No. 24-2574

In the United States Court of Appeals for the Seventh Circuit

MONICA RICHARDS, individually and on behalf of all other similar situated individuals,

Plaintiff-Appellee,

v.

ELI LILLY & COMPANY; LILLY USA LLC,

Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of Indiana, No. 1:23-cv-242

BRIEF OF AMICI CURIAE THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, INC., AND THE NATIONAL RETAIL FEDERATION SUPPORTING DEFENDANTS-APPELLANTS AND REVERSAL

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Under Federal Rule of Appellate Procedure 26.1 and Seventh Circuit Rule 26.1, amicus curiae the Chamber of Commerce of the United States of America certifies that it is a non-profit corporation organized under the laws of the District of Columbia. The Chamber has no parent entity, and no publicly held corporation or similarly situated legal entity has a 10% or greater ownership interest of the Chamber.

Under Federal Rule of Appellate Procedure 26.1 and Seventh Circuit Rule 26.1, amicus curiae the National Federation of Independent Business Small Business Legal Center ("NFIB Legal Center") is a 501(c)(3) public interest law firm and is affiliated with the National Federation of Independent Business, a 501(c)(6) business association. The NFIB Legal Center is incorporated in the State of Tennessee, has no parent corporation, and no publicly held company has 10% or greater ownership in the NFIB Legal Center.

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/s/ Scott A. Keller
Scott A. Keller

Counsel of Record for Amici Curiae

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 24-2574

Short Caption: Monica Richards v. Eli Lilly; Lilly USA LLC

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

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(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

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ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

N/A

(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: /s/ Scott A. Keller Date: 10/7/2024

Attorney's Printed Name: Scott A. Keller

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☑ **No** ☐

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Attorney's Signature: /s/ Steven P. Lehotsky Date: 10/7/2024

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Attorney's Printed Name: Drew F. Waldbeser

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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Attorney's Printed Name: Jennifer B. Dickey

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** _____ **No** ☑

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Attorney's Signature: /s/ Jonathan D. Urick Date: 10/7/2024

Attorney's Printed Name: Jonathan D. Urick

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ____ **No** ☑

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INTEREST OF AMICI CURIAE

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation.[1] It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases, like this one, that raise issues of concern to the Nation's business community.

The National Federation of Independent Business Small Business Legal Center, Inc. is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. It is an affiliate of the National Federation of Independent Business, Inc. (NFIB), which is the nation's leading small business association. NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents, in Washington, D.C., and all 50 state capitals, the interests of its members.

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[1] All parties have consented to this brief's filing. *See* Fed. R. App. P. 29(a)(2). No counsel for a party authored this brief in whole or in part, and no person or entity other than Amici, their members, or their counsel contributed money intended to fund the preparation or submission of this brief.

Established in 1911, the National Retail Federation ("NRF") is the world's largest retail trade association and the voice of retail worldwide. Retail is the largest private-sector employer in the United States. The NRF's membership includes retailers of all sizes, formats, and channels of distribution, spanning all industries that sell goods and services to consumers. The NRF frequently provides courts with the perspective of the retail industry on important legal issues impacting its members by filing amicus curiae briefs.

Thousands of cases are filed every year against employers, including Amici's members, under the Fair Labor Standards Act ("FLSA") and other statutes such as the Age Discrimination in Employment Act ("ADEA") that incorporate the FLSA's collective-action provision. The District Court's conditional collective-action certification method threatens enormous liability, facilitating costly settlements in otherwise meritless cases.[2] Amici thus have a substantial interest in ensuring that district courts have clear procedural and substantive guidance for certifying collective actions in accordance with the statutes' text.

[2] *Federal Judicial Caseload Statistics*, Table C-2 (March 31, 2023) (reporting 5,976 FLSA cases filed between March 31, 2022, and March 31, 2023), https://perma.cc/CA6L-H5M8.

INTRODUCTION

In a collective action under the FLSA or ADEA, an employee may sue an employer for wage-and-hour violations on behalf of themselves and "other employees *similarly situated*." 29 U.S.C. § 216(b) (emphasis added); 29 U.S.C. § 626(b) (incorporating the same provision under the ADEA). This is an opt-in action: a plaintiff must "give[] . . . consent in writing" to become a "party" to the action, *id.*, which necessarily requires those potential opt-in plaintiffs to have notice of the litigation, *Hoffmann-La Roche, Inc. v. Sperling*, 493 U.S. 165, 170 (1989) (collective actions "depend on employees receiving accurate and timely notice").[3] The Supreme Court therefore has recognized "that district courts have discretion, *in appropriate cases*, to implement [§ 216(b)] . . . by facilitating notice to potential plaintiffs." *Id.* at 169 (emphasis added).

To facilitate notice, district courts in this circuit have routinely used the lenient method invented in *Lusardi v. Xerox Corp.*, 118 F.R.D. 351 (D.N.J. 1987). Under *Lusardi*, courts conditionally certify a collective action before definitively answering whether the plaintiffs are "*actually*" "similarly situated"—which is "an essential condition of maintaining" a collective action. *Comer v. Wal-Mart Stores, Inc.*, 454 F.3d 544, 546 (6th Cir. 2006) (emphasis added); *Jonites v. Exelon Corp.*, 522 F.3d 721, 726 (7th Cir. 2008). District courts following the *Lusardi* method accordingly facilitate notice to employees who may not be eligible to opt-in and permit the action to proceed as a collective

[3] *Hoffman-La Roche* considered a claim brought under the ADEA. *See* 493 U.S. at 167-69 (citing 29 U.S.C. § 626(b)).

action through discovery, *before* ultimately determining whether the potential plaintiffs can be actual plaintiffs.

The *Lusardi* method is inconsistent with the statutes, as other Circuits have already concluded. *See, e.g.*, *Clark v. A&L Homecare & Training Ctr., LLC*, 68 F.4th 1003, 1009 (6th Cir. 2023); *Swales v. KLLM Transp. Servs., LLC*, 985 F.3d 430, 440 (5th Cir. 2021); *Campbell v. City of L.A.*, 903 F.3d 1090, 1114 n.19, 1117 (9th Cir. 2018). In addition to its lack of textual support, the lenient ad hoc *Lusardi* method creates perverse incentives for abusive litigation. *Swales*, 985 F.3d at 435; *Bigger v. Facebook, Inc.*, 947 F.3d 1043, 1049 (7th Cir. 2020). The *Lusardi* method both (1) fails to ensure that plaintiffs' claims are capable of "efficient resolution in one proceeding," *Hoffmann-La Roche*, 493 U.S. at 170, and (2) creates an "opportunity for abuse of the collective-action device" because "plaintiffs may wield the collective-action format for settlement leverage," *Bigger*, 947 F.3d at 1049.

This Court has declined to adopt *Lusardi*, though it has not prohibited district courts from applying the method. *Id.* at 1049 n.5. As this Court noted, "expanding the litigation with additional plaintiffs increases pressure to settle, no matter the action's merits." *Id.* at 1049. Conditional certification does precisely that. It is therefore little surprise that "most collective actions settle." 7B Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1807 (3d ed.) (hereinafter "Wright & Miller"). Moreover, even before a settlement, conditional certification ratchets up notice and discovery costs for defendants—which they cannot recover. In this case, as in others,

proceeding through discovery as a collective action without any finding that the plaintiffs are similarly situated will only distort the litigation.

This Court should join other Circuits and reject the *Lusardi* method. In its place, this Court should clarify that many of the well-established procedural safeguards of traditional Rule 23 class actions—namely, *commonality* and *typicality*—should also apply to determining whether putative collective-action plaintiffs are "similarly situated." 29 U.S.C. §216(b). District courts should not certify a collective action unless "there are questions of law or fact common to" all plaintiffs (commonality), and "the claims or defenses of the representative parties are typical of the claims or defenses of" the entire group (typicality). *Cf.* Fed. R. Civ. P. 23(a)(2)-(3).

ARGUMENT

I. Courts must determine whether plaintiffs are "similarly situated" at the outset of a putative collective action.

The FLSA and ADEA allow employees to enforce their requirements (like the federal minimum wage) through "collective actions" brought on behalf of "themselves and other employees *similarly situated*":

> An action . . . 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*. 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.

29 U.S.C. § 216(b) (emphasis added); *id.* § 626(b) (incorporating the same procedure under the ADEA). Successful plaintiffs may collect unpaid wages, liquidated damages, and mandatory attorney's fees. *See id.* § 626(b).

Like a traditional class action, a collective action is a significant exception to the normal rules of civil litigation, and thus poses many of the same risks. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348-49 (2011) (noting the exceptional nature of class actions); *Taylor v. Sturgell*, 553 U.S. 880, 901 (2008) (noting that Federal Rule of Civil Procedure 23's demanding requirements are "grounded in due process"); *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978) ("Certification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense."); *Bigger*, 947 F.3d at 1049 ("Generally speaking, expanding the litigation with additional plaintiffs increases pressure to settle, no matter the action's merits.").

The statutes' plain text imposes two clear requirements: (1) plaintiffs must bring claims that are capable of common resolution in the same action; and (2) courts must make that determination at the outset of litigation, *before* permitting extensive discovery.

A. The "similarly situated" standard ensures that the named plaintiff and other putative plaintiffs raise common issues that can efficiently generate common answers.

As this Court has already explained, "an essential condition of maintaining" a collective action is "that the members of the class be 'similarly

situated' to one another." *Jonites*, 522 F.3d at 726. Although the statutes do not define what makes employees "similarly situated," the statutory context makes clear that their claims must be capable of "efficient resolution in one proceeding of *common issues of law and fact* arising from the same alleged" misconduct. *Hoffmann-La Roche*, 493 U.S. at 170 (emphasis added). Phrases like "common questions" and "similarly situated" must be interpreted in the context of the purpose they serve in the litigation—that is, determining whether "all the[] claims can productively be litigated at once" through a "common contention . . . that it is capable of classwide resolution." *Dukes*, 564 U.S. at 350.

That analysis naturally overlaps with the standards for certifying class actions under Federal Rule of Civil Procedure 23.[4] *See Espenscheid v. DirectSat USA*, LLC, 705 F.3d 770, 772 (7th Cir. 2013) (explaining "there isn't a good reason to have different standards for the certification" of the Rule 23 and collective-action standards, "and the case law has largely merged the standards"). Specifically, the commonality, typicality, and predominance

[4] Though the collective-action provision does not cross reference Rule 23 or otherwise expressly incorporate aspects of Rule 23—the two developed on separate tracks over the same time period—the provision does require plaintiffs to be "similarly situated." *Cf.* Wright & Miller § 1807 (noting some courts have drawn negative inferences from the statutes' lack of cross-reference to Rule 23).

requirements of Rule 23 offer ready-made law to ensure that collective actions involve common issues capable of efficient resolution.

Commonality requires "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). This ensures that plaintiffs assert a "common contention . . . of such a nature that it is capable of [collective] 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." *Dukes*, 564 U.S. at 350. To be similarly situated, therefore, plaintiffs cannot simply raise "common 'questions'—even in droves." *Id.* (citation omitted). Instead, they must raise questions that are capable of "generat[ing] common *answers* apt to drive the resolution of the litigation." *Id.* (citation omitted).

Typicality also ensures that "claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). Although collective actions do not have "representatives," the typicality requirement is probative because it requires the court to identify a claim held by the named plaintiff and then analyze whether that claim is typical of the claims held by putative plaintiffs. If the named plaintiff's claim is atypical, he or she is not similarly situated to other potential plaintiffs. Nor will resolution of an atypical claim drive resolution of the claims of other plaintiffs. In other words, "[t]he commonality and typicality requirements of Rule 23(a) tend to merge. Both serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical." *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 157 n.13 (1982).

Finally, this Court has suggested that Rule 23(b)(3)'s predominance requirement—that "questions of law or fact common to class members predominate over any questions affecting only individual members"—also applies to collective actions. *Alvarez v. City of Chi.*, 605 F.3d 445, 449 (7th Cir. 2010); *see Espenscheid*, 705 F.3d at 772 (suggesting the Rule 23 and "similarly situated" analyses have been "largely merged").

Significant authorities confirm that these Rule 23 requirements are useful in evaluating whether plaintiffs are "similarly situated." The Supreme Court understands "similarly situated" and "commonality" as the same requirement. For example, the Court described the putative class in *Dukes*—which failed Rule 23's commonality requirement—as "not similarly situated." *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 458 (2016) (discussing *Dukes*). More generally, the Supreme Court has long referred to Rule 23 class members as "similarly situated" plaintiffs. *See, e.g.*, *Cooper v. Fed. Reserv. Bank of Richmond*, 467 U.S. 867, 875 (1984); *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 332 (1980); *Coopers & Lybrand*, at 465; *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 549 (1949).[5]

[5] The Supreme Court in *Genesis Healthcare Corporation v. Symczyk*, 569 U.S. 66, 74-75 (2013), recognized that Rule 23 class actions create a class "with an independent legal status," which does not occur when a collective action has been conditionally approved. Rather, the "sole consequence" of conditional certification is facilitation of "court-approved written notice to employees." *Id.* at 75 (citing *Hoffmann-La Roche*, 493 U.S. at 171-72). Here, however, the collective-action provision and Rule 23 are directly aligned. Both the statutes

The drafters of Rule 23 likewise understood class members as "similarly situated" plaintiffs, which is instructive because "the Advisory Committee Notes provide a reliable source of insight into the meaning of a rule." *United States v. Vonn*, 535 U.S. 55, 64 n.6 (2002). When Rule 23 was amended into its current form, the 1966 advisory committee note described a class action under Rule 23(b)(3) (which requires "common" issues to predominate over individual issues) as involving "persons similarly situated." *See* Fed. R. Civ. P. 23, 1966 advisory committee's note. This same advisory committee note also explains the "provisions of 29 U.S.C. §216(b) are not intended to be affected by Rule 23," *id.*, which, in context, makes clear simply that §216(b)'s *opt-in* provision was intended to remain valid even with Rule 23's "opt-out" requirements. *See* Fed. R. Civ. P. 23(c).

Even the pre-1967 collective-action cases recognized the collective-action provision's overlap with the commonality requirement under the prior version of Rule 23. *See Shushan v. Univ. of Colo. at Boulder*, 132 F.R.D. 263, 266-67 (D. Colo 1990) (noting pre-1967 cases "applied rule 23 and treated section 216 cases as 'spurious' . . . class actions"); Wright & Miller § 1752 ("The 'spurious' class action was used extensively in [FLSA and ADEA] litigation[.] . . . [W]hen the employees *were not similarly situated, so that there was no common*

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and Rule 23 evaluate whether other plaintiffs are "similarly situated" before a collective or class action is allowed to proceed. Moreover, as described in Part II, conditional certification creates the same significant settlement pressures and discovery burdens as Rule 23 class certification.

question affecting their several rights to relief, neither a 'spurious' class suit nor permissive joinder under Rule 20(a) was proper.") (emphasis added; footnotes omitted). The use of "similarly situated" to describe plaintiffs in a class action extends back to courts sitting in equity—predating the Rules of Civil Procedure. *See, e.g.*, *Carpenter v. Knollwood Cemetery*, 198 F. 297, 298 (D. Mass. 1912); *Venner v. Great N. Ry. Co.*, 153 F. 408, 409 (S.D.N.Y. 1907).

That understanding continues in modern courts. Even among courts that purport to reject Rule 23's modern commonality requirement in the collective-action context, their own articulations of the "similarly situated" standard do not materially differ from requiring commonality. *See, e.g.*, *Scott v. Chipotle Mexican Grill, Inc.*, 954 F.3d 502, 521 (2d Cir. 2020) (explaining that the "similarly situated" analysis involves asking whether the plaintiffs "share one or more similar questions of law or fact material to the disposition of their FLSA claims"); *Campbell*, 903 F.3d at 1115 (Ninth Circuit describing the "similarly situated" requirement's purpose as "not simply to identify shared issues of law or fact of *some kind*, but to identify those shared issues that will collectively advance the prosecution of multiple claims in a joint proceeding"). As addressed below in Part II, there are some courts that eventually apply factors similar to commonality and typicality (and even predominance) at the second *Lusardi* step, but they refuse to apply these factors at the threshold, as they should. *See infra* pp. 23-24.

To be sure, not every requirement of Rule 23 applies to collective actions or sheds light on the "similarly situated" requirement. *Cf. Vanegas v. Signet*

Builders, Inc., 113 F.4th 718, 724 (7th Cir. 2024) (noting that personal jurisdiction works differently for Rule 23 class actions versus collective actions); *Clark*, 68 F.4th at 1009, 1010 ("[U]nlike a Rule 23 class action, an FLSA collective action is not representative"); *Shushan*, 132 F.R.D. at 269 (holding that requirements of Rule 23 that are consistent with § 216(b) apply to collective actions). As this Court explained, "[t]he princip[al] difference is that plaintiffs who wish to be included in a collective action must affirmatively opt-in to the suit by filing a written consent with the court, while the typical class action includes all potential plaintiffs that meet the class definition and do not opt-out." *Alvarez*, 605 F.3d at 448; *see also LaChapelle v. Owens-Illinois, Inc.*, 513 F.2d 286, 288 (5th Cir. 1975) (per curiam) (same). And Rule 23(a)(1) and (4)'s *numerosity* and *adequacy* of representation requirements do not demonstrate whether plaintiffs are "similarly situated." *Cf.* Wright & Miller § 1807 (observing that some of "the Rule 23 requirements are not needed in collective actions because the rule's requirements are designed to protect the due-process rights of individuals who will be bound by the outcome of the litigation").

B. The "similarly situated" requirement must be rigorously enforced at the threshold to any putative collective action before courts issue any notice.

It is imperative that courts "rigorously enforce" the similarity requirement "at the outset of the litigation." *Swales*, 985 F.3d at 443; *see* Defs. Br. at 27-30 (explaining why rigorous evaluation of whether plaintiffs are similarly

situated is necessary). The Supreme Court has suggested that district courts "begin [their] involvement" in collective actions "early, at the point of the initial notice." *Hoffmann-La Roche*, 493 U.S. at 171. This way, courts can "better manage" the collective action by "ascertain[ing] the contours of the action at the outset." *Id.* at 171-72.

But under the collective-action provision—and unlike class actions under Rule 23—"all plaintiffs must signal in writing their affirmative consent to participate in the action." *Comer*, 454 F.3d at 546 (citations omitted).[6] Because "similarly situated" employees must "opt in" as collective-action plaintiffs, 29 U.S.C. § 216(b), the Supreme Court has recognized "that district courts *have discretion, in appropriate cases*, to . . . facilitat[e] notice to potential plaintiffs," *Hoffmann-La Roche*, 493 U.S. at 169 (emphasis added).

But it is only "appropriate" for a court to provide notice to putative plaintiffs after the court determines that they are in fact "similarly situated" to the named plaintiff. *See id.* Sending notice to potential plaintiffs that are not similarly situated constitutes inappropriate "solicitation of claims"—which the Supreme Court has held improper. *Id.* at 174. In other words, a court "errantly appl[ies] *Hoffman*" when it provides notice to those "who

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[6] Congress added the opt-in provision to "abolish[]" "representative action[s] by plaintiffs *not themselves possessing claims*." *Hoffmann-La Roche*, 493 U.S. at 173 (emphasis added). By ensuring that all plaintiffs must opt-in, Congress did nothing to lessen the requirement that those plaintiffs be "similarly situated."

cannot ultimately participate in the collective" action. *In re JPMorgan Chase & Co.*, 916 F.3d 494, 502, 504 (5th Cir. 2019) (citing *Hoffmann-La Roche*, 493 U.S. at 174); *see also Clark*, 68 F.4th at 1010 ("[N]otice sent to employees who are not, in fact, eligible to join the suit amounts to solicitation of those employees to bring suits of their own."); *In re A&D Ints., Inc.*, 33 F.4th 254, 259 (5th Cir. 2022) (per curiam) (same).

To avoid this improper solicitation, courts must conduct "a rigorous analysis" at the outset about whether the proposed collective action presents truly common issues, as courts do under Rule 23. *Dukes*, 564 U.S. at 350-51; *see also Espenscheid*, 705 F.3d at 772 (explaining "there isn't a good reason to have different standards" for certifying a Rule 23 class action and a collective action). "Frequently that 'rigorous analysis' will entail some overlap with the merits of the plaintiff's underlying claim." *Dukes*, 564 U.S. at 351. It might be "necessary for the court to probe behind the pleadings before coming to rest on the certification question," and thus courts may authorize limited discovery to facilitate a determination about whether putative plaintiffs are similarly situated. *Gen. Tel. Co. of Sw.*, 457 U.S. at 160; *see* Defs. Br. at 40 (noting district courts can engage in limited "threshold discovery"). If that rigorous evaluation demonstrates that the plaintiffs will not be able to litigate towards a common answer collectively resolving their claims, the district court cannot allow sending notice to non-similarly situated people. *See Swales*, 985 F.3d at 441 ("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."); *Clark*, 68 F.4th at 1011 ("[F]or a district court to facilitate notice of an FLSA suit to other employees, the plaintiffs must show a "strong likelihood" that those employees are similarly situated to the plaintiffs themselves.").

In all events, courts must conduct this rigorous analysis *before* facilitating any notice to prospective members of the collective action. *See id.*; *Swales*, 985 F.3d at 441 (explaining the district court must take steps "at the outset of the case" to "determine if and when to send notice to potential opt-in plaintiffs"); *Espenscheid*, 705 F.3d at 772 (Rule 23 certification standards should apply to collective action certification).

Importantly, rigorously applying the "similarly situated" requirement at the threshold does not run contrary to the statutes' purposes. A statute's text is the best indication of its purpose, and here the text requires plaintiffs be "similarly situated," even if that requirement will preclude some claims from being pursued as collective actions. The "similarly situated" requirement ensures that collective actions are efficiently resolved for the benefit of employees and employers alike, rather than bogged down by the inclusion of non-similar claims. That limitation on collective actions is "as much a part of the FLSA's [and ADEA's] purpose as" the prohibitions on wage-and-hour violations and age-based discrimination. *Encino Motorcars, LLC v. Navarro*, 584 U.S. 79, 89 (2018). "Legislation is, after all, the art of compromise, the limitations expressed in statutory terms often the price of passage, and no statute yet known 'pursues its [stated] purpose [] at all costs.'" *Henson v.*

Santander Consumer USA Inc., 582 U.S. 79, 89 (2017) (alteration in original) (quoting *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987) (per curiam)).

Moreover, numerous backstops exist against the "similarly situated" requirement unduly closing the courthouse doors to collective-action claims. For example, district courts *already* allow plaintiffs multiple attempts to proceed using a collective action and to obtain court-facilitated notice. *See Halle v. W. Penn Allegheny Health Sys. Inc.*, 842 F.3d 215, 224-25 (3d Cir. 2016) (noting current practice among district courts). Under this practice, if plaintiffs cannot demonstrate other "similarly situated" plaintiffs, then they may try again with more evidence or a different theory. In addition, other individual plaintiffs may always be *joined* to the existing litigation through the typical operation of the Rules of Civil Procedure.

II. The two-step *Lusardi* method does not ensure compliance with the statutes at the outset of a putative collective action.

Though the *Lusardi* method "has no universally understood meaning," *Swales*, 985 F.3d at 439, courts "in the Northern District of Illinois and other courts" employ *Lusardi*'s "two-step process." *In re New Albertsons, Inc.*, No. 21-2577, 2021 WL 4028428, at *1 (7th Cir. Sept. 1, 2021). "At the first step, plaintiffs need only make a 'modest factual showing sufficient to demonstrate that they and potential plaintiffs together were victims of a common policy or plan that violated the law.'" *Id.* (citation omitted). "If plaintiffs make this showing, the court may conditionally certify the suit as a collective action and allow the plaintiffs to send notice of the case to similarly situated

employees who may then opt in as plaintiffs." *Id.* (citation omitted). The second step—where courts "reevaluate the conditional certification and determine whether there is sufficient similarity between the named and opt-in plaintiffs"—comes only "after employees have opted in and discovery is complete." *Id.* But some courts even use the *Lusardi* method to avoid determining whether plaintiffs are "similarly situated" until after trial.[7] *Monroe v. FTS USA, LLC*, 860 F.3d 389, 402 (6th Cir. 2017) (district court "made its final certification determination post-trial"). Whenever it occurs, the need to conduct a second "decertification step" as a matter of course all but proves that the district court has not done its job at the outset.

The lenient approach at *Lusardi*'s first step produces harms that cannot be remedied at the second. *Lusardi* distorts the litigation process, imposing significant discovery costs upon defendants and exerting hydraulic settlement pressures. *Bigger*, 947 F.3d at 1049. Plus, it "leads to collective actions that cannot be managed, and where trial does not lead to common answers to common questions," *Valte v. United States*, 155 Fed. Cl. 561, 570 (2021) (citation omitted).

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[7] The Eleventh Circuit has erroneously "endorsed *Lusardi*," but "it did so only after a jury verdict." *Swales*, 985 F.3d at 439. Because the appeal addressed only whether de-certification was appropriate, and did not review *Lusardi*'s approach to "notice-giving," the Eleventh Circuit's discussion of *Lusardi* was dicta. *Id.*

A. The first *Lusardi* step imposes enormous litigation costs on defendants not authorized by the statutes.

"The real issues *Lusardi* creates" start at the very "beginning of the case." *Swales*, 985 F.3d at 439. "[T]he amorphous and ad-hoc test provides little help in guiding district courts in their notice-sending authority" under *Hoffman-La Roche*. *Id.* at 439-40. Despite the notice stage's modest theoretical ambitions, in practice that stage leads district courts to improperly certify collective actions.

Rather than rigorously evaluate at the outset whether the plaintiffs are actually similarly situated as the statutes require, under *Lusardi*, "[d]istrict courts use a 'fairly lenient standard' that 'typically results in conditional certification of a representative class'" at the notice stage. *White v. Baptist Mem'l Health Care Corp.*, 699 F.3d 869, 877 (6th Cir. 2012) (quoting *Comer*, 454 F.3d at 547). Though courts vary in how they describe this standard—"sometimes articulated as requiring 'substantial allegations,' sometimes as turning on a 'reasonable basis'"—it is "*loosely akin to a plausibility standard*." *Campbell*, 903 F.3d at 1109 (emphasis added; citations omitted). Often, plaintiffs merely "contend[] that they have at least *facially satisfied* the 'similarly situated' requirement." *Id.* at 1100 (emphasis added; citation omitted).

The District Court in this case inadvertently acknowledged this problem: "where the parties' evidentiary submissions directly conflict," courts in this Circuit "resolve[]" them "in the plaintiffs' favor" rather than make "findings of fact." ECF 82 at 4 (quoting *Berndt v. Cleary Bldg. Corp.*, No. 11-cv-791, 2013

WL 3287599, at *7 (W.D. Wis. Jan. 25, 2013)); *see also Pritchard v. Dent Wizard Intern. Corp.*, 210 F.R.D. 591, 596 (S.D. Ohio 2002) (asserting the "similarly situated" analysis may be conducted only on the pleadings); Defs. Br. at 8 (collecting further examples). Other courts require a limited analysis beyond the pleadings: "whether potential plaintiffs were identified; whether affidavits of potential plaintiffs were submitted; and whether evidence of a widespread discriminatory plan was submitted." *Pritchard*, 210 F.R.D. at 596 (quoting *H & R Block, Ltd. v. Housden*, 186 F.R.D. 399, 400 (E.D. Tex. 1999)).

But all courts using *Lusardi* agree that its first step requires only a "modest factual showing." *In re New Albertsons, Inc.*, 2021 WL 4028428, at *1. And that minimal showing, *Lusardi* says, is enough to conditionally certify a collective action and accordingly send notice to potential plaintiffs. *See* Defs. Br. at 7 (collecting cases in which district courts note the meager factual allegations supporting conditional certification under *Lusardi*).

Of these "conditionally certified putative classes" that do not settle before reaching *Lusardi*'s second step, *see infra* pp. 22, most "fail[] to survive upon a more rigorous review." *Laverenz v. Pioneer Metal Finishing, LLC*, No. 22-C-692, 2024 WL 3887110, at *7 (E.D. Wis. Aug. 21, 2024). For instance, in 2021, courts granted 81% of FLSA conditional-certification motions. Seyfarth Shaw LLP, *18th Annual Workplace Class Action Report* 10 (2022), https://perma.cc/FAX6-AA78. But district courts granted 53% of post-discovery FLSA decertification motions. *Id.* So "over half" the time a court granted conditional certification and ordered notices sent to potential plaintiffs, the

court later determined those plaintiffs were *not* similarly situated. *Laverenz*, 2024 WL 3887110, at *7; *see also* Defs. Br. at 32 (collecting further support).

While "conditional" in name, a "conditionally certified" collective action is, in all practical respects, a full-bore collective action that "proceeds as a representative action *throughout discovery*." *Mooney v. Aramco Servs. Co.*, 54 F.3d 1207, 1214 (5th Cir. 1995) (emphasis added). Indeed, during discovery, more plaintiffs may opt into the litigation *before* the district court determines whether they are similarly situated. This imposes many of the defense burdens of traditional class actions, but only requires a minimal prima facie showing from plaintiffs. Furthermore, the fact that the *court* is involved in sending notice poses the risk that the court could be misunderstood as approving and actively soliciting claims from more potential plaintiffs. *Swales*, 985 F.3d at 436.

Conditional certification thus creates an "opportunity for abuse of the collective-action device" because "plaintiffs may wield the collective-action format for settlement leverage." *Bigger*, 947 F.3d at 1049 (citing *Hoffmann-La Roche*, 493 U.S. at 171). In collective actions especially, "expanding the litigation with additional plaintiffs increases pressure to settle, no matter the action's merits." *Id.*; *see also Swales*, 985 F.3d at 435-36 (explaining that collective actions risk "intensifying settlement pressure no matter how meritorious the action"). That pressure can be substantial because collective actions can have thousands of potential opt-in plaintiffs and "mind-boggling" discovery costs. *Williams v. Accredited Home Lenders, Inc.*, No. 1:05-CV-1681, 2006 WL

2085312, at *5 (N.D. Ga. July 25, 2006); *see, e.g.*, *JPMorgan*, 916 F.3d at 497 (describing collective action in which district court sent notice to approximately 42,000 employees); *Pippins v. KPMG LLP*, No. 11 Civ. 0377, 2011 WL 4701849, at *3 (S.D.N.Y. Oct. 7, 2011) (describing a collective action with 500 members and 2,300 potential members in which the defendants had already incurred "more than $1,500,000" in evidence-preservation costs).

This case is a good example. The District Court conditionally certified a collective action of former and current Eli Lilly employees over 40 years old who were denied a promotion on or after February 12, 2022, for which they were qualified. ECF 82 at 15. The evidence that such a class of similarly situated employees exists was meager. Richards relied on three affidavits, none of which identified a similarly situated Eli Lilly employee. One affidavit involved a former employee who was not similarly situated because her "constructive discharge" came in "November 2021." *Id.* at 7. The only current employee who submitted an affidavit was not similarly situated because he had not actually applied to any job openings during the relevant time period. *Id.* at 8. The final affidavit came from an executive business manager at Eli Lilly who asserts that "twenty [unidentified] employees over the age of forty" have been denied promotions for which they are qualified. *Id.* at 10. The District Court admitted this evidence may be "conclusory and speculative," *id.* at 9, and that there were open factual questions surrounding these affidavits, *id.* at 8. But the court concluded that "[a]judging the accompanying theories and specifics of *how* [qualified individuals were not promoted]

(or [how that] did not happen) is more proper at the second decertification step." *Id.* at 10.

The District Court found that "potential differences between" the potential plaintiffs were not "disqualifying for purposes of authorizing notice" and proceeding as a collective action. *Id.* at 13. If "further discovery reveal[s] that some or all potential plaintiffs are not in fact similarly situated," the court concluded that "decertification [would] be appropriate." *Id.*

But few cases ever reach the decertification stage because "most collective actions settle" due to the pressures inflicted by conditional certification. Wright & Miller § 1807. After a district court improperly conditionally certifies a collective, defendants may be left with no remedy for the resulting distortions to the litigation process. *See New Albertsons*, 2021 WL 4028428, at *2 (denying mandamus relief for conditional certification); *JPMorgan*, 916 F.3d at 497 (absent interlocutory appeal, improper conditional certification is "irremediable on ordinary appeal"); *Holder v. A&L Home Care and Training Ctr., LLC*, 552 F. Supp. 3d 731, 747 (S.D. Ohio 2021) ("This pressure, in turn, may materially affect the case's outcome." (citation omitted)). Settlement becomes the only realistic option.

As the District Court remarked, defendants will continue to face these burdens from the *Lusardi* first step "[i]n the absence of a Seventh Circuit case overruling" the *Lusardi* approach. ECF 82 at 6.

B. The second *Lusardi* "decertification" step after discovery cannot correct the costly distortions created by the first step.

Although the District Court will theoretically evaluate whether plaintiffs are similarly situated at the *second* step of the *Lusardi* method, that consideration will come too late to correct the costly errors that occurred during step one.

Lusardi's second step—the "decertification stage"—comes too late, only "after the necessary discovery is complete." *Campbell*, 903 F.3d at 1100 (citing 1 McLaughlin on Class Actions § 2:16 (14th ed. 2017)). Defendants then must "move for 'decertification' of the collective action," arguing that "plaintiffs' status as 'similarly situated' was not borne out by the fully developed record." *Id.* Under *Lusardi*, it is only at this second stage—well into the litigation and often after discovery closes—that the plaintiffs must affirmatively demonstrate that they are "similarly situated" to proceed collectively at trial. *White*, 699 F.3d at 877.

But like everything else with the *Lusardi* method, courts apply inconsistent criteria even in making this "decertification" evaluation. Some courts consider "the 'factual and employment settings of the individual[] plaintiffs, the different defenses to which the plaintiffs may be subject on an individual basis, [and] the degree of fairness and procedural impact of certifying the action as a collective action.'" *O'Brien v. Ed Donnelly Enters., Inc.*, 575 F.3d 567, 584 (6th Cir. 2009) (alteration in original) (quoting Wright & Miller § 1807 n.65). These factors are essentially the commonality and

typicality requirements of Rule 23, but applied much later in the case, usually after discovery closes. Not all courts, however, consider these factors, and even those courts that *do* may not apply the requirements as rigorously as they would in the context of a Rule 23 class action, as courts tend to emphasize certain factors over others in the collective action context.

There is no basis for refusing to apply or for applying those commonality and typicality criteria less rigorously for collective actions than class actions. The statutes, like Rule 23, permit a collective action *only* if it involves common issues capable of efficient resolution. In other words, the Rule 23 and collective-action standards have been "largely merged." *Espenscheid*, 705 F.3d at 772; *see also supra* pp. 6-11. Courts should therefore apply the same rigorous Rule 23 standard when reviewing putative collective actions.

But the *Lusardi* method allows even the same court to emphasize different, ad hoc factors from case to case. "By encouraging courts to rely on an array of different factors and considerations without firmly relating them to a clear understanding of what it means to be similar, the ad hoc test operates 'at such a high level of abstraction that it risks losing sight of the statute underlying it.'" *Valte*, 155 Fed. Cl. at 570-71 (quoting *Campbell*, 903 F.3d at 1114).

Ultimately, this *Lusardi* second-step evaluation—*if* it comes at all—comes too late to remedy the distorting effects of an improper "conditional certification." And the enormous costs imposed by such improper "solicitation of claims" are unrecoverable. *Hoffmann-La Roche*, 493 U.S. at 174.

CONCLUSION

The Court should reject *Lusardi* and reverse the district court's conditional certification.

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Respectfully submitted.

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CERTIFICATE OF SERVICE

On October 7, 2024, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court.

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CERTIFICATE OF COMPLIANCE

This brief complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) and Seventh Circuit Rule 29 because it contains 6,032 words, excluding the parts of the brief exempted by Rule 32(f); and (2) the typeface requirements of Rule 32(a)(5) because it has been prepared in a proportionally spaced typeface (14-point Palatino Linotype) using Microsoft Word (the same program used to calculate the word count).

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