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So-called "collective" actions under § 216(b) of the Fair Labor Standards Act (the "FLSA") are nothing more than "opt-in" class actions. This Article exposes the unjustifiable failure to apply Rule 23 of the Federal Rules of Civil Procedure to these actions, the erroneous conclusion by several circuit courts that these actions are not "representative" actions but rather some kind of "mass joinder," and the resulting violation of the Rules Enabling Act when courts allow these "collective" actions to proceed without satisfying the requirements of Rules 23(a) and (b). The author explains why the vast majority of federal courts, using an unjustifiable "two-step" procedure, have wrongly failed to apply Rule 23, instead routinely allowing named plaintiffs to form opt-in class actions by sending notice to and inviting hundreds or thousands of individuals to join their action. This two-step procedure is unauthorized by any statute, Federal Rule of Civil Procedure, or Supreme Court precedent. More recently, the Fifth Circuit has jettisoned the two-step approach, while the Sixth and Seventh Circuits have adopted their own entirely different set of standards for determining when notice should be allowed under § 216(b). The result is a four-way split in the circuits. Given the inconsistent, entrenched, and constantly evolving legal standards being applied among the circuits, the author concludes that only the U.S. Supreme Court will be able to correct the lack of

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uniformity and widespread failure to follow the Federal Rules of Civil Procedure in these so-called "collective" or "opt-in" class actions.

INTRODUCTION

The Fair Labor Standards Act (the "FLSA"), originally enacted in 1938, allows "one or more employees" to bring an action "in behalf of himself or themselves and *other employees similarly situated*."[1] Thus, by its express terms, the FLSA authorizes named plaintiffs to pursue a *representative* action *on behalf of* other similarly situated employees.[2] The FLSA provides, however, that only similarly situated employees who give their permission to the representation by filing a "consent in writing" may join the action and be

[1] 29 U.S.C. § 216(b) (emphasis added). Use of the strange "in behalf of" language in this subsection, as opposed to "on behalf of," appears to be inadvertent, as § 216(b) later refers to "[t]he right provided by this subsection to bring an action by or *on behalf of* any employee." *Id.* (emphasis added).

[2] A number of courts have misinterpreted the legislative history to erroneously conclude that actions under § 216(b) of the FLSA are *not* representative actions. *See* discussion *infra* pp. 777–82 and notes 82–90.

represented by the named plaintiffs.[3] The FLSA fails to define the phrase "similarly situated."[4]

The principal purpose of the FLSA was "to protect all covered workers from substandard wages and oppressive working hours,"[5] and "to aid the unprotected, unorganized and lowest paid of the nation's working population."[6] In addition to a minimum wage requirement, the statute provides that a covered employee must be paid "one and one-half times" the employee's "regular rate" of pay for time worked in excess of forty hours per week.[7] This "overtime" requirement, however, is subject to numerous exceptions, including exemptions for "bona fide executive, administrative, or professional" employees, "outside" salesmen, "highly compensated" employees, and other exemptions.[8] In addition to the various exemptions, the overtime requirements do not apply to independent contractors who are not "employees" under the FLSA.[9] Determining whether an exemption applies or whether a particular person is an independent contractor often involves a highly fact-intensive analysis.[10]

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[3] 29 U.S.C. § 216(b) ("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."). Persons who join the action by filing a consent form are commonly referred to as "opt-in" plaintiffs. Christopher M. Cascino & Peter W. Zinober, *Recent Developments in Collective Action Certification Under the Fair Labor Standards Act*, 97 FLA. BAR J. 16, 18 (2023).

[4] 29 U.S.C. § 216(b).

[5] Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728, 739 (1981) (citing 29 U.S.C. § 202(a)).

[6] Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 707 n.18 (1945) (discussing the FLSA's congressional record).

[7] 29 U.S.C. § 207(a)(1) ("[N]o employer shall employ any of his employees . . . 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.").

[8] *Id.* § 213(a); 29 C.F.R. § 541 (defining various exemptions). Exemptions are only vaguely referenced in the statute, with the details better defined in Department of Labor ("DOL") regulations.

[9] *See, e.g.*, Swales v. KLLM Transp. Servs., L.L.C., 985 F.3d 430, 434 (5th Cir. 2021) ("The FLSA protects employees (not independent contractors) . . . .").

[10] *See, e.g.*, Parrish v. Premier Directional Drilling, L.P., 917 F.3d 369, 380 (5th Cir. 2019) (independent contractor analysis is "very fact dependent" (quoting Carrell v. Sunland Const., Inc., 998 F.2d 330, 334 (5th Cir. 1993))); Mike v.

In a typical action under § 216(b) of the FLSA, the complaint alleges a proposed "class" of individuals whom the named plaintiff or plaintiffs seek to represent.[11] The complaint will also typically contain conclusory allegations that members of the putative class are "similarly situated" to the named plaintiff, not subject to any FLSA exemptions, employed in the same role or capacity, with the same job responsibilities, and subject to a uniform plan or "scheme" that resulted in the alleged wrongful denial of overtime compensation.[12] Plaintiffs typically ask the court to "conditionally certify" the action as a representative or class action under § 216(b) of the FLSA and to authorize plaintiffs to send a notice to the proposed class, inviting class members to "opt in" to the action by filing a consent form with the court.[13] Litigants and courts now routinely refer to these representative actions under the FLSA as "collective" actions, although the term "collective" is not found anywhere in the Federal Rules of Civil Procedure.[14]

In many of these so-called collective actions, plaintiffs seek to send notice to a proposed "class" of persons who are arguably exempt under the FLSA, or who are independent contractors and not "employees."[15] As a result of lax and unjustifiable legal standards, courts have been "conditionally certifying" these cases and allowing

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Safeco Ins. Co. of Am., 274 F. Supp. 2d 216, 220 (D. Conn. 2003) ("Determining whether an employee is exempt is extremely individual and fact-intensive.").

[11] *See* Halle v. W. Penn Allegheny Health Sys. Inc., 842 F.3d 215, 223 (3d Cir. 2016).

[12] *See id.* at 224–26.

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

[14] As explained below, the term "collective" action was used in the legislative history to § 216(b) to refer to *representative actions brought by one or more employees*, as opposed to representative actions brought by labor unions or other *non-employees*, which the 1947 amendments to § 216(b) were intended to eliminate. *See* discussion *infra* pp. 777–82 and note 84.

[15] Courts across the country are applying a wide variety of vague and ill-conceived tests to distinguish between an "employee" and an independent contractor under the FLSA. For example, in *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323 (1992), the Supreme Court held that the term "employee," as used in ERISA, should be defined according to its plain meaning under federal common law and traditional agency law principles. *Id.* The Supreme Court should do the same for "employee" under the FLSA. Unfortunately, the Supreme Court has never ruled on this issue, and unnecessary dicta in the *Darden* decision seems to imply that the meaning of "employee" under the FLSA might deviate from its plain meaning, causing a confusing lack of uniformity in the case law. *Id.* at 326.

plaintiffs to send notice to hundreds, and in many cases thousands, of persons who have no viable claims under the FLSA or whose claims involve individualized issues that could not possibly be tried together fairly and efficiently in one action.[16] These notices can cause massive disruption to the defendant's business and irreparably damage goodwill and business relationships.[17] This abusive practice continues today as a result of the failure to apply appropriate legal standards to the request for "conditional certification."[18]

I. NOTICE TO THE PROPOSED "CLASS"

The FLSA does not authorize a named plaintiff to send notice to a proposed "class" of workers or contractors in order to locate and invite individuals who might be "similarly situated" to join a lawsuit.[19] In *Hoffmann-La Roche Inc. v. Sperling*,[20] however, the U.S. Supreme Court held "that district courts have discretion, *in appropriate cases*, to implement 29 U.S.C. § 216(b) . . . by facilitating notice to *potential plaintiffs*."[21] In dissent, Justice Scalia commented:

> Nothing in § 216(b) remotely confers the extraordinary authority for a court—either directly or by lending its judicial power to the efforts of a party's counsel—to *search out* potential claimants, ensure that they are accurately informed of the litigation, and inquire whether they would like to bring their claims before the court.[22]

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[16] *See* Swales v. KLLM Transp. Servs., L.L.C., 985 F.3d 430, 435 (5th Cir. 2021) ("[C]ollective actions also pose dangers: (1) the opportunity for abuse (by intensifying settlement pressure no matter how meritorious the action); and (2) the appearance of court-endorsed solicitation of claims (by letting benign notice-giving for case-management purposes warp into endorsing the action's merits, or seeming to, thus stirring up unwarranted litigation).").

[17] *See id.*

[18] *See id.* at 439–41.

[19] *Id.* at 434.

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

[21] *Id.* at 169 (emphasis added).

[22] *Id.* at 177 (Scalia, J., dissenting).

Nevertheless, a majority of the Court held that a district court had discretion to allow notice "in appropriate cases."[23] The Court instructed, however, that "trial courts must take care to avoid even the appearance of judicial endorsement of the merits of the action," and managing the notice process must be accomplished "not otherwise contrary to . . . the Federal Rules of Civil Procedure."[24] Unfortunately, the Court did not define, and has never subsequently defined, the legal standard to determine when, in a particular case, notice would be "appropriate." As a result, it became common practice for district courts across the country to essentially rubber-stamp requests by plaintiffs to send notice to a proposed "class" of hundreds or thousands of individuals.[25] District courts have been granting these so-called motions for "conditional certification" based on mere allegations, *without* analyzing evidence, and *before* determining whether the individuals to receive notice are legitimate "potential plaintiffs" who are in fact "similarly situated."[26] More recently, three circuits have attempted to rein in the overly lenient practice of sending notice to a class of potential plaintiffs, but they have done so by creating three entirely different sets of legal standards, while failing to properly apply Rule 23 and the Rules Enabling Act, codified at 28 U.S.C. § 2072(a).[27]

II. THE REQUIREMENTS OF RULE 23 AND THE RULES ENABLING ACT

Rule 23 of the Federal Rules of Civil Procedure is *expressly applicable* to requests by named plaintiffs to sue on behalf of a class of other persons.[28] The Rule begins: "One or more members of a class *may sue* or be sued *as representative parties* on behalf of all

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[23] *Id.* at 168–69 (majority opinion).

[24] *Id.* at 170, 174.

[25] Mia Farber et al., *A Rejection of the Rubber-Stamped FLSA Collective*, THE NAT'L L. REV. (June 2, 2021), https://natlawreview.com/article/rejection-rubber-stamped-flsa-collective [https://perma.cc/H466-BTZE].

[26] *See* Swales v. KLLM Transp. Servs., L.L.C., 985 F.3d 430, 436–37 (5th Cir. 2021).

[27] *See* discussion *infra* Part VI (discussing *Swales*, 985 F.3d at 433; Clark v. A&L Homecare & Training Ctr., LLC, 68 F.4th 1003, 1011 (6th Cir. 2023); and Richards v. Eli Lilly & Co., 149 F.4th 901, 916 (7th Cir. 2025)).

[28] FED. R. CIV. P. 23(a).

members *only if*" certain requirements are met.[29] In class action parlance, the Rule 23(a) requirements include numerosity, commonality, typicality, and adequacy.[30] On its face, Rule 23 applies directly, without exception, to any action in which a named plaintiff is attempting to *represent* a class of other persons. The Federal Rules are "binding upon court and parties alike" with "the force of law,"[31] and they "govern the procedure in *all civil actions* and proceedings in the United States district courts, except as stated in Rule 81."[32] And Rule 81 does *not* exempt FLSA actions from the Federal Rules of Civil Procedure.

As the Supreme Court acknowledged in *Hoffmann-La Roche*, actions under § 216(b) involve named plaintiffs ("one or more employees") who are attempting to represent a "class" of "other employees similarly situated."[33] The language of Rule 23 applies directly to this attempt at creating an opt-in class under § 216(b). Moreover, there is nothing in § 216(b) of the FLSA that conflicts with subsections (a) and (b) of Rule 23. And even if Rules 23(a) and

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[29] *Id.* (emphasis added).

[30] *Id.* Rule 23(a) provides:

> (a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:
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> (1) the class is so numerous that joinder of all members is impracticable;
>
> (2) there are questions of law or fact common to the class;
>
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
>
> (4) the representative parties will fairly and adequately protect the interests of the class.

FED. R. CIV. P. 23(a)(1)–(4). In addition, "[a] class action may be maintained if Rule 23(a) is satisfied *and if*" one of the three subsections of Rule 23(b) are satisfied. FED. R. CIV. P. 23(b) (emphasis added).

[31] *In re* Nat'l Prescription Opiate Litig., 956 F.3d 838, 844 (6th Cir. 2020) (citing Bank of Nova Scotia v. United States, 487 U.S. 250, 255 (1988)). *See In re Nat'l Prescription*, 956 F.3d at 841 ("[T]he Federal Rules of Civil Procedure . . . have the same force of law that any statute does.").

[32] FED. R. CIV. P. 1 (emphasis added).

[33] Hoffmann-La Roche Inc. v. Sperling, 493 U.S. 165, 169 (1989) ("[T]his case presents the narrow question whether, in an ADEA action, district courts may play any role in prescribing the terms and conditions of communication from the named plaintiffs *to the potential members of the class* on whose behalf the collective action has been brought." (emphasis added)).

(b) did conflict with § 216(b) of the FLSA, under the Rules Enabling Act, Rule 23 would supersede and override any conflict with § 216(b).[34] But with limited exceptions,[35] courts have ignored the requirements of Rule 23, or erroneously opined that Rule 23 does not apply, instead inventing their own procedural rules for FLSA actions—rules that do not exist within the Federal Rules of Civil Procedure.[36] As discussed below, there is no legally justifiable excuse for the widespread failure to apply Rule 23 to actions under the

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[34] *See* Allan G. King, Lisa A. Schreter & Carole F. Wilder, *You Can't Opt Out of the Federal Rules: Why Rule 23 Certification Standards Should Apply to Opt-In Collective Actions Under the FLSA*, 5 FED. CTS. L. REV. 1, 14 (2011). The Rules Enabling Act, enacted in 1934, empowers the U.S. Supreme Court to promulgate rules of practice and procedure for U.S. District Courts. 28 U.S.C. § 2072(a). Under the "abrogation clause" of the Act, when such rules take effect, they invalidate any preexisting laws in conflict with the rule in question. 28 U.S.C. § 2072(b) ("All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect."); Henderson v. United States, 517 U.S. 654, 656 (1996). Congress enacted the current framework of § 216(b) in 1947, and modern Rule 23 was promulgated in 1966. *See* FED. R. CIV. P. 23 advisory committee's note to 1966 amendment. Thus, Rule 23 governs over any conflict with § 216(b). *See, e.g.*, Vasconcelo v. Mia. Auto Max, Inc., 981 F.3d 934, 943 (11th Cir. 2020) ("Because the Fair Labor Standards Act was enacted before the effective date of Rule 68, the Rules Enabling Act establishes that Rule 68 applies in any conflict between the two."). Recognizing the potential conflict between the "opt-out" procedure of new Rule 23 and the "opt-in" requirement of § 216(b), the Advisory Committee note to the 1966 amendment of Rule 23 "disclaimed any intention for the new opt-out rule to affect 29 U.S.C. § 216(b)." Knepper v. Rite Aid Corp., 675 F.3d 249, 257 (3d Cir. 2012); *see* FED. R. CIV. P. 23 advisory committee's note to 1966 amendment ("[The present provisions of 29 U.S.C. §216(b) are not intended to be affected by Rule 23, as amended.]" (alteration in original)). While this means that the 1966 amendment to Rule 23 was not intended to change § 216(b) from an opt-in to an opt-out procedure, the Advisory Committee note does not (and could not) provide a wholesale exemption from Rule 23 for actions under § 216(b). Nor does the note suggest that the "similarly situated" requirement should not be applied consistent with the requirements of Rules 23(a) and (b), which expressly govern when a named plaintiff may sue as a representative party on behalf of other members of a class. *See* FED. R. CIV. P. 23. Rules 23(a) and (b) make no distinction between an opt-out class and an opt-in class.

[35] *See, e.g.*, Shushan v. Univ. of Colo. at Boulder, 132 F.R.D. 263, 265 (D. Colo. 1990) (conducting exhaustive analysis and holding that the named plaintiffs in a representative action under § 216(b) "must satisfy all of the requirements of [R]ule 23, *insofar as those requirements are consistent with* 29 U.S.C.A. § 216(b)").

[36] *See infra* Part III.

FLSA in which named plaintiffs overtly seek to create and represent a "class" of persons who "opt in" to the action.

III. THE *LUSARDI* "TWO-STEP" APPROACH

Ignoring Rule 23, a majority of district courts have been applying a "two-step" or "two-stage" procedure to determine whether the court should authorize notice to a proposed "class" under § 216(b) of the FLSA.[37] This is the so-called "*Lusardi* approach"—named after a New Jersey district court's decision in *Lusardi v. Xerox Corp.*[38] The vast majority of these district courts fail to independently analyze whether Rule 23 should be applied or whether the *Lusardi* approach makes any sense; instead, these district courts blindly follow what other courts have done before.[39] Some courts have based their failure to apply Rule 23 by citing inapplicable sound bites taken out of context—such as the Fifth Circuit's

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[37] *See* Sarah J. Arendt, *One-Step FLSA Certification: New Trend or Anomaly?*, 51 LAB. & EMP. L.: A.B.A., Winter 2024, at 1, 6.

[38] 118 F.R.D. 351, 352 (D.N.J. 1987). *See, e.g.*, Mooney v. Aramco Servs. Co., 54 F.3d 1207, 1213–14 (5th Cir. 1995) ("Under *Lusardi*, the trial court approaches the 'similarly situated' inquiry via a two-step analysis."), *overruled on other grounds by* Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003). *See also* Clark v. A&L Homecare & Training Ctr., LLC, 68 F.4th 1003, 1008 (6th Cir. 2023) ("[M]ost district courts have adopted a two-step approach first described in a 1987 decision from a district court in New Jersey."); Campbell v. City of Los Angeles, 903 F.3d 1090, 1100 (9th Cir. 2018) ("[I]t is now the near-universal practice to evaluate the propriety of the collective mechanism—in particular, plaintiffs' satisfaction of the 'similarly situated' requirement—by way of a two-step 'certification' process."); Johnson v. Big Lots Stores, Inc., Nos. 04-3201, 05-6627, 2007 WL 5200224, at *3 (E.D. La. Aug. 21, 2007) ("Although no circuit court has mandated the use of the *Lusardi* approach, it is the prevailing mode of analysis among district courts. . . . [D]istrict courts in the Fifth Circuit have uniformly used it to determine whether a collective should be certified under the FLSA."); Ridgeway v. Planet Pizza 2016, Inc., No. 17-cv-03064, 2019 WL 804883, at *2 (D.S.C. Feb. 21, 2019) ("[D]istrict courts of the Fourth Circuit . . . appear to have coalesced around a two-step method . . . .").

[39] *See, e.g.*, Leuthold v. Destination Am., Inc., 224 F.R.D. 462, 467 (N.D. Cal. 2004) ("The court proceeds under the two-tiered analysis, given that the majority of courts have adopted it."); Harris v. Hinds Cnty., No. 12–cv–00542, 2014 WL 457913, at *2 (S.D. Miss. Feb. 4, 2014) (applying the "*Lusardi* method" because it "is recognized as the favored approach by courts in the Fifth Circuit" (footnotes, quotations, and citations omitted)).

statement in *LaChapelle* that class actions under Rule 23 and § 216(b) are "mutually exclusive and irreconcilable,"[40] or the Supreme Court's comment in *Genesis Healthcare* that "Rule 23 actions are fundamentally different from collective actions under the FLSA."[41] And still other courts have based their use of *Lusardi* on an outright misstatement of prior law.[42]

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[40] In *LaChappelle v. Owens-Illinois, Inc.*, 513 F.2d 286, 289 (5th Cir. 1975), the Fifth Circuit correctly held that a plaintiff could not bring an "opt-out" class action under Rule 23 for an alleged violation of the ADEA. *Id. LaChappelle* had nothing to do with conditional certification or deciding when it would be "appropriate" to send notice to a proposed class of alleged claimants under the FLSA.

[41] Genesis Healthcare Corp. v. Symczyk, 569 U.S. 66, 74 (2013). Rule 23 class actions and actions under § 216(b) are "fundamentally different" because Rule 23 class actions are "opt-out" class actions, whereas § 216(b) permits only those who "opt-in" to become members of the class. *See id.* (citing Hoffmann-La Roche Inc. v. Sperling, 493 U.S. 165, 177–78 (1989) (Scalia, J., dissenting)). The Supreme Court's decision in *Genesis Healthcare* had nothing to do with determining the legal standard for sending notice under § 216(b). *See Genesis Healthcare*, 569 U.S. at 73–74. The Court in *Genesis* decided that the district court lost subject matter jurisdiction when the plaintiff's individual claim became moot as the result of an offer of judgment under Rule 68. *Id.* at 70. In dicta, the Court stated, "[w]hile we do not express an opinion on the propriety of [the] use of class-action nomenclature [in connection with actions under § 216(b)], we do note that there are significant differences between certification under Federal Rule of Civil Procedure 23 and the joinder process under § 216(b)." *Id.* at 70 n.1. The Court further stated that "Rule 23 actions are fundamentally different from collective actions under the FLSA," and that "[w]hatever significance 'conditional certification' may have in § 216(b) proceedings, it is not tantamount to class certification under Rule 23." *Id.* at 74, 78. Even if these statements were not dicta (which they clearly are), nothing in *Genesis* attempts to analyze whether § 216(b) actions are representative actions to which Rule 23 must be applied before a court allows the formation of an "opt-in" class.

[42] *See, e.g.*, Dyson v. Stuart Petrol. Testers, Inc., 308 F.R.D. 510, 512 (W.D. Tex. 2015) (erroneously opining that "both the Fifth Circuit and the Supreme Court have made statements implying that a Rule 23-type analysis is incompatible with FLSA collective actions"). To the contrary, at the time of the *Dyson* decision, neither the Fifth Circuit nor the Supreme Court had ever suggested that principles developed under Rule 23 are "incompatible" *in the context of deciding whether notice should be allowed in an FLSA case*. Indeed, the Fifth Circuit had reviewed the *Shushan*-Rule 23 approach side-by-side with the *Lusardi* approach and explicitly avoided suggesting that Rule 23 was an "incompatible" option. *See* Mooney v. Aramco Servs. Co., 54 F.3d 1207, 1216 (5th Cir. 1995). Furthermore, the U.S. Supreme Court has never held or implied that Rule 23 principles do not apply when named plaintiffs have requested to represent a "class" of opt-in plaintiffs pursuant to § 216(b). As discussed *infra*, the Fifth Circuit subsequently became

Under the "first step" (sometimes called the "notice stage") of the *Lusardi* approach, the district court decides whether notice should be sent to the proposed "class," which may include hundreds or thousands of a company's exempt employees, or even independent contractors.[43] Remarkably, in making this determination, many courts accept conclusory allegations in the complaint as true; the plaintiff has no genuine burden of proof; there is no meaningful legal standard; the determination is made *before* any discovery or depositions of the named plaintiffs (so the defendant cannot genuinely defend itself); and there is no proof that the named plaintiff is an adequate representative of the proposed class.[44] To the extent the defendant submits any evidence in opposition to conditional certification, many courts hold that they "need not consider evidence provided by defendants" when determining whether notice is appropriate.[45]

Given the lax legal standard, it is no surprise that this notice stage "typically results in 'conditional certification' of a representative class."[46] As a result, the court authorizes plaintiffs to send notice to hundreds or thousands of unsuspecting "class" members *before*

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the first circuit court to reject the *Lusardi* approach. *See* Swales v. KLLM Transp. Servs., L.L.C., 985 F.3d 430, 434 (5th Cir. 2021).

[43] Hipp v. Liberty Nat'l Life Ins. Co., 252 F.3d 1208, 1218 (11th Cir. 2001).

[44] *See generally id.* at 1219 (detailing how the "similarly situated" requirement is elastic and less stringent than Rules 20 and 42).

[45] *See, e.g.*, Dudley v. TrueCoverage LLC, No. CV 18-3760, 2018 WL 6431869, at *4 (C.D. Cal. Sep. 28, 2018) (in determining whether plaintiff has carried her burden at the notice stage, "the court need not consider evidence provided by defendants") (citing Williams v. U.S. Bank Nat'l Ass'n, 290 F.R.D. 600, 605 (E.D. Cal. 2013)); Kress v. PricewaterhouseCoopers, LLP, 263 F.R.D. 623, 628 (E.D. Cal. 2009) (in determining whether plaintiffs have met their "fairly lenient standard" for conditional certification, "courts need not consider evidence provided by defendants"); Lewis v. Wells Fargo & Co., 669 F. Supp. 2d 1124, 1128 (N.D. Cal. 2009) ("[T]he Court need not consider the [defendant's] declarations at this time. Defendant can re-submit them as part of a motion to decertify the class once discovery is complete.").

[46] Mickles v. Country Club Inc., 887 F.3d 1270, 1276 (11th Cir. 2018) ("At the first 'notice stage,' the district court decides whether notice of the action should be given to potential class members who *could be* similarly situated. This stage . . . typically results in 'conditional certification' of a representative class." (emphasis added)); Mooney v. Aramco Servs. Co., 54 F.3d 1207, 1214 (5th Cir. 1995) ("Because the court has minimal evidence, this determination . . . typically results in 'conditional certification' of a representative class.").

there has been any factual determination that recipients of the notice are "similarly situated" or that they are legitimate "potential plaintiffs."[47] This notice invites recipients to "opt in" and join the lawsuit by filing a consent form with the court.[48] The complaint is not amended to include allegations by any of the "opt-in" plaintiffs. After the opt-in period, "[t]he action proceeds through discovery *as a representative action*."[49]

The "second stage" of the *Lusardi* approach occurs months or years later, after discovery, and is triggered if and when the defendant files a motion for "decertification."[50] It is not until this second stage that a district court makes a "factual determination" of whether the class, which was already created in stage one, actually consists of persons who are "similarly situated," and whether the action

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[47] Hoffmann-La Roche v. Sperling, 493 U.S. 165, 169 (1989). To add further confusion and lack of uniformity to the case law addressing *conditional* certification, some district courts modify the legal standard for determining whether notice will be allowed, depending upon how much discovery has occurred at the time the plaintiff files a motion for conditional certification; if significant discovery has been taken, some courts have applied "intermediate scrutiny." *See, e.g.*, Blake v. Hewlett-Packard Co., No. 11–CV–592, 2013 WL 3753965, at *5 (S.D. Tex. July 11, 2013) (because the parties had five months of discovery, the court applied an "intermediate approach," including a "heightened evidentiary standard," and denied conditional certification); *id.* at *4 (explaining that "[a]s the parties conduct more discovery, the importance of the evidentiary distinctions begin to fade, and the rationale for applying a limited, lenient inquiry at the notice stage loses its force"); Scott v. NOW Courier, Inc., No. 10–cv–971, 2012 WL 1072751, at *7 (S.D. Ind. Mar. 29, 2012) ("[W]hen substantial discovery has been conducted but is not yet complete, an intermediate level of scrutiny is appropriately applied by the Court."). District courts in the Second Circuit refer to this increased scrutiny as a "modest plus" standard. *See, e.g.*, Brown v. Barnes & Noble, Inc., No. 16-cv-07333, 2018 WL 3105068, at *6 (S.D.N.Y. June 25, 2018) (denying renewed motion for "conditional certification" and noting that "when there has been substantial discovery, some courts in this Circuit have imposed a 'modest plus' standard"). Other courts hold that an intermediate standard is not appropriate where the parties have completed "just some discovery," but not all of it. *See* Long v. CPI Sec. Sys., Inc., 292 F.R.D. 296, 300 (W.D.N.C. 2013) (noting that there are sound substantive reasons for not applying an intermediate standard).

[48] *Blake*, 2013 WL 3753965, at *4.

[49] Mickles v. Country Club Inc., 887 F.3d 1270, 1276 (11th Cir. 2018) (emphasis added).

[50] Hipp v. Liberty Nat'l Life Ins. Co., 252 F.3d 1208, 1218 (11th Cir. 2001).

should be allowed to proceed to trial as a representative action.[51] This second stage of the *Lusardi* approach more often than not results in decertification.[52] Thus, the second stage of *Lusardi* serves in most cases *to correct the error* of having sent notice to a class of persons who were *not* similarly situated. There is no retroactive remedy, however, to cure the massive disruption of the defendant's business and the enormous waste of time and resources caused by the inappropriate notice and months or years of unnecessary discovery.

IV. DECONSTRUCTING THE *LUSARDI* "TWO-STEP" APPROACH

The two-stage "*Lusardi* approach" is unsupported by any statute, Federal Rule of Civil Procedure, or Supreme Court precedent, and it is an entirely inappropriate "procedure" for determining when notice should be sent to an alleged class of "similarly situated" persons.[53] First, the so-called *Lusardi* "approach" is not an approach at all. *Lusardi* was a series of decisions by different district court judges, all decided *before* the Supreme Court's decision in *Hoffmann-La Roche*. The original district court judge erroneously held that an entirely separate form of "class action" was authorized by § 216(b).[54]

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[51] *Mickles*, 887 F.3d at 1276 (at the "second stage," "the court has more information and makes a factual determination of the similarly-situated question").

[52] Mooney v. Aramco Servs. Co., 54 F.3d 1207, 1214 (5th Cir. 1995) ("Based on our review of the case law, no representative class has ever survived the second stage of review."); Goss v. Tyler Traditions, Inc., No. 18-CV-423, 2019 WL 4935290, at *3 (E.D. Tex. July 22, 2019) ("Final certification is rarely granted.") (citing Gallender v. Empire Fire & Marine Ins. Co., No. 05cv220, 2007 WL 325792, at *2 (S.D. Miss. Jan. 31, 2007)); Clay v. New Tech. Glob. Ventures, LLC, No. 16-296, 2019 WL 1028532, at *11 (W.D. La. Mar. 4, 2019) ("Because it requires a fact-intensive inquiry that is 'highly dependent on the particular situation presented,' courts rarely grant final certification of a collective of plaintiffs alleging that they were improperly classified as independent contractors." (citation omitted)).

[53] *See* Swales v. KLLM Transp. Servs., L.L.C., 985 F.3d 430, 434 (5th Cir. 2021) ("*Lusardi* has no anchor in the FLSA's text or in Supreme Court precedent.").

[54] *See* Lusardi v. Xerox Corp., 99 F.R.D. 89, 93 n.7 (D.N.J. 1983) (ordering that "plaintiffs will have to amend their complaint to provide for class claims pursuant to 29 U.S.C. §§ 626(b) and 216(b)"). *See also id.* at 94 ("[W]e hold that . . . a class may be certified pursuant to § 7(b) of the ADEA, but not under Rule 23 . . . .").

The first *Lusardi* judge reasoned that the "effectiveness of class enforcement of the ADEA would be vastly diminished if" notice were not allowed.[55] The court's decision was based on the erroneous assumption that notice should be allowed *in every case* where a "class" was requested under § 216(b), in order "to notify those who *may be* similarly situated of their *right* to be included in the class through written consent."[56] Thus, the first *Lusardi* judge entered orders allowing notice and "conditionally certifying" a class *without* first determining whether the class members were "similarly situated" to the named plaintiffs.[57] As a result, 1,312 individuals "opted-in" to the *Lusardi* action.[58] After "extensive discovery," the defendants moved for decertification.[59] In a comprehensive decision, a new district judge *decertified* the class, holding that the class members were *not* "similarly situated,"[60] in effect *correcting the mistake* made over three years earlier by the prior judge. The idea that the *Lusardi* decisions illustrate a favorable "approach" to determining when notice would be appropriate under § 216(b) of the FLSA is baffling and entirely unsupportable.

Indeed, the first *Lusardi* court's conclusion in 1983 that notice should be allowed *in every case* simply because a "class" is demanded in a complaint citing § 216(b) was implicitly rejected by the Supreme Court six years later in *Hoffmann-La Roche*.[61] The Supreme Court held that "district courts have discretion, *in appropriate cases*," to facilitate notice to "potential plaintiffs,"[62] but cautioned that its decision "does not imply that trial courts have

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[55] *Id.* at 93.

[56] *See id.* (emphasis added).

[57] Lusardi v. Xerox Corp., 118 F.R.D. 351, 353–54 (D.N.J. 1987) (discussing procedural history). The first *Lusardi* judge held on August 30, 1983, that he would "allow notice to be sent to putative 'similarly situated' class members." *See Lusardi*, 99 F.R.D. at 93. On January 31, 1984, he "conditionally certified" a class without prejudice to a later motion for decertification. *See Lusardi*, 118 F.R.D. at 353–54.

[58] *Lusardi*, 118 F.R.D. at 354.

[59] *Id.*

[60] *Id.* at 380; Lusardi v. Xerox Corp., 122 F.R.D. 463, 464–67 (D.N.J. 1988). The class was ultimately decertified on November 5, 1987. *Lusardi*, 118 F.R.D. at 380.

[61] *See* 493 U.S. 165, 169, 174 (1989); *In re* JPMorgan Chase & Co., 916 F.3d 494, 501 (5th Cir. 2019).

[62] *Hoffmann-La Roche*, 493 U.S. at 169 (emphasis added).

unbridled discretion."[63] *Hoffmann-La Roche* "nowhere suggests that employees have a *right* to receive notice of potential FLSA claims."[64] Nor did the Supreme Court suggest that actions under § 216(b) requesting notice to a proposed "class" of individuals are somehow exempt from Rule 23 or the Federal Rules of Civil Procedure.[65] To the contrary, the Supreme Court expressly instructed that the "authority to manage the process" should be exercised "in a manner that is orderly, sensible, and *not otherwise contrary to* . . . the provisions of the Federal Rules of Civil Procedure."[66] The vast majority of courts have ignored this instruction.[67]

Rule 23 of the Federal Rules of Civil Procedure expressly states that an individual may sue as a representative party on behalf of members of a class "*only if*" the requirements of Rules 23(a) and (b) are satisfied.[68] Compliance with Rule 23 is not optional, and neither *Lusardi* nor any other court has articulated a defensible legal argument for blatantly ignoring the express language and requirements of Rule 23.

V. SECTION 216(B) PROVIDES FOR A *REPRESENTATIVE* ACTION

As a threshold matter, there is no question that § 216(b) of the FLSA creates a *representative* action. Any contrary position ignores the express language of § 216(b), the Supreme Court's decision in *Hoffmann-La Roche*, and legislative history. Section 216(b) permits an action to be "maintained" by "one or more employees for and in behalf of himself or themselves and other employees similarly situated."[69] The "*in behalf of*" language of the statute means "*on behalf of*," which plainly describes a representative action.[70] As Justice Scalia noted: "The portion of the statute dealing with collective employee actions provides that employees *may sue in a representative*

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[63] *Id.* at 174.

[64] *In re JPMorgan Chase & Co.*, 916 F.3d at 501 (emphasis added).

[65] *Hoffmann-La Roche*, 493 U.S. at 170.

[66] *Id.* (emphasis added).

[67] *See* discussion *infra* pp. 788–94.

[68] FED. R. CIV. P. 23(a) (emphasis added).

[69] 29 U.S.C. § 216(b).

[70] *See, e.g.*, *Hoffmann-La Roche*, 493 U.S. at 167 (the ADEA "provides that an employee may bring an action *on behalf of* himself and other employees similarly situated" (emphasis added)).

capacity for other similarly situated employees who have consented to the representation."[71] He observed further that the requirement to file a written consent serves as "a *limitation* upon the affirmative permission *for representative actions* that already exists in Rule 23."[72] While the quoted language comes from Justice Scalia's dissent, it is clear that his description of § 216(b) as a representative action involving an *opt-in class* is consistent with the majority opinion.[73]

Moreover, named plaintiffs in FLSA collective actions routinely file pleadings expressly asking to litigate the action as representatives *on behalf of* "class" members who opt in to the action.[74] And the consent forms sent with notice typically ask putative class members for their consent to be represented by the named plaintiffs.[75] Courts have recognized that, if the case is "conditionally certified" and "putative class members are given notice," "[t]he action proceeds through discovery *as a representative action*."[76] The named

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[71] *Id.* at 176 (emphasis added).

[72] *Id.* (emphasis added).

[73] *See id.* at 169 (explaining that the notice issue involves "communication from the named plaintiffs *to the potential members of the class on whose behalf the collective action has been brought*" (emphasis added)). *See also* Hipp v. Liberty Nat'l Life Ins. Co., 252 F.3d 1208, 1219 (11th Cir. 2001) (commenting on the "certification of § 216(b) *opt-in classes*" and "[t]he decision to create *an opt-in class* under § 216(b)" (emphasis added)).

[74] *See, e.g.*, Holt v. XTO Energy, Inc., No. 16-CV-00162, 2017 WL 10676816, at *1 (W.D. Tex. June 14, 2017) ("Plaintiffs bring this lawsuit as a collective action on behalf of themselves and the following class of potential FLSA opt-in litigants . . . ."); Carts v. Wings Over Happy Valley MDF, LLC, No. 17-CV-00915, 2023 WL 373175, at *10 (M.D. Pa. Jan. 24, 2023) ("[B]oth complaints are styled 'COMPLAINT—CLASS ACTION,' and both assert that 'this [is a] collective and class action lawsuit' . . . .").

[75] *See, e.g.*, Sandoval-Zelaya v. A+ Tires, Brakes, Lubes, & Mufflers, Inc., No. 13-CV-810, 2017 WL 4322404, at *3 (E.D.N.C. Sep. 28, 2017) ("In addition to the named plaintiffs, nineteen plaintiffs filed written consent to join the collective action under the FLSA and for the named plaintiffs to serve as their representatives."); York v. Velox Express, Inc., No. 19-CV-00092, 2022 WL 20804127, at *8 (W.D. Ky. Mar. 25, 2022) ("Plaintiffs obtained an order conditionally certifying the FLSA collective action, and after distributing Court-approved notices to putative collective members, eight individuals opted to join the collective as party plaintiffs.").

[76] Mickles v. Country Club Inc., 887 F.3d 1270, 1276 (11th Cir. 2018) (emphasis added).

plaintiffs do not amend the complaint to add factual allegations specific to every person who opts in to the action. Persons who merely file a consent form to be represented by named plaintiffs are not part of the pleadings under the Federal Rules of Civil Procedure.[77] The action is to be "maintained" by the named plaintiffs on behalf of themselves and those who consent to be represented,[78] not by persons who have "consented to the representation."[79]

Several courts, however, have erroneously stated that FLSA actions under § 216(b) are *not* "representative" actions, but some kind of unique "joinder" of plaintiffs that exists outside the Federal Rules of Civil Procedure. The Ninth Circuit seems to have originated this view by misinterpreting legislative history and opining that § 216(b) authorizes "a kind of mass action."[80] The *Campbell* court's conclusion was based on its erroneous opinion that the 1947 amendments to § 216(b) were intended to ban or eliminate *all* representative actions.[81] This is plainly wrong. The Portal-to-Portal Act of 1947 was a response to thousands of lawsuits filed under § 216(b) in which labor unions were acting as "representatives" of employees:

> These suits were "representative" in the sense that, as authorized by the statute, they were initiated by third-party union officials as representatives of the employees, the real parties in interest. But despite the broad language allowing suits on behalf of those "similarly situated," these were not opt-out class actions analogous to suits under modern Rule 23, which did not exist at the time. Instead, case law on § 16(b) held that plaintiffs must affirmatively join in a representative action to recover, analogizing such

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[77] *See* FED. R. CIV. P. 7(a) (defining "pleadings").

[78] 29 U.S.C. § 216(b).

[79] Hoffmann-La Roche Inc. v. Sperling, 493 U.S. 165, 176 (1989) (Scalia, J., dissenting).

[80] Campbell v. City of Los Angeles, 903 F.3d 1090, 1105 (9th Cir. 2018) (opining that "[a] collective . . . is not a comparable form of representative action," but "is more accurately described as a *kind of mass action*" (emphasis added)).

[81] *See id.* (stating that "Congress added the FLSA's opt-in requirement with the express purpose of 'bann[ing]' such [representative] actions under the FLSA" (citing Portal-to-Portal Act of 1947, Pub. L. No. 80-49, § 5(a), 61 Stat. 84, 87)).

> suits to "spurious" class actions available under Rule 23(a)(3) at the time.[82]

As used in the legislative history, the term "representative action" referred specifically to these lawsuits *filed by non-employees*:

> Senator Donnell, chairman of the drafting subcommittee, offered an exposition of § 5(a) and its purported remedy of the deficiencies of § 16(b) during Senate debates. He observed that § 16(b) had allowed two types of actions. "First, a suit by one or more employees, for himself and all other employees similarly situated. That *I shall call for the purpose of identification a collective action*, a suit brought by one collectively for himself and others. . . . In [this] case an employee . . . can sue for himself and other employees. We have no objection to that." What Senator Donnell objected to was the "second class of actions," *which he deemed "a representative action, as distinguished from a collective action*." In these cases, "an agent or representative *who may not be an employee of the company at all* can be designated by the employee or employees to maintain an action on behalf of all employees similarly situated." He characterized this class of cases as those "in which an outsider, perhaps someone who is desirous of stirring up litigation without being an employee at all, is permitted to be the plaintiff in the case."[83]

Thus, for purposes of identification, Senator Donnell used the term "collective action" to refer to a *representative action brought by employees*, whereas the term "representative action" was used to refer to a representative action *brought by non-employees*. Consequently, "[a] modern Rule 23 class action *is analogous to what Senator Donnell dubbed a 'collective action*.'"[84]

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[82] Knepper v. Rite Aid Corp., 675 F.3d 249, 254–55 (3d Cir. 2012).

[83] *Id.* at 256 (emphasis added) (citations omitted).

[84] *Id.* at 260 n.15 (emphasis added). The Third Circuit in *Knepper* explained "the conflation of two different meanings of the word 'representative'":

In amending § 216(b) in 1947, "the primary concern of Congress was 'representative' actions *as Senator Donnell defined them*, and of the sort that had dominated the portal-to-portal litigation—that is, instances where union leaders allegedly 'stirred up' litigation without a personal stake in the case."[85] This was subsequently confirmed by the Supreme Court in *Hoffmann-La Roche*.[86] The idea that the 1947 amendments to § 216(b) abolished *all* "representative" actions, including those by employees who *do themselves possess claims*, is specious. Simply put, a "collective" action under § 216(b), as defined by Senator Donnell, is a *representative* action brought by "one or more employees" *on behalf of* other employees who consent.[87] Because these "collective" actions are in fact *representative* actions, Rule 23 applies by its express terms. Indeed, Rule 23 *has*

> As Senator Donnell's statement makes clear, he understood a representative action to be one in which "an agent or representative who may not be an employee of the company at all can be designated by the employee or employees to maintain an action on behalf of all employees similarly situated." By contrast, although a modern Rule 23 class action is often described as a "representative action" with the named plaintiff as a "class representative," the "representative" must be a member of the class, not a third party without an interest in the litigation. In the context of an employment class action, the class representative must be an employee. *A modern Rule 23 class action is analogous to what Senator Donnell dubbed a "collective action*," where "an employee . . . can sue for himself and other employees," to which Senator Donnell had "no objection."

Id. (emphasis added) (citations omitted) (quoting 93 CONG. REC. 2182 (1947)).

[85] *Knepper*, 675 F.3d at 256 (emphasis added).

[86] Hoffmann-La Roche v. Sperling, 493 U.S. 165, 173 (1989) (explaining that, in response to "excessive litigation spawned by plaintiffs lacking a personal interest in the outcome, the representative action by plaintiffs *not themselves possessing claims was abolished*, and the requirement that an employee file a written consent was added" (emphasis added)). "[T]he Portal-to-Portal Act was 'designed to eliminate lawsuits by third parties (typically union leaders) on behalf of a disinterested employee (in other words, someone who would not otherwise have participated in the federal lawsuit).'" *Knepper*, 675 F.3d at 259 (quoting Ervin v. OS Rest. Servs., Inc., 632 F.3d 971, 978 (7th Cir. 2011)).

[87] "A modern Rule 23 class action is analogous to what Senator Donnell dubbed a 'collective action,' where 'an employee . . . can sue for himself and other employees,' to which Senator Donnell had 'no objection.'" *Knepper*, 675 F.3d at 260 n.15 (quoting 93 CONG. REC. 2182 (1947)).

always applied to actions under § 216(b), even before Rule 23 was amended in 1966.[88]

VI. SECTION 216(B) DOES NOT AUTHORIZE "MASS JOINDER"

The Ninth Circuit's misinterpretation of the Portal-to-Portal Act in *Campbell*—concluding that an action under § 216(b) was not a "representative" action—was subsequently repeated by the Second and Sixth Circuits with no meaningful analysis,[89] and most recently by the Seventh Circuit.[90] Having erroneously ruled out a representative action, the *Campbell* court opined that a collective action was "a kind of mass action," despite the fact that no such action exists within the Federal Rules of Civil Procedure.[91]

Contrary to *Campbell*'s reasoning, the Supreme Court directed in *Hoffmann-La Roche* that § 216(b) must be applied "in a manner that is orderly, sensible, and *not otherwise contrary to* statutory commands or the provisions of the Federal Rules of Civil Procedure."[92] If Rule 23 did not govern the representative action allowed by § 216(b) (which it does), then *all* opt-in plaintiffs would need to comply with Rule 20(a), which governs "permissive joinder" in *all*

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[88] *See Knepper*, 675 F.3d at 255 n.9 (explaining that a"comprehensive survey of the case law" at the time (in 1947 when the FLSA was amended), showed that actions under § 216(b) were considered "spurious class actions" under the then-current version of Rule 23).

[89] *See, e.g.*, Scott v. Chipotle Mex. Grill, Inc., 954 F.3d 502, 519 (2d Cir. 2020) (repeating the incorrect statement that the 1947 amendments were intended to "put an end to" *all* "representational litigation in the context of actions proceeding under § 216(b)," instead of only representational litigation brought by non-employees such as labor unions (citing Campbell v. City of Los Angeles, 903 F.3d 1090, 1112 (9th Cir. 2018))); Canaday v. Anthem Cos., Inc., 9 F.4th 392, 402 (6th Cir. 2021) (misinterpreting the 1947 amendments and stating that "[a] Rule 23 class action is representative, while a collective action under the FLSA is not"); Clark v. A&L Homecare & Training Ctr., LLC, 68 F.4th 1003, 1009 (6th Cir. 2023) (stating that an "FLSA collective action is not representative" (citing *Canaday*, 9 F.4th at 402)).

[90] *See* Richards v. Eli Lilly & Co., 149 F.4th 901, 906 (7th Cir. 2025) (stating that an action under § 216(b) is "a consolidation of individual cases, brought by individual plaintiffs" (citing Vanegas v. Signet Builders, Inc., 113 F.4th 718, 726 (7th Cir. 2024))).

[91] Campbell v. City of Los Angeles, 903 F.3d 1090, 1105 (9th Cir. 2018).

[92] *See* Hoffmann-La Roche v. Sperling, 493 U.S. 165, 170 (1989) (emphasis added).

civil actions.[93] Statements suggesting that § 216(b) supersedes or overrides Rule 20(a)[94] conflict with *Hoffmann-La Roche* and are unsupportable.

Having untethered themselves from the Federal Rules, some courts have suggested that persons who merely file their "consent in writing" become full-blown "parties" for all purposes, equivalent to the original named plaintiffs, or persons who might intervene in an action.[95] There is no basis in § 216(b) or the Federal Rules of Civil Procedure for such a conclusion. Section 216(b) states that "[n]o 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."[96] There is nothing in § 216(b) suggesting that use of the descriptive language "party plaintiff"—referring to a person who must file a consent form (which includes the named plaintiff)[97]—was intended to eliminate the representative nature of the action or to allow a consenter to act as though that person were an original named plaintiff. To the contrary, persons filing consents are *consenting to being represented* by the original named plaintiffs, with the statutory directive that the action "may be maintained" *by* the original "one or more" named plaintiffs who will litigate the claims *on their behalf*.[98]

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[93] *See* FED. R. CIV. P. 20(a)(1) (stating conditions when persons "may join" together in the same action as plaintiffs); FED. R. CIV. P. 1 ("These rules govern the procedure in all civil actions in the United States district courts, except as stated in Rule 81."). "The Federal Rules regularly use 'may' to confer categorical permission." Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 398–99 (2010).

[94] *See, e.g.*, Waters v. Day & Zimmerman NPS, Inc., 23 F.4th 84, 96 (1st Cir. 2022) (suggesting § 216(b) "displaces Rule 20"); Scott v. Chipotle Mex. Grill, Inc., 954 F.3d 502, 520 (2d Cir. 2020) (suggesting that § 216(b) operates outside the Federal Rules and imposes a "lower bar" for joining parties than Rule 20).

[95] *See* Clark v. A&L Homecare & Training Ctr., LLC, 68 F.4th 1003, 1009 (6th Cir. 2023) ("[S]imilarly situated employees who join an FLSA action become parties with 'the same status in relation to the claims of the lawsuit as do the named plaintiffs.' . . . [T]he district court simply adds parties to the suit.").

[96] 29 U.S.C. § 216(b) (emphasis added).

[97] Even with respect to an employee "named as a party plaintiff in the complaint," the action is not "commenced" for purposes of the statute of limitations until the named plaintiff files a written consent with the court. *See id.* § 256.

[98] The statute states plainly that an action under § 216(b) "*may be maintained* against any employer . . . *by* any one or more employees for and in behalf of himself or themselves and other employees similarly situated." *Id.* § 216(b) (emphasis

VII. DUE PROCESS CONCERNS AND INEFFICIENCY FROM THE *LUSARDI* APPROACH

As the Seventh Circuit once recognized:

> The only difference of moment between the two types of action is that in a collective action the members of the class (of the "collective") must opt into the suit to be bound by the judgment or settlement in it, while in a class action governed by Rule 23(b)(3) (a class action seeking damages) they must opt out *not* to be bound. . . . [D]espite the difference between a collective action and a class action . . . there isn't a good reason to have different standards for the certification of the two different types of action . . . .[99]

Thus, it should come as no surprise that the failure to apply Rule 23 standards to collective actions under § 216(b) creates serious due process concerns.

First, the "lenient" approach to approving notice under *Lusardi*, which is the antithesis of the "rigorous analysis" required under Rule 23, allows plaintiffs to issue notice to hundreds or thousands of a defendant's exempt employees or independent contractors based on nothing more than conclusory allegations.[100] Such notice exponentially increases the threat of liability and can irreparably harm the defendant's goodwill and relationship with an entire segment of its

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added). The statute does not state that § 216(b) loses its representative nature when persons file consent forms, or that those persons filing consent forms can begin litigating the action on their own. A person who merely files a "consent" form is not part of the complaint and has no factual allegations before the court. *See* Johnston v. Coleman Music & Ent., L.L.C., No. 12–cv–448–J–99TJC, 2013 WL 12159256, at *6 (M.D. Fla. Apr. 8, 2013) ("[N]o individual may be a party plaintiff to a collective action unless he or she files a written consent with the court; the act of filing a written consent alone does not automatically join an individual to the lawsuit.").

[99] Espenscheid v. DirectSat USA, LLC, 705 F.3d 770, 771–72 (7th Cir. 2013).

[100] *See, e.g.*, *In re* JPMorgan Chase & Co., 916 F.3d 494, 497–98 (5th Cir. 2019) (staying district court order, which would have authorized notice inviting 42,000 persons to opt-in to the litigation where district court utilized the *Lusardi* approach).

business.[101] Similar to the concern with Rule 23 class actions, the two-step *Lusardi* approach allows named plaintiffs to improperly pressure defendants to abandon meritorious defenses in order to avoid the threat of class-wide liability. "Nothing in the FLSA's legislative history supports the application of a lenient 'conditional certification' standard in the place of Rule 23's more stringent class certification requirements."[102]

In addition, because the two-step approach circumvents Rule 23's requirements, there is no determination of the "adequacy" of the named plaintiffs prior to notice.[103] Adequacy, however, is "one of the most important" requirements in a representative action because it protects the due process rights of absent class members.[104] In a collective action, the opt-in claimants are in need of the same due process protections as absent class members in a Rule 23 class action:

> [I]n contrast to a person who actually intervenes in the action . . . the person who merely files his written consent should not be expected fully to appreciate actual or potential conflicts between himself and the class representatives or counsel for the class representatives. The court should protect him by insuring [sic] that the representative will fully and adequately protect his interest.[105]

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[101] *See* Clark v. A&L Homecare & Training Ctr., LLC, 68 F.4th 1003, 1007 (6th Cir. 2023) ("[T]he decision to send notice of an FLSA suit to other employees is often a dispositive one, in the sense of forcing a defendant to settle—because the issuance of notice can easily expand the plaintiffs' ranks a hundredfold."). *See also* Bigger v. Facebook, Inc., 947 F.3d 1043, 1049 (7th Cir. 2020) (noting the "opportunity for abuse of the collective-action device," and that "expanding the litigation with additional plaintiffs increases pressure to settle, no matter the action's merits").

[102] King, Schreter & Wilder, *supra* note 34, at 20.

[103] *See* FED. R. CIV. P. 23(a)(4).

[104] *See* Key v. Gillette Co., 782 F.2d 5, 7 (1st Cir. 1986); Day v. Celadon Trucking Servs., Inc., No. 09CV00031, 2010 WL 3270760, at *6 (E.D. Ark. Aug. 16, 2010); Elliott v. Sims, No. 08-cv-1144, 2009 WL 3876538, at *2 (S.D. Ohio Nov. 18, 2009).

[105] Shushan v. Univ. of Colo. at Boulder, 132 F.R.D. 263, 267 (D. Colo. 1990) (citing FED. R. CIV. P. 23(a)(4)).

For example, putative collective actions may be filed by *former* independent contractors who are no longer working for a company, but who seek to represent a class of both former *and* current independent contractors.[106] Having no continuing interest in the nature of their business relationship, these former contractors claim that they were "employees" instead of independent contractors, claims that are often directly *antagonistic* to the interests of those currently working as contractors for the company.[107]

The *Lusardi* approach is also grossly inefficient, resulting in countless examples of prolonged litigation and wasted resources, including the *Lusardi* case itself, in which an improperly created "class" of 1,312 was ultimately decertified after five years of litigation.[108] In *JPMorgan Chase & Co.*, if not for intervention by the

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[106] *See, e.g.*, Delgado v. Apollo Envtl. Strategies, Inc., No. 18-CV-00526, 2018 WL 3421388, at *1 (S.D. Tex. June 27, 2018) (recommending certification of a collective action composed of "[a]ll current and former . . . independent contractors [employed] by [defendant] at any time during the last three years"), *report and recommendation adopted*, Delgado v. Apollo Envtl. Strategies Inc, No. 18-CV-00526, 2018 WL 3416387 (S.D. Tex. July 13, 2018).

[107] *See, e.g.*, *Delgado*, 2018 WL 3421388, at *1 ("Plaintiff alleges that he was improperly and illegally classified by [d]efendant as an independent contractor, and that based on that improper classification, [d]efendant failed to pay him overtime."). Independent contractors often enjoy substantial freedom to set their own schedules, to work from home or other locations, and to determine the details of how and when they accomplish their work. *See Fact Sheet 13: Employee or Independent Contractor Classification Under the Fair Labor Standards Act (FLSA)*, U.S. DEP'T OF LAB. WAGE & HOUR DIV. (Mar. 2024), https://www.dol.gov/agencies/whd/fact-sheets/13-flsa-employment-relationship [https://perma.cc/5P7Z-2HGJ]. Individuals who are no longer working for a company have no interest in the freedoms that current contractors enjoy and are unconcerned about upending existing independent contractor arrangements to the detriment of current contractors who could lose all of their freedoms by being reclassified as W-2 employees.

[108] The *Lusardi* case was filed on March 8, 1983, and a "class" was "conditionally certified" on January 31, 1984. Lusardi v. Xerox Corp., 118 F.R.D. 351, 353 (D.N.J. 1987). The class was later decertified on November 5, 1987. *Id.* at 380. It was decertified again on October 21, 1988, after two trips to the Third Circuit Court of Appeals. Lusardi v. Xerox Corp., 122 F.R.D. 463, 463–64 (D.N.J. 1988). *See also, e.g.*, Gatewood v. Koch Foods of Miss., LLC, No. 07CV82, 2009 WL 8642001, at *1, *8, *22 (S.D. Miss. Oct. 20, 2009) (decertifying and dismissing 1,320 opt-ins and severing five remaining named plaintiffs into separate cases after seventy-four depositions and over two years of discovery)). In the *Campbell* case, "[d]iscovery was extensive, last[ing] several years," after which the district court decertified two actions and dismissed "roughly" 2,500 Los Angeles police

Fifth Circuit pursuant to a petition for a writ of mandamus, the district court, using the *Lusardi* approach, would have authorized notice inviting 35,000 persons to "opt-in" to the litigation, notwithstanding arbitration agreements that waived their right to participate in class and collective actions.[109]

Why any court would follow the pre-*Hoffmann-La Roche* decisions in *Lusardi* as a preferred "procedure" for determining when notice is "appropriate" is perplexing. The original *Lusardi* decision that allowed notice contained *no legal standard* for determining when notice would or would not be appropriate; it simply *assumed* that notice was allowed *in every case*, and the court's subsequent decertification and dismissal of over 1,300 opt-ins because they were *not* similarly situated should have served as a warning sign that this "procedure" was seriously flawed.[110] If anything, the *Lusardi* litigation should have served as a blueprint for how *not* to adjudicate a proposed FLSA collective action.

VIII. THE PROPER APPROACH TO DETERMINING WHEN NOTICE IS "APPROPRIATE"

A request pursuant to § 216(b) to send notice to a proposed class of allegedly similarly situated employees is a request *to form and sue on behalf of an opt-in class*. In a comprehensive analysis, the district court in *Shushan v. University of Colorado at Boulder* held that named plaintiffs must satisfy all of the requirements of Rule 23, to the extent they are not inconsistent with § 216(b), before a proposed class would be conditionally certified for purposes of sending notice.[111] The court explained:

> While the "opt-in" feature of section 216 is manifestly "irreconcilable," with the "opt-out" feature of rule 23, *it does not necessarily follow that every other*

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officers who had opted in to the actions. Campbell v. City of Los Angeles, 903 F.3d 1090, 1099, 1103 (9th Cir. 2018). The determination that the officers were not "similarly situated" could have and should have been made in *one step* pursuant to Rule 23 before notice was sent out.

[109] *In re* JPMorgan Chase & Co., 916 F.3d 494, 497–98 (5th Cir. 2019).

[110] *Lusardi*, 118 F.R.D. at 380.

[111] Shushan v. Univ. of Colo. at Boulder, 132 F.R.D. 263, 265, 268 (D. Colo. 1990).

> *feature of rule 23 is similarly irreconcilable with section 216*. Cases holding that rule 23 is wholly inapplicable in ADEA actions are premised partly on this *non sequitur*, and that is part of the reason they do not seem entirely persuasive.[112]

The *Shushan* court correctly concluded that the requirements of Rule 23 should be applied and satisfied before a class is created under § 216(b):

> I cannot accept the extraordinary assertion that an aggrieved party can file a complaint, claiming to represent a class whose preliminary scope is defined by him, and by that act alone obtain a court order which conditionally determines the parameters of the potential class and requires discovery concerning the members of that class. Before I conditionally determine the scope of the class, plaintiffs will need to satisfy me that there exists a definable, manageable class and that they are proper representatives of the class. They will, in other words, need to show that they satisfy the requirements of rule 23 or convince me that a particular requirement is inconsistent with 29 U.S.C.A. § 216(b). When that showing is made, I will consider the question of notice under the guidelines set forth in rules 23(c) and 23(d) and in *Hoffmann-La Roche* . . . .[113]

Shushan was decided after *Hoffmann-La Roche*, and unlike *Lusardi*, the *Shushan* court considered the Supreme Court's decision in its analysis.[114] The court noted:

> A predictable practical effect of [*Hoffmann-La Roche*] is that district courts will be confronted with more motions, such as the one before me, which seek to define a potential class in broad terms, to obtain

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[112] *Id.* at 266 (emphasis added) (citation omitted).

[113] *Id.* at 268 (citations omitted).

[114] *Id.* ("The [§ 216(b)] class action after [*Hoffmann-La Roche*] is more like the familiar class action under rule 23 than a permissive joinder device . . . .").

> discovery identifying all members of the class, and to notify all such persons so that they can decide whether to "opt-in" to the action. In dealing with such motions, I cannot see why the district courts should fail to utilize existing procedures, embodied in rule 23, which are designed to promote effective management, prevent potential abuse, and protect the rights of all parties.[115]

The reasoning of the court in *Shushan* is sound, and far more efficient than a "two-step" approach that has no basis in the Federal Rules and postpones any genuine determination of whether the recipients of notice are "similarly situated" until *after* invitations have already gone out.

In sum, a motion to send notice to a proposed class under § 216(b) should be recognized for what it is—a request to create and sue "[o]n behalf of" an opt-in class.[116] Such a motion should be treated the same as a motion for class certification under Rule 23. No notice should be permitted unless all of the requirements of Rules 23(a) and (b) are satisfied by a preponderance of the evidence, and whether the Rule is satisfied should be subject to a "rigorous analysis."[117] Application of Rule 23 is not a matter of discretion. It is *required* by the express language of Rule 23[118] and the Rules Enabling Act,[119] as well as the Supreme Court's direction not to apply § 216(b) "contrary . . . [to] the Federal Rules of Civil Procedure."[120]

IX. A CIRCUS IN THE CIRCUIT COURTS

The failure to apply Rule 23 to actions under § 216(b) has resulted from a confluence of factors, including the failure to consider

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115 *Id.*

116 29 U.S.C. § 216(b).

117 *See* Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350–51 (2011) (stating that class "certification is proper only if 'the trial court is satisfied, after a rigorous analysis, that the requirements of Rule 23(a) have been satisfied'").

118 FED. R. CIV. P. 23(a) ("One or more members of a class may sue or be sued as representative parties on behalf of all members *only if* . . . ." (emphasis added)).

119 *See supra* note 34 (discussing the abrogation clause of the Rules Enabling Act).

120 Hoffmann-La Roche Inc. v. Sperling, 493 U.S. 165, 170 (1989).

the Rules Enabling Act, the failure to examine the mandatory language of Rule 23, and the failure to recognize that § 216(b) authorizes one or more employees to "sue in a *representative capacity* for other similarly situated employees who have consented to the representation."[121] Under inconsistent and differing standards, multiple circuit courts have endorsed or encouraged the sending of notice under the "first step" of the *Lusardi* two-step procedure, allowing creation of an opt-in "class," while disregarding Rule 23 and the Rules Enabling Act. For example, the Eleventh Circuit stated in 2001 that the two-stage approach "appears to be an effective tool" and "suggest[ed] that district courts . . . adopt it."[122] Although the court has also stated that the two-step procedure is not "require[d],"[123] its recommendation of the procedure as an "effective tool"[124] has led to almost universal use of the two-step procedure within the Eleventh Circuit.[125] At least six other circuits have authorized or allowed district courts to use a two-step approach, including an overly lenient

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[121] *Id.* at 176 (emphasis added).

[122] Hipp v. Liberty Nat'l Life Ins. Co., 252 F.3d 1208, 1219 (11th Cir. 2001) ("The two-tiered approach to certification of § 216(b) opt-in classes . . . appears to be an effective tool for district courts to use in managing these often complex cases, and we suggest that district courts in this circuit adopt it in future cases. Nothing in our circuit precedent, however, requires district courts to utilize this approach.").

[123] *Id.*; Mickles v. Country Club Inc., 887 F.3d 1270, 1276 (11th Cir. 2018) ("In *Hipp*, we noted that nothing in our circuit precedent *requires* district courts to use this approach.").

[124] *Hipp*, 252 F.3d at 1219; Wright v. Waste Pro USA, Inc., 69 F.4th 1332, 1339 (11th Cir. 2023) ("We have recommended that district courts use a two-step approach to determine whether a purported collective action meets the statutory requirements."); Morgan v. Fam. Dollar Stores, Inc., 551 F.3d 1233, 1260 (11th Cir. 2008) ("[W]e have sanctioned a two-stage procedure . . . .").

[125] The legal standards applicable to the "two steps" vary significantly among the circuits. As to the first step, whereas many circuits essentially allow district courts to "rubber stamp" requests for "conditional certification," using a mere pleading standard without considering a defendant's evidence, the Eleventh Circuit has stated that a plaintiff seeking conditional certification must "successfully engage defendants' [contrary] affidavits." Yoder v. Fla. Farm Bureau, 446 F. Supp. 3d 956, 961 (N.D. Fla. 2020) (citing Grayson v. K Mart Corp., 79 F.3d 1086, 1097 (11th Cir. 1996)). This has allowed some district courts to consider evidence and properly deny notice where the proposed class did not consist of persons similarly situated. *Id.* at 966 (denying conditional certification).

first step that permits notice to be sent without any meaningful evidentiary process.[126]

To its credit, the Fifth Circuit became the first circuit to curtail this abusive procedure by expressly "reject[ing] *Lusardi*'s two-step certification rubric."[127] The court held that district courts should make a single determination, after discovery and based on evidence, whether notice should be sent to those alleged to be similarly situated to the named plaintiffs.[128] This includes considering evidence

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[126] *See* Campbell v. City of Los Angeles, 903 F.3d 1090, 1110 (9th Cir. 2018) (opining that there is "good reason" for endorsing the "two-step approach," which "has the advantage of ensuring early notice of plausible collective actions"); Halle v. West Penn Allegheny Health Sys. Inc., 842 F.3d 215, 224 (3d Cir. 2016) ("The first step, so-called conditional certification, requires a named plaintiff to make a 'modest factual showing'—something beyond mere speculation . . . ."); Myers v. Hertz Corp., 624 F.3d 537, 554–55 (2d Cir. 2010) ("[T]he district courts of this Circuit appear to have coalesced around a two-step method, a method which, while again not required by the terms of FLSA or the Supreme Court's cases, we think is sensible." (footnote omitted)); Thiessen v. Gen. Elec. Cap. Corp., 267 F.3d 1095, 1105 (10th Cir. 2001) ("We find no error on the part of the district court in adopting the *ad hoc* [two-step] approach."). The Fourth Circuit has not ruled on the proper standard for authorizing notice under § 216(b) but has allowed all district courts within the Fourth Circuit to use the two-step procedure. *See, e.g.*, Amoko v. N&C Claims Serv., Inc., 577 F. Supp. 3d 408, 413 (D.S.C. 2021) ("In this District, certification of an FLSA collective action is a two-step process."); *id.* at 414–15 (declining "to abandon the lenient standard adopted by courts in this District and throughout the Fourth Circuit."). District courts in the Eighth Circuit similarly employ the two-step procedure. *See, e.g.*, Babbitt v. Target Corp., No. 20-490, 2023 WL 2540450, *3 (D. Minn. Mar. 16, 2023) ("In this Circuit, courts utilize a two-step process to determine whether employees are similarly situated and thus may opt-in as a party to an FLSA action.").

[127] Swales v. KLLM Transp. Servs., L.L.C., 985 F.3d 430, 434 (5th Cir. 2021). Until *Swales*, district courts in the Fifth Circuit were applying the two-step procedure in virtually every case despite the Fifth Circuit having stated on three occasions that it did not "endorse" the *Lusardi* approach. Mooney v. Aramco Servs. Co., 54 F.3d 1207, 1216 (5th Cir. 1995) ("[W]e specifically *do not* endorse the [*Lusardi*] methodology employed by the district court, and *do not* sanction any particular methodology."); *In re* JPMorgan Chase & Co., 916 F.3d 494, 500 n.9 (5th Cir. 2019) ("[T]his court has carefully avoided adopting the two-stage '*Lusardi*' method of certifying a collective action."); Acevedo v. Allsup's Convenience Stores, Inc., 600 F.3d 516, 518–19, 519 n.1 (5th Cir. 2010).

[128] *Swales*, 985 F.3d at 434, 441–43. The Fifth Circuit states:

> In our view, a district court must rigorously scrutinize the realm of "similarly situated" workers, and must do so from the outset of the case, not after a lenient, step-one "conditional

of whether the case could be tried on a "collective basis."[129] The court rejected the argument that evidence of important liability issues—such as whether the plaintiffs were misclassified as independent contractors—should be disregarded at the "notice" stage because such evidence goes to the "merits."[130] The court held that "the FLSA's similarity requirement is something that district courts should *rigorously enforce* at the outset of the litigation."[131] Although the court recognized that the predominance of individual issues would render notice and the formation of a collective action inappropriate (similar to the commonality and predominance requirements of Rules 23(a)(2) and (b)(3)),[132] the court did not instruct district courts to apply Rule 23 in its new "one-step" procedure for determining whether notice would be appropriate.

The Sixth Circuit recently became the first circuit to create an entirely new standard for notice based on "part of the preliminary-

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> certification." Only then can the district court determine whether the requested opt-in notice will go to those who are actually similar to the named plaintiffs. These bedrock rules, not *Lusardi*, define and delimit the district court's discretion.

Id. at 434.

[129] *See id.* at 442–43.

[130] *Id.* at 441–42 ("The fact that a threshold question is intertwined with a merits question does not itself justify deferring those questions until after notice is sent out . . . it [is] improper to ignore evidence of other threshold matters, like whether the plaintiffs are 'employees' such that they can bring an FLSA claim."). The court also noted that considering "whether merits questions can be answered collectively . . . aids the district court in deciding whether notice is necessary." *Id.* at 442.

[131] *Id.* at 443 (emphasis added).

[132] In *Swales*, the Fifth Circuit recognized that the threshold issue of whether plaintiffs and their proposed class members were "employees" or independent contractors depended on application of the so-called "economic realities" test. *Swales*, 985 F.3d at 442.

> Thus, the district court needed to consider the evidence relating to this threshold question in order to determine whether the economic-realities test could be applied on a collective basis. If answering this question requires a highly individualized inquiry into each potential opt-in's circumstances, the collective action would quickly devolve into a cacophony of individual actions.

Id. By this, the Fifth Circuit meant the case could not be tried as a collective action and notice would not be appropriate. *Id.*

injunction standard."[133] Under this standard, a district court should not approve notice to other employees unless the plaintiffs "show a 'strong likelihood' that those employees are similarly situated to the plaintiffs themselves."[134] The court recognized that this "strong likelihood" standard could include employees who "*might* be similarly situated to the original plaintiffs," as opposed to those who were in fact similarly situated.[135] In making the determination of whether notice is appropriate under the Sixth Circuit's standard, district courts should consider evidence of all defenses.[136] According to the dissent in *Clark*, the majority opinion leaves intact the potential for a "second step" when the court would make a final determination whether opt-ins were in fact "similarly situated."[137]

More recently, in *Richards v. Eli Lilly & Company*, the Seventh Circuit created yet another set of standards to determine when notice

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[133] Clark v. A&L Homecare & Training Ctr., LLC, 68 F.4th 1003, 1011 (6th Cir. 2023).

[134] *Id.*

[135] *Id.* at 1010. To justify sending notice to those who *might not* be similarly situated, the court stated it did not "see how a district court [could] conclusively make 'similarly situated' determinations as to employees who are in no way present in the case." *Id.* This statement makes no sense. District courts routinely make difficult decisions to determine whether named plaintiffs can maintain class actions under Rule 23—including detailed claim-by-claim determinations of commonality, typicality, and whether individual issues predominate—all without absent class members being "present in the case." District courts are capable of doing the same with respect to the "similarly situated" determination under § 216(b) without the need for any additional employees to first join the case.

[136] *See Clark*, 68 F.4th at 1012 (rejecting plaintiffs' argument that "an arbitration defense is off-limits for purposes of the notice determination because that defense presents 'merits' questions," and reasoning that "nearly every defense concerns the claim's merits" and that "[t]he very point of the 'similarly situated' inquiry is to determine whether the merits of other-employee claims would be similar to the merits of the original plaintiffs' claims—so that collective litigation" would be appropriate).

[137] *Id.* at 1017 ("I note, however, that the advantages of a two-step framework remain, and today's ruling still supports a two-step approach by contemplating notice before a final similarity determination." (White, J., concurring in part and dissenting in part)). Judge White spends most of her dissent defending the *Lusardi* "lenient" standard for sending notice and attempting to water down the majority's new stricter standard. *See id.* at 1015–21 (White, J., concurring in part and dissenting in part).

should be permitted, rejecting the *Lusardi* approach,[138] as well as the decisions of both the Fifth and Sixth Circuits.[139] Now, in the Seventh Circuit, "to secure notice, a plaintiff must first make a threshold showing that there is a material factual dispute as to whether the proposed collective is similarly situated."[140] The plaintiff "must produce some evidence," which "need not be definitive," and "defendants must be permitted to submit rebuttal evidence," for the court to assess "whether a material dispute exists."[141] The court stated that notice is "not automatically" authorized "upon establishing the existence of a material dispute as to similarity." [142] But the court gave no definitive guidance regarding what should be done if a "material dispute exists."[143] The court left open the possibility of issuing notice under the former "two-step approach . . . while postponing the final determination as to whether plaintiffs are similarly situated," if the district court believed "the evidence necessary to resolve a similarity dispute is likely in the hands of yet-to-be-noticed plaintiffs."[144] Alternatively, if "a similarity dispute can be resolved by a preponderance of the evidence before notice," the Seventh Circuit indicated the district court "may authorize limited and expedited discovery . . . and tailor (or deny) notice accordingly."[145]

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[138] The court noted that "*Lusardi*'s permissive notice standard" forces courts to "wait to sever a collective until after full opt-in and discovery are complete—even if the dissimilarity of the collective could have been readily established earlier. In such a case issuing notice is deeply inefficient, inviting 'futile attempts at joinder' that undermine judicial economy and unnecessarily increase litigation costs." Richards v. Eli Lilly & Co., 149 F.4th 901, 911 (7th Cir. 2025).

[139] *Id.* at 911 ("Eli Lilly argues we should adopt the Fifth Circuit's preponderance of the evidence approach, or, at the very least, the Sixth Circuit's strong likelihood of similarity standard. We decline to do either." (citations omitted)).

[140] *Id.* at 913.

[141] *Id.*

[142] *Id.*

[143] *Id.*

[144] *Richards*, 149 F.4th at 913. This analysis makes no sense. "Yet-to-be-noticed plaintiffs" are similar to absent class members in a Rule 23 class action. District courts routinely perform a rigorous analysis to determine whether plaintiffs in a Rule 23 class action have met their burden of establishing the Rule 23 requirements, without a "two-step" procedure, regardless of any evidence that might be "in the hands of" absent class members. *See id.*

[145] *Id.* To confuse matters further, the court opined that the decision to allow notice "need not be an all-or-nothing determination," suggesting that a district court could authorize notice on "a subset of issues," while leaving other disputes

There are now at least four different standards for determining when notice is "appropriate" under § 216(b): (1) the lenient first step of the two-step *Lusardi* approach;[146] (2) the Fifth Circuit's one-step determination of the similarly situated issue by a preponderance of the evidence;[147] (3) the Sixth Circuit's "strong likelihood" standard;[148] and (4) the Seventh Circuit's "material dispute" approach.[149] In addition, there are significant differences in how courts apply the *Lusardi* two-step approach that create even further inconsistencies between the circuits. For example, whereas some courts refer to Rule 23 concepts in evaluating the propriety of notice or whether trial of a "collective" action would be proper, the Ninth Circuit, in applying its version of the two-step approach, held that Rule 23 criteria cannot be considered, and that a "flaw" in the two-step approach is allowing "fairness and procedural considerations" in determining whether a collective action could go forward.[150]

CONCLUSION

The issuance of notice in a so-called "collective" action under § 216(b) allows "one or more employees," as named plaintiffs, to form an "opt-in" class and to maintain a representative action on behalf of other similarly situated employees who file their written consent. This is plainly and unequivocally a *representative* action

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to be resolved "later in the proceedings." *Id.* at 914. And a district court could "deny the motion for notice without prejudice," leaving open the possibility of reconsideration. *Id.* According to the court, these myriad options with no definitive procedure or burden of proof indicated "flexibility, with respect for the principles outlined in *Hoffmann-La Roche* and the remedial goals of the FLSA and ADEA." *Id.*

[146] *See supra* notes 45–47 and accompanying text.

[147] *See* Swales v. KLLM Transp. Servs., L.L.C., 985 F.3d 430, 441 (5th Cir. 2021).

[148] *See* Clark v. A&L Homecare & Training Ctr., LLC, 68 F.4th 1003, 1011 (6th Cir. 2023).

[149] *See* Richards v. Eli Lilly & Co., 149 F.4th 901, 913 (7th Cir. 2025).

[150] Campbell v. City of Los Angeles, 903 F.3d 1090, 1115 (9th Cir. 2018). According to the Ninth Circuit, decertification of § 216(b) actions "cannot be permitted unless the collective mechanism is truly infeasible." *Id.* at 1116. In *Scott*, a split panel of the Second Circuit similarly held that "analogies to Rule 23 . . . are inconsistent with the language of § 216(b)." Scott v. Chipotle Mexican Grill, Inc., 954 F.3d 502, 518 (2d Cir. 2020).

on behalf of those who opt in, not some type of "mass joinder" that exists outside the Federal Rules of Civil Procedure. Given the express language of Rule 23, the Supreme Court's instructions to apply § 216(b) consistent with the Federal Rules of Civil Procedure, and the mandate of the Rules Enabling Act, notice should not be issued unless the requirements of Rule 23 are satisfied.

There is no basis in § 216(b), Supreme Court precedent, or the Federal Rules of Civil Procedure for the use of a "two-step" procedure to determine when notice is "appropriate."[151] And there is even less justification for a perfunctory "first step" that inevitably results in the inappropriate issuance of notice *before* there has been an evidentiary finding that the proposed class members are indeed "similarly situated" to the named plaintiffs and the action can proceed as a representative action in compliance with Rule 23. But the failure to apply Rule 23 to these representative actions under § 216(b) has allowed every circuit to develop its own unique rules governing procedure and the legal standard for when notice to a proposed opt-in class is appropriate. The differences between the circuits are stark and entrenched.

The absence of Supreme Court guidance, and the failure of lower courts to apply Rule 23 in FLSA actions under § 216(b), has resulted in inappropriate notice (in many cases to hundreds or thousands of individuals), disruption of business operations, and months or years of expensive discovery and decertification procedures in cases where notice should never have been issued in the first place. The Supreme Court and all Circuit Courts of Appeals should eradicate the "two-step" *Lusardi* procedure and make it clear that the "similarly situated" requirement of § 216(b) must be interpreted consistently with Rule 23 standards, and that Rules 23(a) and (b) must be satisfied *before* any notice is allowed to issue. Notice is "appropriate" under *Hoffmann-La Roche* only after a factual determination, based on evidence, that the named plaintiffs have met their burden of showing that the proposed recipients of notice have viable FLSA claims susceptible to class-wide proof in a representative action. The courts should eliminate any procedure that allows notice to issue before the defendant has had a meaningful opportunity for

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[151] *See* Swales v. KLLM Transp. Servs., L.L.C., 985 F.3d 430, 434 (5th Cir. 2021) ("*Lusardi* has no anchor in the FLSA's text or in Supreme Court precedent interpreting it.").

discovery, and an opportunity to submit evidence in response to any motion seeking to send notice to defendants' employees, independent contractors, or business partners.