs' argument was that the employer had improperly classified them as exempt under the executive and/or administration exemption based on their duties being primarily executive or administrative in nature.[203]

The plaintiffs brought their claims as a hybrid action.[204] The plaintiffs sought class action certification for the state law claims in federal court, and therefore Rule 23 applied

197. *Dukes*, 564 U.S. at 350.

198. *See* discussion *supra* Part IV.B.

199. FED. R. CIV. P. 20.

200. No. 12-CV-8333, 2017 U.S. Dist. LEXIS 59753 (S.D.N.Y. Apr. 18, 2017).

201. *Id.* at *184.

202. *Id.* at *185–86.

203. *Id.* at *193–96. An employee is exempt under the duties portion of the executive exemption as follows:

> [A]ny employee . . . (2) [w]hose primary duty is the management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof; (3) who customarily and regularly directs the work of two or more other employees; and (4) who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight.

29 C.F.R. § 541.100(a)(2)–(4).

204. *Scott*, 2017 U.S. Dist. LEXIS 62902, at *185.

to those claims.[205] The federal claims were brought under the FLSA, and the plaintiffs sought collective action treatment for those claims.[206] For the state law class action, seven named plaintiffs attempted to represent six putative classes under Rule 23(b)(3).[207] The named plaintiffs also sued on behalf of themselves and 516 individuals who opted in to the collective action for purposes of the FLSA claims.[208]

The district court evaluated the case in a very common-sense way. The court denied certification for the Rule 23 state-law classes.[209] The court conducted a predominance evaluation and found that the case fell apart as a class action, because the individualized issues overwhelmed any common issues.[210] Whether the apprentices were properly classified as exempt under the executive exemption depended on the actual duties performed by the various apprentices in restaurants across the nation.[211] The evidence showed that although there were general similarities in the types of duties performed among the apprentices, there were a number of dissimilarities as well.[212] For example, the evidence varied across apprentices regarding their involvement, if any, in hiring workers, supervising workers, drafting employee schedules, setting pay, performing store budgeting, and the amount of time performing those tasks compared to the amount of time spent doing nonexempt work such as working the line, serving customers, grilling, and running the cash register.[213] The evidence also showed that the "differences in the structures of the [various restaurant] locations, sales volume, and managerial styles across the country affected the amount of time Apprentices' [sic] spen[t] performing managerial tasks."[214] Some stores had a general manager; some had a restaurateur with responsibility for managing numerous stores; and some stores had neither a general manager nor a restaurateur involved, and were managed completely by apprentices.[215] These variances in the amount of time apprentices spent performing different types of job duties in restaurants across the country meant that there was no way to determine whether apprentices were exempt as a nationwide class group.[216]

The district court then relied upon those very same facts to find that apprentices were not "similarly situated" under Section 216(b), and decertified the collective action.[217] The court cited the typical Section 216(b) factors for conducting its "similarly situated" analysis, but for all practical purposes made clear that, because it was a huge attempted collective—recall that 516 individuals had opted-in—it should follow Rule 23 principles

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205. *Id.* at *185–89.
206. *Id.* at *184–212.
207. *Id.* at *184–92.
208. Scott v. Chipotle Mexican Grill, Inc., 954 F.3d 502, 506 (2d Cir. 2020); *Scott*, 2017 U.S. Dist. LEXIS, at *209 (the 516 opt-in plaintiffs worked in thirty-seven states over the restaurant's nine geographic regions).
209. *Scott*, 954 F.3d at 502.
210. *Scott*, 2017 U.S. Dist. LEXIS 62902, at *193–206.
211. *Scott*, 954 F.3d at 508–14.
212. *Id.* at 521.
213. *Scott*, 2017 U.S. Dist. LEXIS 62902, at *193.
214. *Id.* at *204.
215. *Id.* at *205.
216. *Id.* at *206 (sharing disparate accounts from apprentices across the country regarding the amount of time spent performing job duties was fatal to the predominance inquiry).
217. *Id.* at *208–12.

and mirror the Rule 23 analysis.[218] The court pointed to the overwhelming number of individual issues involving the apprentices, previously explained under the class action evaluation, as making collective action treatment improper.[219] The court emphasized the unfairness that would arise for defendants if the case were allowed to proceed as a collective, since they would be unable to rely on "representative proof" when asserting individualized defenses.[220] Clearly, it was not enough in the district court's eyes for the collective action plaintiffs to prevail by merely demonstrating that they raised one common issue material to the FLSA litigation: whether apprentices were misclassified as exempt employees.[221]

The Second Circuit Court of Appeals, however, issued an opinion that stripped away the good work done by the district court on its collective action decision.[222] While the appellate court affirmed the district court's findings on the state-law Rule 23 class action claims, it also ruled that the district court erred in applying the more stringent requirements of Rule 23.[223] The appellate court rejected the so-called sliding scale analogy: the idea that "the more opt-ins there are in the class, the more the analysis under § 216(b) will mirror the analysis under Rule 23."[224] The appellate court also adopted an untenable, broad rule that "similarly situated" means that district courts must certify a collective under Section 216(b) so long as the plaintiffs share a *single* similar question of law or fact material to the disposition of their FLSA claims.[225] This is an unworkable standard that will destroy a defendant's ability to fairly contest individualized issues in large Section 216(b) collectives.

The dissent in *Scott* explained the problematic nature of the majority's ruling.[226] The dissenting circuit judge noted that the district court had the benefit of reviewing the volumes of evidence after years of discovery, and was best equipped to weigh the similarities and dissimilarities to determine if the "similarly situated" standard was appropriate; yet the majority still determined that the district court abused its discretion.[227] The dissenting circuit judge critiqued the broad "similarly situated" standard adopted by the majority and implicitly recognized the propriety of using Rule 23 principles to influence the "similarly situated" inquiry.[228] In future cases, other courts outside of the

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218. *Scott,* 2017 U.S. Dist. LEXIS 62902, at *207–09.

219. *Id.* at *209–10.

220. *Id.* at *210–11 ("The myriad of accounts from opt-in plaintiffs and named plaintiffs weigh against certification of the collective action, because it would be difficult for [the restaurant] to rely on 'representative proof' while asserting its defenses as noted above.").

221. *Id.* at *211.

222. Scott v. Chipotle Mexican Grill, Inc., 954 F.3d 502 (2d Cir. 2020).

223. *Id.* at 514, 520 (holding that the district court improperly imported the more stringent requirements of Rule 23 through the back door that do not apply to FLSA collective actions).

224. *Id.* at 520–21 ("[i]t is simply not the case that the more opt-ins there are in the class, the more the analysis under § 216(b) will mirror the analysis under Rule 23.").

225. *Id.* at 521 ("On remand, the district court shall reconsider whether named plaintiff and opt-in plaintiffs are 'similarly situated'—that is, whether they share one or more similar questions of law or fact material to the disposition of their FLSA claims.").

226. *Id.* at 522–24 (Sullivan, J., dissenting).

227. *Scott*, 954 F.3d at 524 (Sullivan, J., dissenting).

228. *Id.* (Sullivan, J., dissenting) ("Although the requirements under Rule 23 and § 216(b) are different, we have in fact recognized that the predominance inquiry under Rule 23 and the 'similarly situated' standard under

Second Circuit should look to the reasoning and approach from the district court and dissenting circuit judge in *Scott* to help guide their understanding of the meaning of "similarly situated."

In summary, the vision of this statutory interpretation approach to the "similarly situated" language requires a high level of commonality for collective action treatment under the FLSA, EPA, and ADEA. Common issues must predominate over individualized issues for such treatment.[229]

V. EMPLOYMENT LAW CLASS/COLLECTIVE ACTIONS IN CONTEXT

To this point, this article has focused on interpreting Section 216(b) collective action law within the legal framework that currently exists. I advocate for a statutory interpretation approach that allows courts to be more involved at an earlier stage of litigation in making evidence-based collective action determinations that align the "similarly situated" standard with Rule 23 principles.[230] While this approach is certainly an improvement on the status quo, I recognize that the dominant approach continues to distinguish between class action law and Section 216(b) FLSA, EPA, and ADEA collective actions.[231] Taking a bird's eye view of the broader context of mass actions in employment law statutes—given the dominant view that draws sharp lines between Section 216 collective actions and Rule 23 class action law—it becomes apparent that the lack of uniformity in employment law mass actions makes little sense from a policy perspective. Therefore, this area of the law is ripe for legislative action.

A. High-Level Commonality Standard For Employment Law Mass Actions

To the extent the "similarly situated" language is interpreted in Section 216(b) as a broad-based "single common question of law or fact" approach, FLSA actions will more easily move forward as collectives than state law overtime claims filed in federal court, which must follow Rule 23.[232] This is true even though both FLSA and state-law wage-and-hour claims essentially follow the same substantive law regarding coverage and

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§ 216(b) are 'admittedly similar.'" (citing Myers v. Hertz Corp., 624 F.3d 537, 556 (2d Cir. 2010))).

229. *Id.* at 522–23 (Sullivan, J., dissenting.).

230. *See supra* Parts II and III.

231. *See supra* Part III.A.

232. The Second Circuit's opinion in *Scott v. Chipotle Mexican Grill* is a perfect example of this point. 954 F.3d 502 (2020). State law wage-and-hour overtime claims filed in federal court do not meet the predominance inquiry under Rule 23, so the class action is not certified. *Id.* Some claims brought under the FLSA may presumably still meet the liberal "one similar question of law or fact material to the litigation" standard, so collective action certification for those claims under Section 216(b) may be appropriate. *Id.* at 521–22. Courts seem to intuitively understand the practical problems caused by these divergent outcomes, however, and it is typical for courts to simplify things and make the same decision on both hybrid claims as to whether or not to proceed as a class. *See* Ruiz v. CitiBank, N.A., 93 F. Supp. 3d 279, 298–99 (S.D.N.Y. 2015) ("[I]t is not mere coincidence that courts facing parallel motions to decertify an FLSA collective action under Section 216(b) and to certify a class action under Rule 23 have tended to allow either both actions or neither to proceed on a collective basis."); William C. Jhaveri-Weeks & Austin Webbert, *Class Actions under Rule 23 and Collective Actions Under the Fair Labor Standards Act*, 23 GEO. J. POVERTY L. & POL'Y 233, 264 (2016) (courts assessing the predominance requirement for claims covered by Rule 23 "almost always" reach the same conclusion about whether to proceed collectively).

exemptions.[233] In addition, Section 216(b) ADEA actions will more easily move forward as collectives than Title VII private actions that seek class-wide treatment, because Title VII claims brought by private litigants must meet Rule 23 standards.[234] There does not appear to be a persuasive policy rationale for allowing wage-and-hour, age discrimination, and EPA actions to meet more lenient standards for collective treatment than race, color, religion, sex, and national origin claims, as they are all employment law claims under remedially-tailored statutes.[235]

Title VII claims also have higher burdens for employers to meet in so-called "pattern or practice" cases that may awkwardly fit together into this area of the law.[236] A special Title VII statutory provision specifically permits the EEOC to bring a "pattern or practice" claim without satisfying the Rule 23 class action requirements.[237] The elements of a prima facie "pattern or practice" case may be used in a Rule 23 class action brought by private litigants under Title VII,[238] although there is some debate whether private plaintiffs have

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233. In *Scott v. Chipotle Mexican Grill, Inc.*, the class plaintiffs brought their state law overtime claims under New York, Missouri, Illinois, North Carolina, Colorado, and Washington state wage-and-hour laws. 954 F.3d at 508 (2020). The state law exemption criteria under New York, Missouri, Illinois and North Carolina were the same as the exemption criteria for the FLSA, and there were only minor differences between Colorado and Washington exemption laws and the FLSA. N.Y. COMP. CODES R. & REGS. tit. 12, §§ 146-1.4, -1.6; N.Y. LAB. LAW § 195; MO. REV. STAT. § 290.527; 820 ILL. COMP. STAT. § 105/4a; N.C. GEN. STAT. § 95-25.22(a1); 13 N.C. ADMIN. CODE § 12.080; COLO. CODE REGS. § 1103-1.5(b); WASH. ADMIN. CODE § 296-128-510. Colorado and Washington have strict percentage limitations on how much time an employee can perform non-exempt work and still be an exempt employee, while the FLSA is more flexible on the percentage question. *Scott*, 954 F.3d at 511 n.3, 512.

234. *See* EEOC v. Sol Mexican Grill, LLC, 415 F. Supp. 3d 5, 13 (D.D.C. 2019) ("A private litigant may bring Title VII discrimination claims only on his or her own behalf. If a private litigant seeks relief on behalf of a group of similarly situated employees, the private litigant must comply with Rule 23's class action requirements.").

235. Some courts contend that the FLSA's special status as a "remedial statute with broad worker-protective aims" and a "statute tailored specifically to vindicate federal labor rights" is a justification to depart from Rule 23 principles and hence a higher commonality bar. *See* Campbell v. City of L.A., 903 F.3d 1090, 1113 (9th Cir. 2018); *Scott*, 954 F.3d at 519. However, Title VII, the ADEA, and state law wage statutes all have remedial aims themselves, and are specially constructed to protect employment law rights. Accordingly, that is not a persuasive policy-based reason for different commonality standards in the mass actions under these various statutes.

236. *See* Franks v. Bowman Transp. Co., 424 U.S. 747 (1976); Int'l Bhd. of Teamsters v. U.S., 431 U.S. 324 (1977); Hazelwood School Dist. v. U.S., 433 U.S. 299 (1977); *and* Cooper v. Fed. Rsrv. Bank of Richmond, 467 U.S. 867 (1984). In a "pattern or practice" case, the trial proceeds in two phases. At the initial "liability" phase, the "[g]overnment is not required to offer evidence that each person . . . was a victim of the employer's discriminatory policy. Its burden is to establish a prima facie case that such a policy existed. The burden then shifts to the employer" to make a showing that the government's evidence is "either inaccurate or insignificant." *Teamsters*, 431 U.S. at 360. At the second, remedial phase, there are a series of individual determinations to decide whether a particular individual falls within the pattern and is entitled to relief. The burden of proof is on the defendant-employer to overcome the presumption that an individual is entitled to relief and prove that the individual defendant falls outside the pattern and is not entitled to relief. *Teamsters*, 431 U.S. at 360–62; *Cooper*, 467 U.S. at 875. *See also* Thiessen v. GE Capital Corp., 267 F.3d 1095, 1106 (outlining the two-state trial procedure for pattern-or-practice cases).

237. *See* 42 U.S.C. § 2000e-(6)(a).

> Whenever the Attorney General [now EEOC] has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this subchapter . . . the Attorney General [now EEOC] may bring a civil action in the appropriate district court of the United States . . . .

Id.

238. *See Teamsters*, 431 U.S. at 357–60; Davis v. Coca-Cola Bottling Co. Consol., 516 F.3d 955, 965 ("A pattern or practice claim for such relief may also be brought under Title VII as a class action, pursuant to Federal Rule of Civil Procedure 23(b)(2), by one or more of the similarly situated employees." (citing *Cooper*, 467 U.S.

the statutory right to bring free-standing "pattern or practice" claims.[239] Even though the ADEA lacks specific language giving the EEOC statutory authority to assert "pattern or practice" claims, several circuit courts of appeals have ruled that such claims may proceed under the ADEA.[240] The alignment of the following areas of mass action employment law is unclear: "pattern or practice" claims with their special two-phase proof structure; Title VII private class actions subject to Rule 23 requirements; and FLSA and ADEA collective actions subject to low-level Section 216(b) commonality standards.[241]

Writing on a clean slate, the best legislative approach would be one that incorporates a uniform Rule 23-type predominance standard for collective/class action treatment across the various federal and state employment law statutes, including Title VII, the EPA, the ADEA, Section 1981, the ADA, and the FLSA.[242] This change would provide for greater consistency in the employment law area and better protect the interests of both plaintiffs and defendants in employment cases where collective/class treatment is a consideration. Once a consistent high-level commonality standard for collective/class action treatment is achieved across employment statutes—whether that arises from statutory interpretation or legislative action—it will become easier to see how the remaining pieces of joinder law in employment law mass actions would fit together. The FLSA idea of requiring opt-in plaintiffs (as opposed to Rule 23(b)(3) opt outs) has value to it, and is something to consider incorporating across other employment law statutes as well.

B. Traditional Joinder and Class/Collective Actions in Employment Law

Under my approach, Title VII, EPA, ADEA, FLSA, and state law wage-and-hour claims would go down one of two routes. First, the route of class/collective action treatment is one of judicially approved notice and only applies if the high level of commonality articulated in this article is satisfied.[243] Second, for employment discrimination and wage-and-hour plaintiffs who desire to keep or add together parties and claims with similar interests, there is always the traditional Rule 20(a) permissive

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at 876 n.9 ("[I]t is plain that the elements of a prima facie pattern-or-practice case are the same in a private class action [as when the government brings the claim].")).

239. *See* Parisi v. Goldman, Sachs & Co., 710 F.3d 483, 488 (2d Cir. 2013) (holding that there is no statutory right for private plaintiffs to bring a pattern-or-practice claim of discrimination); Shultz v. Dixie State Univ., No. 2:16-CV-830, 2017 U.S. Dist. LEXIS 72562, at *14–15 (D. Utah May 11, 2017) ("pattern or practice" method may be used in Title VII class actions brought by private litigants but "the 'pattern or practice' language does not create a separate cause of action, but instead creates an alternative means to prove a violation of Title VII.").

240. *See* Thompson v. Weyerhaeuser Co., 582 F.3d 1125, 1127–29 (10th Cir. 2009); Hipp v. Liberty Nat'l Life Ins. Co., 252 F.3d 1208, 1227 (11th Cir. 2001); King v. Gen. Elec. Co., 960 F.2d 617, 624 (7th Cir. 1992); Haskell v. Kaman Corp., 743 F.2d 113, 119 (2d Cir. 1984); EEOC v. W. Elec. Co., 713 F.2d 1011, 1016 (4th Cir. 1983); *and* Marshall v. Sun Oil Co., 605 F.2d 1331, 1336 n.2 (5th Cir. 1979).

241. *See, e.g.*, Thiessen v. GE Capital Corp., 582 F.3d 1095, 1108 (ADEA "pattern or practice" claims under *Teamsters* still must satisfy Section 216(b) "similarly situated" standard through application of the factors identified in the ad hoc approach); Heath v. Google LLC, 345 F. Supp. 3d 1152, 1168 (N.D. Cal. 2018) (considering ADEA "pattern or practice" claims under *Teamsters* in overall evaluation of the relevant factors to determine whether plaintiffs are "similarly situated" under § 216(b)).

242. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e17 (as amended); Equal Pay Act, 29 U.S.C. § 206(d) (as amended); Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621–634 (as amended); 42 U.S.C. § 1981; Americans with Disabilities Act, 42 U.S.C. §§ 12101–12213 (as amended); Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201–219.

243. *See supra* Part IV.

joinder,[244] Rule 24 intervention,[245] and Rule 42 consolidation path that can be pursued in federal court.[246] This "traditional joinder" route gives judges flexibility to decide whether it makes sense for multiple claims and parties to proceed together in the same suit, and allows plaintiffs the opportunity to make arguments for joinder under the low-level commonality standard that they seek.[247] Defendants would have the right to move for misjoinder of the plaintiffs' claims, severance of the plaintiffs' claims, or separate trials under traditional joinder principles.[248] However, the judicially-approved notice of the type that exists under class/collective action law would not necessarily survive.[249]

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244. FED. R. CIV. P. 20(a):

> Persons Who Join Or Be Joined. (1) Plaintiffs. Persons may join in one action as plaintiffs if: (1) they assert any right to relief jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and (B) any question of law or fact common to all plaintiffs will arise in the action. (2) Defendants. Persons . . . may be joined in one action as defendants if: (A) any right to relief is asserted against them jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and (B) any question of law or fact common to all defendants will arise in the action.

Id.

245. FED. R. CIV. P. 24(b):

> Permissive Intervention. (1) In General. On timely motion, the court may permit anyone to intervene who: (A) is given a conditional right to intervene by a federal statute; or (B) has a claim or defense that shares with the main action a common question of law or fact.

Id.

246. FED. R. CIV. P. 42(a):

> Consolidation. If actions before the court involve a common question of law or fact, the court may: (1) join for hearing or trial any or all matters at issue in the actions; (2) consolidate the actions; or (3) issue any other orders to avoid unnecessary cost or delay.

Id.

247. Professors Scott Moss and Nantiya Ruan contend that Section 216(b) itself should be interpreted as a liberalized form of simple Rule 20 joinder. Under their approach, wage-and-hour plaintiffs simply file suit together or join in the action and then proceed as a collective action. The court has no role as a gatekeeper of FLSA collective actions other than to provide notice to potential opt-ins and to decide Rule 21 misjoinder and severance motions or other dismissal motions. Section 216(b) collective actions are then not subject to any certification process and the low-level Rule 20 commonality standard applies for deciding misjoinder motions. Scott A. Moss & Nantiya Ruan, *The Second-Class Class Action: How Courts Thwart Wage Rights by Misapplying Class Action Rules*, 61 AM. UNIV. L. REV. 523, 567–78 (2012). I agree with Professors Moss and Ruan that nothing precludes plaintiffs from bringing FLSA claims (or ADEA and EPA claims) together in one suit subject to traditional Rule 20 joinder principles. But, under my approach, any sort of collective action notice to potential opt-ins would not be permitted in that traditional suit because the plaintiffs are not pursuing an actual Section 216(b) collective action. In my view, wage-and-hour plaintiffs must choose between two routes: (1) a traditional suit pursuant to Rule 20 (Joinder), Rule 24 (Intervention), and Rule 42 (Consolidation) principles; or, (2) a true Section 216(b) action that allows for judicially-approved notice after the court decides that the action may proceed as a collective under the Rule 23/*Dukes*-type higher level commonality standard.

248. *See* FED. R. CIV. P. 21 ("Misjoinder and Nonjoinder of Parties. Misjoinder of parties is not a ground for dismissing an action. On motion or on its own, the court may at any time, on just terms, add or drop a party. The court may also sever any claim against a party."); FED. R. CIV. P. 42(b) ("Separate Trials. For convenience, to avoid prejudice, or to expedite and economize, the court may order a separate trial of one or more separate issues, claims, crossclaims, counterclaims, or third-party claims. When ordering a separate trial, the court must preserve any federal right to a jury trial.").

249. In *Hoffman La-Roche v. Sperling*, the Supreme Court held that district courts have discretion to implement a Section 216(b) collective action procedure by facilitating notice to potential plaintiffs. 493 U.S. 165, 168–69 (1989). The Court also observed that federal courts have considerable authority to generally regulate the actions of parties in a multiparty suit under Rule 83. *Id.* at 172. *See also* Gulf Oil Co. v. Bernard, 452 U.S. 89, 99 n.10 (1981) ("Rule 83 provides a more general authorization to district courts, stating that in 'all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules.'").

This separate dual-route system is fair to both plaintiffs and defendants. Traditional Rule 20(a) joinder law requires the satisfaction of a two-part test: (1) a low-level commonality standard, and (2) a requirement that the claims arise out of the "same transaction, occurrence, or series of transactions or occurrences."[250] Courts typically employ a flexible approach to this "same transaction" requirement.[251] Yet, even with this relatively loose standard, there is still some uncertainty as to whether and how multiple claims and parties will proceed within the suit.[252] On the other hand, class/collective action suits face a higher commonality standard and, once certified, receive more consistency in oversight of the action and heightened judicial intervention with notice to potential platintiffs. With this dual system, the joinder of employment law claims with a limited number of plaintiffs would typically progress like they historically have under Rule 20, Rule 24, and Rule 42.[253] Cases with large numbers of plaintiffs are more likely to go down the class/collective action treatment route with uniform high-level commonality standards, structured notice requirements, and judicial oversight of the class/collective claims.

Moreover, Rule 19 provides courts with the authority to order the joinder of a required party. FED. R. CIV. P. 19(a)(2) ("Joinder by Court Order. If a person has been joined as required, the court must order that the person be made a party."). However, the extent to which a district court could get involved in providing a collective/class style notice to potential plaintiffs in an FLSA/ADEA/EPA suit that is not pursued under Section 216(b) is unclear.

250. *See* FED. R. CIV. P. 21.

251. In determining whether multiple claims arise from the "same transaction or occurrence," many courts consider whether a "logical relationship" exists among the claims. *See* Miller v. Hygrade Food Prods. Corp., 202 F.R.D. 142, 144 (E.D. Pa. 2001). The "logical relationship" test is a flexible, case-by-case approach. *See* Moore v. N.Y. Cotton Exch., 270 U.S. 593, 610 (1926) (holding that a "transaction" may entail "a series of many occurrences, depending not so much upon the immediateness of their connection as upon their logical relationship."). Deciding whether the "same transaction or occurrence" test is satisfied when multiple employment discrimination claims are brought in the same suit, one court summarized that,

> in causes of action involving discrimination, Title VII or otherwise, courts look to whether the discrimination took place at roughly the same time, if it involved the same people, whether there is a relationship between the discriminatory action, whether the discriminatory action involved the same supervisor or occurred within the same department, and whether there is a geographic proximity between the discriminatory actions . . . . On the other hand . . . allegations of a common discriminatory policy or practice, or a company-wide policy of discrimination, could tilt the balance in favor of joinder despite those other factors which might favor severance.

Byers v. Ill. State Police, No. 99-C-8105, 2000 U.S. Dist. LEXIS 17929, at *11–12 (N.D. Ill. Dec. 4, 2000). *See also* Mosley v. Gen. Motors Corp., 497 F.2d 1330, 1331–34 (8th Cir. 1974) (finding the "same transaction" test satisfied when ten plaintiffs joined their individual Title VII claims against the single employer alleging different acts of discrimination—failure to hire, failure to promote, retaliation, and denial of break time—because all of the claims were based on a company-wide policy).

252. *See* Acevedo v. Allsup's Convenience Stores, Inc., 600 F.3d 516, 521 (5th Cir. 2010) (noting that even if the two-part Rule 20(a) joinder test is met, "district courts have discretion to refuse joinder in the interest of avoiding prejudice and delay, ensuring judicial economy, or safeguarding principles of fundamental fairness.").

253. *See* Aguirre v. Valerus Field Sols. LP, No. 4:15-CV-03722, 2017 U.S. Dist. LEXIS 108989, at *2–13 (S.D. Tex. July 13, 2017) (court denied employer's motion to sever the employment discrimination claims of three plaintiffs because joinder of the parties and claims was proper under Rule 20(a)); Robinson v. Geithner, No. 1:05-cv-01258, 2011 U.S. Dist. LEXIS 2054, at *3–26 (E.D. Cal. Jan. 7, 2011) (court granted employer's motion to sever the employment discrimination claims of three plaintiffs and original lawsuit was split into three separate suits because plaintiffs did not satisfy Rule 20(a) joinder standards); EEOC v. Coley's #101, LLC, 1:11-CV-3465, 2012 U.S. Dist. LEXIS 94387, at *1–11 (N.D. Ala. July 9, 2012) (district court permitted private plaintiffs asserting Title VII sexual harassment and retaliation claims to intervene under Rule 24 in ongoing sexual harassment lawsuit brought by the EEOC against the employer); *and* Clark v. Ark. Steel Assocs., LLC, 1:15CV00092, 2017 U.S. Dist. LEXIS 1382, at *1–6 (E.D. Ark. Jan. 5, 2017) (district court denied consolidation under Rule 42 of employment discrimination suits brought by two plaintiffs against the same employer).

VI. CONCLUSION

Courts have pieced together the FLSA/ADEA Section 216(b) collective action in a way that is not required by the statutory text. Fresh eyes should allow courts to put together the puzzle pieces of the Section 216(b) collective action in a new way: evidence-based collective action determinations by courts earlier on in the litigation under a high-level commonality standard consistent with Rule 23 class action principles. In addition, legislative action to provide a more uniform approach to collective/class action treatment determinations across a variety of federal and state employment laws should be considered in light of the challenges of interpreting the current version of Section 216(b).