GIVE ME A SIGN, SEND ME NOTICE ONE MORE TIME: THE DISTRICT COURTS AND THE FLSA NOTICE STANDARD

Abstract: On May 19, 2023, in *Clark v. A&L Homecare and Training Center*, the U.S. Court of Appeals for the Sixth Circuit held that plaintiffs seeking to add other employees to Fair Labor Standards Act (FLSA) suits must demonstrate a "strong likelihood" that such employees are "similarly situated" before district courts facilitate notice informing them of their right to opt in. In articulating this new standard, the Sixth Circuit declined to adopt the lenient approach endorsed by a majority of courts or the strict approach endorsed by the Fifth Circuit, opting instead to land somewhere in between. This Comment argues that the Sixth Circuit erred by improperly analogizing distinct mechanisms of law at the expense of the FLSA's purpose.

INTRODUCTION

Maya is an hourly employee at a retail store in Tennessee.[1] Her boss often requires her to work beyond her scheduled shifts, and she complies, counting the ways she will spend her additional earnings.[2] After a few weeks, however, Maya notices that her paychecks have not increased.[3] Instead, her employer has been retroactively modifying her timesheets, and as a result, Maya has unwittingly performed hours of free labor.[4]

[1] *See* Crosby v. Stage Stores, Inc., 348 F. Supp. 3d 742, 745 (M.D. Tenn. 2018) (detailing alleged wage theft by retail chain). The defendant in *Crosby* had approximately eight hundred clothing stores across forty-two states in 2018. *Id.*

[2] *See id.* at 747 (recounting plaintiff's allegation that she worked significant overtime hours).

[3] *See id.* (detailing plaintiff's claim that she did not receive compensation for hours exceeding forty per week).

[4] *See id.* (relaying plaintiff's assertion that defendant engaged in practice of "time-shaving"); *see also* 29 U.S.C. § 207(a) (requiring employers to pay overtime for hours exceeding forty per week). Maya Crosby was one of two named plaintiffs in *Crosby*. 348 F. Supp. 3d at 745. The second, Deneen Patton, alleged that she was often required to come in to work early, but was only permitted to clock in when her shift began. *Id*. at 747. Seeking to create a class of employees with similar harms, Crosby and Patton moved to send notice to "[a]ll persons who at any time from May 30, 2015 through the date of final judgment in this matter have worked as hourly, non-exempt employees . . . in Defendant's United States locations." *Id.*; *see also* 29 U.S.C. § 216(b) (authorizing employees to bring action on behalf of themselves and others similarly situated); Lusardi v. Xerox Corp., 118 F.R.D. 351, 361 (D.N.J. 1987) (delineating notice facilitation process). Finding sufficient common ground between the employees, the court granted the motion. *Crosby*, 348 F. Supp. 3d at 752.

The FLSA provides a solution.[5] Under 29 U.S.C. § 216(b), employees like Maya may enforce payment of overtime wages and similar FLSA mandates by bringing a private cause of action against their employers.[6] In addition to representing themselves, plaintiffs may also bring in employees with similar stories.[7] The resulting collective action increases workers' access to the judicial system while reducing the strain on court resources.[8]

In 2023, in *Clark v. A&L Homecare and Training Center*, the U.S. Court of Appeals for the Sixth Circuit held that plaintiffs who seek to notify other employees of their suit must demonstrate a strong likelihood that their stories are, in fact, similar.[9] In doing so, *Clark* departed from accepted practice and widened an emerging circuit split.[10] Part I of this Comment provides the legal background of the FLSA, collective actions thereunder, and *Clark*.[11] Part II describes the current state of the debate between circuits.[12] Finally, Part III argues that the Sixth Circuit erred in adopting a new standard that is too high to comport with the goals of the FLSA.[13]

I. THE LEGAL, FACTUAL, AND PROCEDURAL BACKGROUND OF *CLARK V. A&L HOMECARE AND TRAINING CENTER*

The Fair Labor Standards Act of 1938 (FLSA) imposed for the first time duties on employers to pay certain employees federal minimum wage and overtime pay for hours exceeding forty per week.[14] Section A of this Part discusses the FLSA and the development of the case law regarding FLSA collec-

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[5] *See* 29 U.S.C. § 207(a) (mandating overtime pay); *id.* § 216(b) (affording aggrieved employees a method of redress through court system).

[6] 29 U.S.C. § 216(b).

[7] *Id.*

[8] *See* Hoffman-La Roche Inc. v. Sperling, 493 U.S. 165, 170 (1989) (describing dual benefits of collective actions). Collective actions allow plaintiffs "the advantage of lower individual costs to vindicate rights by the pooling of resources." *Id.* In turn, "[t]he judicial system benefits by efficient resolution in one proceeding of common issues of law and fact arising from the same alleged discriminatory activity." *Id.*

[9] 68 F.4th 1003, 1011 (6th Cir. 2023).

[10] *See id.* at 1009 (declining to endorse previously applied approaches); *see also* Lusardi v. Xerox Corp., 118 F.R.D. 351, 361 (D.N.J. 1987) (implementing two-step certification process); Swales v. KLLM Transp. Servs., 985 F.3d 430, 441 (5th Cir. 2021) (discarding two-step process for single-step inquiry).

[11] *See infra* notes 14–45 and accompanying text.

[12] *See infra* notes 46–76 and accompanying text.

[13] *See infra* notes 77–104 and accompanying text.

[14] 29 U.S.C. § 206(a) (instituting federal minimum wage); *id.* § 207(a) (mandating overtime pay). Congress enacted the Fair Labor Standards Act (FLSA) after the Supreme Court's decision in *West Coast Hotel Co. v. Parrish* upheld the constitutionality of the minimum wage under the commerce clause. *See* U.S. CONST. art. I, § 8, cl. 3 (granting Congress authority to regulate interstate commerce); W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 396 (1937) (overturning Lochner v. New York, 198 U.S. 45, 64 (1905)).

tive actions.[15] Section B then introduces the key facts to understanding the Sixth Circuit's decision in *Clark v. A&L Homecare and Training Center*.[16]

A. The FLSA and the District Courts

The objective of the FLSA is to guarantee the unorganized worker's right to a livable wage.[17] Workers who are not paid in accordance with the Act may file suit against their employers under § 216(b) on "behalf of . . . themselves and other employees similarly situated."[18] Such suits are known as collective actions.[19]

Whether other employees are similarly situated depends on multiple factors, including the specifics of their employment and the individualized defenses their employer may raise in court.[20] Generally, courts will consider employees sufficiently similar if they suffer from the same policies and allege the same FLSA infractions.[21] Even if they do not suffer from the same policies, employees may still be similar if they can present a common theory of violations.[22] Conversely, courts will not find similarity between those who experience distinctive policies and cannot present a unifying theory of harm.[23]

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[15] *See infra* notes 17–36 and accompanying text.

[16] *See infra* notes 38–45 and accompanying text.

[17] *See* 29 U.S.C. § 202 (declaring the elimination of detrimental labor conditions to be the policy rationale of the FLSA); Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 706 (1945) (detailing the intent and purpose of the FLSA); 81 CONG. REC. 7672 (announcing that the fundamental goal of the FLSA is the protection of the nation's poorest workers); 81 CONG. REC. 7652 (recognizing the FLSA's function as a collective bargaining tool); Emily Jordan, Note, *All Work and No Pay: The Massachusetts Overtime Statute and Its Agricultural Exemption*, 63 B.C. L. REV. 1133, 1138 (2022) (recognizing the FLSA's intent to protect employees at risk of exploitation).

[18] 29 U.S.C. § 216(b). The "twin goals" of § 216(b) collective actions are "enforcement of the FLSA" and efficiency "by resolving in a single action common issues arising from the same alleged illegal activity." Bigger v. Facebook, Inc., 947 F.3d 1043, 1049 (7th Cir. 2020).

[19] *See* Hoffman-La Roche Inc. v. Sperling, 493 U.S. 165, 169 (1989) (characterizing FLSA actions as "collective").

[20] 29 U.S.C. § 216(b); *see* O'Brien v. Ed Donnelly Enters., 575 F.3d 567, 584 (6th Cir. 2009) (observing variety of factors pertinent to similarity); Pierce v. Wyndham Resorts, Inc., 922 F.3d 741, 745–46 (6th Cir. 2019) (applying factors to find in-house and front-line sales employees similarly situated).

[21] *See* Thompson v. Bruister & Assocs., 967 F. Supp. 2d 1204, 1213 (M.D. Tenn. 2013) (citing *O'Brien*, 575 F.3d at 584) (finding employees sufficiently similar). *Thompson* involved over 1,700 cable technicians who alleged that their employer required them to work without pay for over an hour each day. *Id.* at 1207. The court found the technicians sufficiently similar because they each performed the same duties and followed the same policies and procedures. *Id.* at 1220.

[22] *See id.* at 1213 (allowing plaintiffs to proceed upon common theory claim). FLSA plaintiffs need not be identical. *Id.* at 1220. Rather, *Thompson* noted that the proper inquiry was "whether the presence of common issues allows the class-wide claims to be addressed without becoming bogged down by individual differences among class members." *See id.* (quoting Houston v. URS Corp., 591 F. Supp. 2d 827, 832 (E.D. Va. 2008)) (articulating common theory standard)."Rare," the court continued, "would be the collective action . . . where the employees labored under the *exact same* circumstances." *Id.* (emphasis added). Ultimately, being similarly situated means that the named plaintiffs

Similarly situated employees not originally parties to FLSA suits must opt in to the proceedings by filing written consent with the court.[24] The requirement that employees opt in distinguishes collective actions filed under the FLSA from class actions filed pursuant to Rule 23 of the Federal Rules of Civil Procedure.[25] In the latter, class members are automatically included in the suit and are not required to signal their participation to benefit from judgments returned in the class's favor.[26] In contrast, potential plaintiffs to an FLSA action must affirmatively join the suit to reap the rewards of the litigation.[27]

To opt in, however, potential plaintiffs must first receive notice of the litigation.[28] In 1989, in *Hoffman-La Roche Inc. v. Sperling*, the Supreme Court of the United States held that § 216(b) impliedly gives district courts discretion to

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and the potential plaintiffs are subject "to some common employer practice that, if proved, would help demonstrate a violation of the FLSA." Zavala v. Wal Mart Stores Inc., 691 F.3d 527, 538 (3d Cir. 2012).

[23] *See* Creely v. HCR ManorCare, Inc., 920 F. Supp. 2d 846, 854 (N.D. Ohio 2013) (finding other employees insufficiently similar to join FLSA litigation). The plaintiffs in *Creely* challenged the defendant's policy of automatically deducting overtime hours from employees' timesheets. *Id.* at 849. The court reasoned that although the plaintiffs were all subject to the auto-deduct policy on paper, the "localized nature of Defendant's implementation of the auto-deduct policy" ultimately rendered the plaintiffs dissimilar. *Id.* at 853.

[24] 29 U.S.C § 216(b). The 1947 Portal-to-Portal Act established the opt-in requirement in response to the influx of cases brought by representative plaintiffs with no personal stake in the proceedings. *Hoffman-La Roche*, 493 U.S. at 173 (1989); *see* 93 CONG. REC. 2182 (statement of Senator Forest Donnell, discussing "unwholesome champertous situations" in which non-employee outsiders bring FLSA suits).

[25] *See* FED. R. CIV. P. 23 (governing class actions); Genesis Healthcare Corp. v. Symczyk, 569 U.S. 66, 74 (2013) (reiterating that class actions under Rule 23 are "fundamentally different from collective actions under the FLSA"); LaChapelle v. Owens-Illinois, Inc., 513 F.2d 286, 289 (5th Cir. 1975) (declaring "opt-out" class actions and "opt-in" class actions "mutually exclusive and irreconcilable"). In class actions, a single plaintiff or a small group of plaintiffs represent a larger group's interests in court. *Class action*, BLACK'S LAW DICTIONARY (11th ed. 2019). Rule 23 sets forth four prerequisites for class actions. *See* FED. R. CIV. P. 23 (describing four criteria to sue as representative parties). First, the class must be so large that it is impracticable to unite the plaintiffs under one suit via joinder. *Id.* Second, the class must share common "questions of law or fact." *Id.* Third, the claims and/or defenses raised by the representative parties must be "typical" of the claims that would have been raised by the rest of the class, had they brought their own suits. *Id.* Finally, the representative parties must "fairly and adequately protect the interests of the class." *Id.*

[26] *See* FED. R. CIV. P. 23 (requiring judgments to include all members of the class). Class members may, however, opt to remove themselves from the litigation if they so choose. *Id.* Class members who fail to opt out are bound by the settlement or judgment and prohibited from initiating their own suits. *Id.*; *see* Daniel Lopez, *Collective Confusion: FLSA Collective Actions, Rule 23 Class Actions, and the Rules Enabling Act*, 61 HASTINGS L.J. 275, 286 (2009) (illuminating intricacies of class actions).

[27] *See* 29 U.S.C. § 216(b) (requiring written consent to become party to action). For this reason, Justice Antonin Scalia characterized the opt-in requirement in § 216(b) as a "limitation upon the affirmative permission for representative actions that already exists in Rule 23." *Hoffman-La Roche*, 493 U.S. at 176 (Scalia, J., dissenting).

[28] *See Hoffman-La Roche*, 493 U.S. at 169 (concluding that § 216(b) impliedly gave district courts power to notify potential plaintiffs).

notify potential plaintiffs of pending FLSA suits.[29] The Court declined to prescribe any further details, emphasizing only that notice should not approximate claim solicitation or offer judicial endorsement of the merits.[30] Without further guidance, district courts have had to determine for themselves the appropriate standards and methodologies to adopt in facilitating notice under § 216(b).[31]

In 1987, in *Lusardi v. Xerox Corporation*, the U.S. District Court for the District of New Jersey instituted a two-step process for determining whether and how to send notice to potentially similar plaintiffs.[32] In step one, district courts grant potential plaintiffs conditional certification if the named plaintiffs make at least a moderate showing of similarity.[33] This standard is relatively permissive and usually leads to conditional certification.[34] District courts then notify the conditionally certified plaintiffs of the suit and their right to opt in.[35] In step two, district courts "decertify" would-be plaintiffs if the defendants so move and the court determines that such plaintiffs are not sufficiently similar

[29] *Id.*; 29 U.S.C. § 216(b). The plaintiffs in *Hoffman-La Roche* brought suit for age discrimination under the Age Discrimination in Employment Act of 1967 (ADEA). 493 U.S. at 168; 29 U.S.C. § 623 (prohibiting discrimination on the basis of age in the workplace); *see id.* § 626(b) (authorizing enforcement of the ADEA via 29 U.S.C. § 216(b)). The Court observed that collective actions benefit the judicial system by minimizing excessive litigation and accelerating disposition of claims. *Hoffman-La Roche*, 493 U.S. at 172.

[30] *See Hoffman-La Roche*, 493 U.S. at 174 (cautioning against overreach of court discretion).

[31] *See* Swales v. KLLM Transp. Servs., 985 F.3d 430, 436 (5th Cir. 2021) (observing the lack of guidance regarding process of notice).

[32] 118 F.R.D. 351, 361 (D.N.J. 1987). Prior to *Lusardi*, few cases addressed the notice requirement, and those that did followed no uniform scheme. *See id.* at 359 (citing Owens v. Bethlehem Mines Corp., 108 F.R.D. 207, 212 (S.D. W. Va. 1985) (finding potential plaintiffs similarly situated despite employment in different departments); Allen v. Marshall Field & Co., 93 F.R.D. 438, 443 (N.D. Ill. 1982) (green-lighting notice to potential plaintiffs across locations and positions regardless of possibility of future removal from case); Plummer v. Gen. Elec. Co., 93 F.R.D. 311, 312 (E.D. Pa. 1981) (finding those who worked in the same department similarly situated and those who worked in different departments not similarly situated); Burgett v. Cudahy Co., 361 F. Supp. 617, 622 (D. Kan. 1973) (facilitating notice upon consideration of five factors)). As in *Hoffman-La Roche*, *Lusardi* concerned an ADEA claim brought under § 216(b) by § 626(b). *See Hoffman-La Roche*, 493 U.S. at 168 (dealing with ADEA collective action); *Lusardi*, 118 F.R.D. at 352 (reviewing ADEA claim).

[33] *Lusardi*, 118 F.R.D. at 361; *see, e.g.*, Pritchard v. Dent Wizard Int'l Corp., 210 F.R.D. 591, 596 (S.D. Ohio 2002) (finding "modest factual showing" required for conditional certification). *See generally* WILLIAM RUBENSTEIN, ALBA CONTE & HERBERT B. NEWBERG, NEWBERG AND RUBENSTEIN ON CLASS ACTIONS § 23:37 (6th ed.) (defining conditional certification as an "initial notice stage" whereby courts send notice of suit if plaintiffs meet low standard).

[34] *See, e.g.*, Knecht v. C & W Facility Servs., Inc., 534 F. Supp. 3d 870, 873 (S.D. Ohio 2021) (describing the standard for conditional certification as "fairly lenient").

[35] *Lusardi*, 118 F.R.D. at 361. *See generally* RUBENSTEIN ET AL., *supra* note 33, § 23:37 (illuminating majority approach). Upon conditional certification, courts may also greenlight discovery of potential plaintiffs. *See id.* (detailing *Lusardi* method).

to the named plaintiffs under a heightened standard of review.[36] Since 1987, most federal courts have adopted *Lusardi*'s two-step approach.[37]

B. Factual History of Clark v. A&L Homecare and Training Center

A&L Homecare & Training Center (A&L) is an Ohio-based home healthcare agency.[38] A&L employs approximately fifty home-health aides and compensates them by the hour to provide in-home services for the company's clients.[39]

In 2020, a group of former home-health aides sued A&L for noncompliance with the FLSA and the Ohio Minimum Fair Wage Standards Act.[40] Pursuant to § 216(b), the named plaintiffs moved to conditionally certify three collectives of potential plaintiffs.[41] The district court conditionally certified the first two and denied the third for failure to meet the evidentiary standard.[42] The

[36] *Lusardi*, 118 F.R.D. at 361. *See generally* RUBENSTEIN ET AL., *supra* note 33, § 23:37 (elucidating rigorous analysis stage of *Lusardi* method).

[37] *See, e.g.*, Karlo v. Pittsburgh Glass Works, 849 F.3d 61, 85 (3d Cir. 2017) (applying two-step method); *In re* HCR ManorCare, Inc., No. 11-3866, 2011 WL 7461073, at *1 (6th Cir. 2011) (same); Myers v. Hertz Corp., 624 F.3d 537, 554–55 (2d Cir. 2010) (same); Hipp v. Liberty Nat'l Life Ins. Co., 252 F.3d 1208, 1219 (11th Cir. 2001) (same).

[38] Plaintiffs' Pre-Discovery Motion for Conditional Collective Action Certification at 2, Clark v. A&L Homecare & Training Ctr., 68 F.4th 1003 (6th Cir. 2023) (No. 20-cv-757). Home healthcare consists of a variety of healthcare services provided to patients within the comfort of their own homes. Shawn Plummer, *Home Health Care: A Comprehensive Guide*, THE ANNUITY EXPERT, https://www.annuityexpertadvice.com/home-health-care/ [https://perma.cc/55W8-7U3X].

[39] Plaintiffs' Pre-Discovery Motion for Conditional Collective Action Certification, *supra* note 38, at 2–3. In-home services provided to patients include nursing services, physical therapy, and personal care. *Services Provided & Insurance Accepted*, A&L HOME CARE & TRAINING CTR., LLC, https://aandlhomecare.com/index.php/services-provided-insurances-accepted/ [https://perma.cc/L6DM-BDG4].

[40] Holder v. A&L Homecare & Training Ctr., 552 F. Supp. 3d 731, 737 (2021), *vacated*, *Clark*, 68 F.4th 1003; 29 U.S.C. § 206(a); *id.* § 207(a); OHIO REV. CODE ANN. § 4111.02 (LexisNexis 2023); OHIO REV. CODE ANN. § 4111.03 (LexisNexis 2023). First, the plaintiffs alleged that A&L failed to include the shift differential premium A&L paid them for working undesirable hours in their overtime pay calculation, therefore undercompensating them. Plaintiffs' Pre-Discovery Motion for Conditional Collective Action Certification, *supra* note 38, at 3. Second, the plaintiffs alleged that A&L paid them only a flat rate of $0.25/mile for driving between clients' homes rather than crediting them for their time. *Id.* at 4. Third, the plaintiffs alleged that A&L failed to properly reimburse them for vehicle expenses they incurred while using their personal vehicles on the job. *Id.* at 5.

[41] 29 U.S.C. § 216(b); Plaintiffs' Pre-Discovery Motion for Conditional Collective Action Certification, *supra* note 38, at 9. The first collective consisted of A&L employees who had worked over forty hours per week during the pertinent period and had been required to travel on duty. Plaintiffs' Pre-Discovery Motion for Conditional Collective Action Certification, *supra* note 38, at 9. The second collective consisted of A&L employees who had worked over forty hours per week and had been paid a shift differential premium. *Id.* The third collective consisted of A&L employees who had been required to use personal vehicles to travel on duty. *Id.*

[42] *Holder*, 552 F. Supp. 3d at 739–41. The plaintiffs supported their motion for conditional certification of the first group with submissions describing an orientation program attended by the named plaintiffs and others where A&L taught them to complete mileage reimbursement forms. *Id.* at 739. The plaintiffs also provided paystubs that showed that A&L did, in fact, reimburse them by the mile.

court further held that employees who had previously signed arbitration agreements with A&L were not entitled to receive notice because they were no longer potential plaintiffs under *Hoffman-La Roche*.[43]

The court then certified for interlocutory appeal the questions of whether district courts are bound by *Lusardi* and whether they should consider arbitration agreements at the conditional certification stage.[44] Upon appeal, the Sixth Circuit agreed that evidence of arbitration agreements is relevant to the question of similarity, but vacated the lower court's decision and remanded for reconsideration under a new standard requiring named plaintiffs to show a strong likelihood that potential plaintiffs are similarly situated.[45]

II. The Circuit Split: To Notify or Not to Notify

In 2023, the Sixth Circuit's decision in *Clark v. A&L Homecare and Training Center* became the most recent in an emerging debate regarding the proper standard for courts to facilitate notice to potential FLSA plaintiffs.[46] Section A of this Part discusses the majority approach and the Fifth Circuit's

Id. The court found that this met the modest factual showing required to move forward with conditional certification because the plaintiffs had "firsthand knowledge" that other employees had attended the orientation and had been trained the same way. *Id.* The court granted conditional certification of the second group based on statements by A&L's former Schedule Supervisor that the shift differential premium policy appeared in the employee manual, though the court recognized this was a relatively thin argument. *Id.* at 740 (citing Waggoner v. U.S. Bancorp, 110 F. Supp. 3d 759, 770 (N.D. Ohio 2015)). The court denied conditional certification of the third group because the plaintiffs presented no evidence that A&L required other employees to use their vehicles on duty; only that they had required the named plaintiffs to do so. *Id.* at 741. This evidence did not allow the court to "reasonably infer the existence of other employees who were subject to the same wage and work hours policy as plaintiff." *Id.*-(quoting Rembert v. A Plus Home Health Care Agency, No. 17-CV-287, 2018 WL 2015844, at *2 (S.D. Ohio May 1, 2018)).

[43] *Id.* at 744; *see* Hoffman-La Roche Inc. v. Sperling, 493 U.S. 165, 169 (1989) (directing courts to notify only potential plaintiffs). Parties who sign arbitration agreements agree to resolve future disputes via arbitration rather than litigation. *Arbitration agreement*, BLACK'S LAW DICTIONARY, *supra* note 25.

[44] *Holder*, 552 F. Supp. 3d at 746–48; 28 U.S.C. § 1292(b). Interlocutory appeals are appeals made prior to the final disposition of the case. *Interlocutory appeal*, BLACK'S LAW DICTIONARY, *supra* note 25. Questions presented for interlocutory appeal must meet three criteria. 28 U.S.C. § 1292(b). First, the question must be controlling. *Id.* Courts have interpreted controlling to mean "materially affect[ing] the outcome of a case." *Holder*, 552 F. Supp. 3d at 747 (citing *In re* Trump, 874 F.3d 948, 951 (6th Cir. 2017)). Second, there must be "substantial ground for difference of opinion." 28 U.S.C. § 1292(b). Finally, granting interlocutory appeal must present potential to "materially advance the ultimate termination of the litigation." *Id.*

[45] *Clark*, 68 F.4th at 1011.

[46] *See* 68 F.4th 1003, 1011 (6th Cir. 2023) (articulating new standard for showing of similarity required to facilitate notice of suit); Swales v. KLLM Transp. Servs., 985 F.3d 430, 441 (5th Cir. 2021) (creating circuit split regarding notice facilitation process).

2015 departure.[47] Section B of this Part addresses the Sixth Circuit's concerns with both approaches before analyzing its own contribution to the debate.[48]

A. The Majority Approach and the Fifth Circuit Departure

Since *Lusardi v. Xerox Corporation* in 1987, a majority of courts have embraced a two-tiered approach to screening potential plaintiffs for similarity.[49] For example, in 2001, in *Hipp v. Liberty National Life Insurance Corporation*, the Eleventh Circuit affirmed the lower court's use of the *Lusardi* method, observing in particular its efficacy with regards to intricate cases.[50] Likewise, in 2010, the Second Circuit articulated in *Myers v. Hertz Corporation* its position that the dual-stage inquiry is sensible, albeit not required by law.[51]

In 2021, however, the Fifth Circuit announced in *Swales v. KLLM Transportation Services* that it would not endorse the *Lusardi* method.[52] In doing so, the court emphasized the lack of support for conditional certification in the text of the FLSA or in Supreme Court precedent.[53] In *Lusardi*'s place, the court instituted for the Fifth Circuit a single-step process in which district courts "rigorously scrutinize" potential plaintiffs for similarity at the outset of the litigation.[54] *Swales* directed district courts to authorize preliminary discovery as

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[47] *See infra* notes 49–60 and accompanying text.

[48] *See infra* notes 61–76 and accompanying text.

[49] *See, e.g.*, Karlo v. Pittsburgh Glass Works, 849 F.3d 61, 85 (3d Cir. 2017) (recognizing use of two-step process in Third Circuit); *In re* HCR ManorCare, Inc., No. 11-3866, 2011 WL 7461073, at *1 (6th Cir. 2011) (noting implied endorsement of two-step process among Sixth Circuit cases); Myers v. Hertz Corp., 624 F.3d 537, 554–55 (2d Cir. 2010) (acknowledging coalescence of Second Circuit courts around two-step process); Hipp v. Liberty Nat'l Life Ins. Co., 252 F.3d 1208, 1219 (11th Cir. 2001) (advising Eleventh Circuit to adopt two-step process). In contrast to the *Lusardi* approach, in 1990, in *Shushan v. University of Colorado*, the U.S. District Court for the District of Colorado held that potential plaintiffs seeking to opt in to collective litigation under § 216(b) must meet the requirements laid out in Rule 23. 132 F.R.D. 263, 268 (D. Colo. 1990); *see* FED R. CIV. P. 23 (governing class actions). This approach has not been adopted by many courts. *See Swales*, 985 F.3d at 437 (commenting on the unpopularity of the *Shushan* approach).

[50] *See Hipp*, 252 F.3d at 1219 (describing the two-step process as "an effective tool for district courts to use in managing . . . often complex cases").

[51] *See Myers*, 624 F.3d at 554–55 (endorsing two-tiered approach despite lack of binding authority).

[52] *Swales*, 985 F.3d at 434. In declining to adopt *Lusardi*, the court observed that "practice is not necessarily precedent." *Id.* at 440.

[53] *See id.* at 434 (reasoning that there was "no anchor" for *Lusardi* in the FLSA or *Hoffman-La Roche*). In rejecting the majority approach of *Lusardi*, the Fifth Circuit identified two "interpretive first principles." *Id.* First, plaintiffs in collective actions must be similarly situated. 29 U.S.C. § 216(b); *Swales*, 985 F.3d at 434. Second, district courts may send notice to potential plaintiffs but may not "signal approval of the merits or otherwise stir up litigation." *Swales*, 985 F.3d at 434 (citing Hoffman-La Roche Inc. v. Sperling, 493 U.S. 165, 174 (1989) (authorizing discretion to facilitate notice but discouraging "even the appearance of judicial endorsement")). According to the *Swales* court, these principles are "the only binding commands" on district courts overseeing FLSA collective actions. *Id.*

[54] *See Swales*, 985 F.3d at 434 (rejecting the two-step process in favor of a more rigorous, one-step inquiry).

necessary to make a final decision *before* sending notice, thus extending notice only to those who are actually similarly situated.[55] The *Lusardi* method, in contrast, reserves discovery and subsequent judgment as to who is similarly situated until *after* potential plaintiffs are notified of the suit.[56] The *Swales* method therefore flips *Lusardi* on its head.[57]

Swales' determination that courts should send notice only to those who are actually similar drew on an earlier Fifth Circuit decision concerning employees who had signed arbitration agreements with their employers.[58] In 2019, in *In re JPMorgan Chase & Company*, the Fifth Circuit held that district courts do not have discretion to send notice to such employees.[59] Notice, the court held, may only be sent to potential plaintiffs, and those who sign arbitration agreements are not such plaintiffs, having waived their right to sue in an Article III court.[60]

B. Response from the Sixth Circuit

In 2023, in *Clark v. A&L Homecare and Training Center*, the U.S. Court of Appeals for the Sixth Circuit answered two questions of consequence for future FLSA actions in the Sixth Circuit.[61] The court first considered whether to adopt *Lusardi* or *Swales* as the standard for facilitating notice to potential plaintiffs, with the *Clark* plaintiffs arguing the former, and the defendants the latter.[62] Finding neither approach satisfactory, the court opted instead to articulate a new standard that lay somewhere in between.[63]

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[55] *Id.* at 441. The *Swales* court reasoned that sending notice to persons not actually similarly situated poses two dangers: (1) defendants will face unjust pressure to settle and (2) district courts will appear to be endorsing the merits of the underlying claim. *Id.* at 435.

[56] *See* 118 F.R.D. 351, 361 (D.N.J. 1987) (conditionally certifying potential plaintiffs first, authorizing discovery second).

[57] *See* RUBENSTEIN ET AL., *supra* note 33, at § 23:37 (observing an inverse relationship between *Lusardi* and *Swales* methods).

[58] *See Swales*, 985 F.3d at 440 (comparing independent contractor classifications at issue to arbitration agreements); *In re* JPMorgan Chase & Co., 916 F.3d 494, 504 (5th Cir. 2019) (holding that employees with arbitration agreements cannot receive notice). The *Swales* court concluded: "Just as we held it was improper to ignore evidence of the arbitration agreements in *JPMorgan*, it's improper to ignore evidence of other threshold matters, like whether the plaintiffs are 'employees' such that they can bring an FLSA claim." 985 F.3d at 441. For a thorough discussion of the *JPMorgan* decision, see generally Christian Villanueva, Comment, *What You Don't Know Can't Hurt You Unless You Work For JPMorgan Chase: The Fifth Circuit's Refusal to Notify Potential FLSA Plaintiffs Under Arbitration Agreements*, 61 B.C. L. REV. E. SUPP. II.-359 (2020), https://storage.googleapis.com/jnl-bcls-j-bclr-files/journals/1/articles/265/63a406e76ef66.pdf [https://perma.cc/5JUG-BKLW].

[59] *In re JPMorgan*, 916 F.3d at 504; *see* Hoffman-La Roche Inc. v. Sperling, 493 U.S. 165, 169 (1989) (holding that § 216(b) impliedly gives discretion to district courts to facilitate notice to potential plaintiffs).

[60] *In re JPMorgan*, 916 F.3d at 504.

[61] *See* 68 F.4th 1003, 1008 (6th Cir. 2023) (reviewing district court's handling of FLSA claims on interlocutory appeal).

[62] *Id.* at 1009. Prior to *Clark*, many district courts in the Sixth Circuit embraced the *Lusardi* two-step approach though no decision by the Court of Appeals required them to do so. *See, e.g.*, *In re* HCR

According to the court, *Swales* rests on the misguided assumption that in 1989, the Supreme Court in *Hoffman-La Roche Inc. v. Sperling* intended "potential plaintiffs" to include only those who are actually similarly situated to the named plaintiffs.[64] In the Sixth Circuit's view, it is equally likely that the Court intended "potential plaintiffs" to extend more broadly to all who *might* be similarly situated.[65] Moreover, the court did not find it practicable for district courts to make a final decision regarding potential plaintiffs' actual similarity before they become active in the case.[66]

Yet the court also declined to adopt *Lusardi*'s lenient standard.[67] Concerned that sending notice to employees ineligible to participate would approach claim solicitation, the court held that district courts should send notice only to those who are actually eligible to the extent feasible.[68]

To achieve this goal, the court analogized the decision to facilitate notice to the decision to award a preliminary injunction.[69] According to the court, the

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ManorCare, Inc., No. 11-3866, 2011 WL 7461073, at *1 (6th Cir. 2011) (observing implied endorsement of two-step process among Sixth Circuit cases); Evans v. Caregivers, Inc., No. 17-cv-0402, 2017 WL 2212977, at *4 (6th Cir. 2017) (adopting two-step process in Sixth Circuit).

[63] *See Clark*, 68 F.4th at 1011 (imposing requirement that plaintiffs prove a strong likelihood of similarity).

[64] *Id.* at 1009–10; *see Hoffman-La Roche*, 493 U.S. at 169 (articulating the term "potential plaintiff").

[65] *Clark*, 68 F.4th at 1010; *see Hoffman-La Roche*, 493 U.S. at 169 (authorizing facilitation of notice to "potential plaintiffs" of FLSA suits).

[66] *Clark*, 68 F.4th at 1010. Whether potential plaintiffs are sufficiently similar is a fact-specific inquiry. *Id. Clark* held that it is unreasonable for district courts to discern the actual similarity or dissimilarity of potential plaintiffs without consulting them first because they may have relevant information that is unavailable to the named parties. *Id.*

[67] *Id.* At the outset of its analysis, the Sixth Circuit rejected *Lusardi*'s use of the term "certification" to describe the court-approved addition of potential plaintiffs to FLSA actions. *Id.* at 1009. The court attributed the term "certification" to class actions governed by Rule 23. *Id.*; *see* FED. R. CIV. P. 23 (setting forth requirements for class action suits). According to the court, collective actions are separate and distinct from class actions because, in a collective action, no plaintiff represents another. *Clark*, 68 F.4th at 1009 (citing Canaday v. Anthem Cos., 9 F.4th 392, 402–03 (6th Cir. 2021) (observing plaintiffs added later to have "the same status in relation to the claims of the lawsuit as . . . the named plaintiffs")). The court summarized: "under Rule 23, the district court certifies the action itself as a class action; whereas in an FLSA action, under § 216(b), the district court simply adds parties to the suit." *Id. Compare* FED. R. CIV. P. 23 (concerning class action certification), *with* 29 U.S.C. § 216(b) (authorizing FLSA collective actions).

[68] *Clark*, 68 F.4th at 1010; *see Hoffman-La Roche*, 493 U.S. at 174 (authorizing discretion to facilitate notice but discouraging claim solicitation). The Fifth Circuit shared similar concerns with regards to solicitation. *See* Swales v. KLLM Transp. Servs., 985 F.3d 430, 435 (5th Cir. 2021) (cautioning against claim solicitation and/or judicial endorsement of the merits).

[69] *See Clark*, 68 F.4th at 1010 (observing similarities between decision to facilitate notice and decision to grant preliminary injunction). A preliminary injunction is a provisional injunction issued at the start of trial "to prevent an irreparable injury from occurring." *Preliminary injunction*, BLACK'S LAW DICTIONARY, *supra* note 25. The modern preliminary injunction standard consists of four prongs. *See* Memphis A. Philip Randolph Inst. v. Hargett, 2 F.4th 548, 554 (6th Cir. 2021) (applying four-factor preliminary injunction test). Courts must weigh "(1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury absent the

two are similar because both are final decisions rendered after full development of the record with "immediate consequences" for the suit.[70] Adopting part of the preliminary injunction standard, *Clark* then held that named plaintiffs in FLSA suits must demonstrate a "strong likelihood" that potential plaintiffs are similarly situated before district courts facilitate notice of suit.[71] This one-step inquiry places a heavier burden on named plaintiffs than *Lusardi*, but not as heavy a burden as *Swales*.[72]

Turning to the district court's decision to exclude employees who had signed arbitration agreements, the court again chose the middle of the road.[73] The court did not agree with the Fifth Circuit that it is possible to make a final decision on the effect of potential plaintiffs' alleged arbitration agreements without first hearing from the employees themselves.[74] The court nevertheless held that evidence to that effect is relevant to the question of similarity as one possi-

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injunction; (3) whether the injunction would cause substantial harm to others; and (4) whether the public interest would be served by the issuance of an injunction." *Id.* (quoting ACLU Fund of Mich. v. Livingston County., 796 F.3d 636, 642 (6th Cir. 2015)).

[70] *Clark*, 68 F.4th at 1010.

[71] *Id.* at 1011. In Sixth Circuit preliminary injunction cases, courts consider whether movants have a "strong likelihood of success on the merits," among other factors. *Hargett*, 2 F.4th at 554 (quoting *ACLU Fund*, 796 F.3d at 642).

[72] *See Clark*, 68 F.4th at 1011 (noting that the strong likelihood standard requires more proof than the genuine issue of fact standard, but less proof than the preponderance of the evidence standard). *Compare Swales*, 985 F.3d at 434 (requiring Fifth Circuit to analyze similarity rigorously), *with Lusardi v. Xerox Corp.*, 118 F.R.D. 351, 361 (D.N.J. 1987) (articulating low bar for similarity at litigation's outset). Both concurrences in *Clark* argue that, if district courts adopt the Sixth Circuit's elevated standard, they should also adopt a policy of equitable tolling. *See Clark*, 68 F.4th at 1012 (Bush, J., concurring) (writing separately to express view that equitable tolling should be available to FLSA plaintiffs); *id.* at 1017 (White, H., concurring in part and dissenting in part) (echoing support for equitable tolling). Equitable tolling "allows courts to toll a statute of limitations when 'a litigant's failure to meet a legally-mandated deadline unavoidably arose from circumstances beyond that litigant's control.'" Robertson v. Simpson, 624 F.3d 781, 783 (6th Cir. 2010) (quoting Graham-Humphreys v. Memphis Brooks Museum of Art, 209 F.3d 552, 560–61 (6th Cir. 2000)). Once the harm occurs, potential plaintiffs have two years to file suit or else opt in. *See* 29 U.S.C. § 255(a) (setting statute of limitations on FLSA claims at two years); *see also id.* § 256 (establishing date of filing or date of written consent as date action commences). As Judge Bush observes, the strong likelihood standard necessarily requires district courts to engage in more searching review, and so many potential plaintiffs may not receive notice to join a suit until after the statute of limitations has run. *See Clark*, 68 F.4th at 1012 (Bush, J., concurring) (acknowledging inherent delays in discovery and litigation of defenses under strong likelihood standard). Equitable tolling is therefore necessary to accommodate the delay. *See id.* (encouraging courts to apply equitable tolling). Since *Clark*, at least some district courts in the Sixth Circuit have granted potential plaintiffs equitable tolling. *See, e.g.*, Stewart v. Epitec, Inc., No. 22-CV-12857, 2024 WL 95676, at *7 (E.D. Mich. Jan. 9, 2024) (equitably tolling limitations period from date of stay until issuance of notice).

[73] *See Clark*, 68 F.4th at 1011–12 (agreeing with plaintiffs in part and agreeing with defendants in part).

[74] *Id.* at 1011. *Contra In re* JPMorgan Chase & Co., 916 F.3d 494, 504 (5th Cir. 2019) (finding employees with arbitration agreements ineligible to receive notice); *Swales*, 985 F.3d at 440 (endorsing *In re JPMorgan*).

ble defense to which the plaintiffs may be subject.[75] *Clark* therefore directed the Sixth Circuit to factor evidence of arbitration agreements into the overall equation when evaluating whether the strong likelihood standard has been met.[76]

III. PRELIMINARY INJUNCTIONS AND THE SIMILARLY SITUATED STANDARD

In 2023, in *Clark v. A&L Homecare and Training Center*, the U.S. Court of Appeals for the Sixth Circuit broadened the circuit split on the *Lusardi* method by comparing notice facilitation to preliminary injunctions.[77] Yet, as this Part explains, the rationale behind the preliminary injunction standard does not apply to notice facilitation, and so the requirement that plaintiffs in FLSA suits must demonstrate a strong likelihood of similarity places an unfair burden upon them.[78] The Sixth Circuit should have followed past practice and affirmed the *Lusardi* method instead.[79]

Rule 65 of the Federal Rules of Civil Procedure governs preliminary injunctions.[80] Noticeably absent from the rule is guidance on when to grant (or deny) an injunction.[81] In 2008, in *Winter v. Natural Resources Defense Council, Inc.*, the Supreme Court established a four-factor balancing test that instructs courts faced with a motion for preliminary injunction to consider the "likelihood of success on the merits," among other factors.[82]

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[75] *Clark*, 68 F.4th at 1012 (citing Pierce v. Wyndham Resorts, Inc., 922 F.3d 741, 745 (6th Cir. 2019) (including defenses that plaintiffs may face in similarity analysis)).

[76] *Id.*

[77] *See Clark*, 68 F.4th 1003, 1009 (6th Cir. 2023) (declining to follow neither majority approach nor recent Fifth Circuit departure).

[78] *See infra* notes 80–104 and accompanying text.

[79] *See infra* notes 80–104 and accompanying text.

[80] *See* FED. R. CIV. P. 65 (concerning preliminary injunctions).

[81] *See id.* (lacking procedure for courts to follow in granting or denying preliminary injunctions); Katherine Wheeler, Comment, *Why There Should Be a Presumption Against Nationwide Preliminary Injunctions*, 96 N.C. L. REV. 200, 204 (2017) (observing lack of procedural detail in Rule 65). Rule 65 provides relatively little guidance in general, stating only that courts must issue notice to a party before granting a preliminary injunction, and that the injunction itself must include the reasons for issuing the order, the specific terms of the order, and the actions to be restrained "in reasonable detail." *See* FED. R. CIV. P. 65 (instructing courts to issue notice and to describe details of injunction in court order).

[82] 555 U.S. 7, 20 (2008). Prior to *Winter*, the standard for preliminary injunctions suffered from a "dizzying diversity of formulations." *See* John Leubsdorf, *The Standard for Preliminary Injunctions*, 91 HARV. L. REV. 525, 526 (1978) (observing marked disagreement over preliminary injunction standard). The plaintiffs in *Winter* brought a claim against the U.S. Navy under the National Environmental Policy Act of 1969, the Endangered Species Act, and the Coastal Management Zone Act for using sonar equipment at the risk of harm to nearby marine mammals. *Winter*, 555 U.S. at 16–17; *see* 42 U.S.C § 4332 (requiring preparation of Environmental Impact Statement for "every . . . major Federal actio[n] significantly affecting the quality of the human environment"); 16 U.S.C. § 1531 (protecting endangered species); *id.* § 1456 (mandating that federal agencies carry out activities "in a manner which is consistent to the maximum extent practicable with the enforceable policies of approved State management programs"). The plaintiffs sought a preliminary injunction preventing the Navy from using the equipment until the close of the case. *Winter*, 555 U.S. at 16–17. The court artic-

But the Sixth Circuit has gone a step further than the Supreme Court: it requires courts to find a *strong* likelihood of success on the merits.[83] The Sixth Circuit's reasons for imposing such a high standard are twofold.[84] First, granting a preliminary injunction is a tremendous exercise of judicial power.[85] An equitable remedy issued before a case proceeds to trial, preliminary injunctions seek to prevent irreparable harm from occurring during the proceedings.[86] So, the court must intervene before it has an opportunity to review the merits of the action.[87] Second, the Sixth Circuit imposes a high standard for preliminary injunctions to ensure they are granted sparingly, indeed because they are such an extraordinary exercise of power.[88] Neither justification warrants raising the bar with regards to the showing of similarity required of plaintiffs in FLSA claims.[89]

The decision to facilitate notice to potential FLSA plaintiffs is not nearly as remarkable a power as a grant of a preliminary injunction.[90] Rather, notice facilitation is a small part of the district courts' administrative role as case

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ulated four points of consideration in determining how to rule on a motion for a preliminary injunction. *Id.* at 20. "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Id.* Ultimately, the court reversed and vacated the preliminary injunction granted by the lower court. *Id.* at 33. Using the balancing test, the court explained that the Navy's interest in national security outweighed the plaintiff's interest in protecting marine mammals for the duration of trial. *Id.*

[83] *See* Memphis A. Philip Randolph Inst. v. Hargett, 2 F.4th 548, 554 (6th Cir. 2021) (articulating "strong likelihood" standard).

[84] *See* Leary v. Daeschner, 228 F.3d 729, 739 (6th Cir. 2000) (quoting Direx Israel, Ltd., v. Breakthrough Med. Corp., 952 F.2d 802, 811 (4th Cir. 1991)) (providing insight on justifications for preliminary injunction standard).

[85] *See id.* (observing that preliminary injunctions are "an extraordinary remedy involving the exercise of a very far-reaching power"); *see also Winter*, 555 U.S. at 24 (characterizing preliminary injunctions as an "extraordinary remedy never awarded as a matter of right").

[86] *See* Wheeler, *supra* note 81, at 204 (describing the purpose of preliminary injunctions).

[87] *See* Leubsdorf, *supra* note 82, at 525 (describing the preliminary injunction as "the most striking remedy wielded by contemporary courts"); Wheeler, *supra* note 81, at 200 (characterizing relief as "drastic medicine"). Some have even analogized preliminary injunctions to "judgment and execution before trial." *See* Maggie Wittlin, *Meta-Evidence and Preliminary Injunctions*, 10 U.C. IRVINE L. REV. 1331, 1362 (2020) (quoting Herman v. Dixon, 141 A.2d 576, 577 (Pa. 1958)) (observing strength of preliminary injunction standard). Court intervention may take a variety of forms. *See* Leubsdorf, *supra* note 82, at 525 (noting diversity of uses for preliminary injunctions in recent history). Preliminary injunctions may "block the enforcement of legislation, place a candidate on the ballot, forbid strikes, prevent mergers, or enforce a school desegregation plan." *Id.* Due to the substantial time required to conduct a trial on the merits, a preliminary injunction may last months, even years. *See id.* (observing longevity of preliminary injunctions while litigation plays out).

[88] *See Leary*, 228 F.3d at 739 (quoting *Direx Israel*, 952 F.2d at 811) (noting that preliminary injunctions are "to be applied 'only in [the] limited circumstances which clearly demand it'").

[89] *See Clark*, 68 F.4th 1003, 1015 (6th Cir. 2023) (White, J., concurring in part and dissenting in part) (condemning "strong likelihood" standard for its potential to undermine district courts and the goals of the FLSA).

[90] *See Winter*, 555 U.S. at 24 (observing extraordinary nature of preliminary injunctions).

managers.[91] To merely notify persons of a pending lawsuit is not the same as to impose an injunction restraining one's actions before trial.[92] This is true especially when it is unclear how long the trial, and thus the injunction, will run.[93]

Second, and more importantly, it is not desirable to restrict notice the way that courts restrict preliminary injunctions.[94] To do so undermines the very purpose of the FLSA: to empower unorganized workers to sue exploitative employers.[95] In her partial dissent in *Clark*, Judge Helene White argues that in 1989, the Supreme Court in *Hoffman-La Roche Inc. v. Sperling* directed district courts to effectuate the goals of the FLSA to the fullest extent.[96] The strong likelihood standard, in contrast, will have the effect of keeping persons potentially similarly situated out of the know and ultimately out of the litigation.[97] The majority in *Clark* even addresses the multitude of ways that information asymmetry may prevent potential plaintiffs from receiving notice, yet it chooses to discard each without attempting to articulate a satisfactory resolution.[98]

The Fifth Circuit's one-step analysis in *Swales v. KLLM Transportation Services* similarly undermines the purpose of the FLSA by rigorously screening employees for similarity before hearing their side of the story, thereby increasing the risk of improper exclusion.[99] The two-step approach, in contrast, honors the purpose of the FLSA by bringing employees who *might* be similarly

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[91] *See Clark*, 68 F.4th at 1016 (White, J, concurring in part and dissenting in part) (quoting Campbell v. City of Los Angeles., 903 F.3d 1090, 1110 (9th Cir. 2018)) (finding notice facilitation "largely a question of case management"); *see also* Hoffman-La Roche Inc. v. Sperling, 493 U.S. 165, 174 (1989) (finding notice facilitation necessary for "case management purposes").

[92] *Contra Clark*, 68 F.4th at 1010 (comparing notice facilitation with grant of preliminary injunction).

[93] *See* Kevin Lynch, *Preliminary Injunctions in the Public Law: The Merits*, 60 HOUS. L. REV 1067, 1070 (2023) (detailing lasting effects of preliminary injunctions during litigation).

[94] *Cf. Leary*, 228 F.3d at 739 (cautioning against overuse of preliminary injunctions as judicial remedy).

[95] *See* 29 U.S.C. § 202 (seeking to eliminate "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers"); Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 706 (1945) (recognizing that unequal bargaining power requires passage of federal legislation); 81 CONG. REC. 7672 (declaring that the chief goal of the FLSA was the protection of the nation's poorest workers); 81 CONG. REC. 7652 (commending the FLSA's value for non-unionized workers); Jordan, *supra* note 17, at 1138 (noting the FLSA's intent to protect workers against exploitation).

[96] *See Clark*, 68 F.4th at 1016 (White, J, concurring in part and dissenting in part) (urging majority to bear in mind FLSA's purpose); *Hoffman-La Roche*, 493 U.S. at 173 (declaring that the "broad remedial goal of [the FLSA] should be enforced to the full extent of its terms").

[97] *Cf.* Lusardi v. Xerox Corp., 118 F.R.D. 351, 361 (D.N.J. 1987) (allowing more employees to receive notice through low similarity standard).

[98] *See* 68 F.4th at 1010 (discussing possibility of inadequacy of records as to hours actually worked and tasks actually performed). The court also expressed similar concerns on the issue of arbitration agreements. *See id.* at 1011 (identifying lack of consent, fraud, duress, or mistake, and unconscionability as reasons to invalidate arbitration agreements).

[99] *See* 985 F.3d 430, 441 (5th Cir. 2021) (imposing high standard for showing of similarity required to facilitate notice).

situated into the litigation early and removing those who are factually ineligible later.[100] Tried and true, this approach prioritizes greater access to the courts over the minimal efficiency benefits to be gained from collapsing the two inquiries into one.[101]

Finally, *Clark*'s preoccupation with claim solicitation is unfounded.[102] Regardless of when notice is sent, district courts are still bound by *Hoffman-La Roche* and may never endorse the merits of the action or encourage plaintiff participation.[103] Because the Sixth Circuit's strong likelihood standard is unsupported by analogy to preliminary injunctions and unreasonably concerned with solicitation, *Clark* should have affirmed thirty years of practice and adopted the more plaintiff-friendly notice standard instead.[104]

CONCLUSION

In 2023, in *Clark v. A&L Homecare and Training Center*, the U.S. Court of Appeals for the Sixth Circuit held that plaintiffs in FLSA suits must demonstrate a "strong likelihood" that other employees are sufficiently similar to themselves for district courts to facilitate notice of the suit. In doing so, the Sixth Circuit deviated from both the lenient standard applied by a majority of courts and the strict standard applied by the Fifth Circuit, opting instead to land somewhere in between. The lenient standard is the preferable approach because it is the one most in line with the broad purpose of the Fair Labor Standards Act. Absent Supreme Court guidance, lower courts outside the Sixth Circuit should continue to facilitate notice upon a modest showing of similarity.

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[100] *See Lusardi*, 118 F.R.D. at 361 (articulating low bar for similarity at litigation's outset); *see also Clark*, 68 F.4th at 1015 (White, J., concurring in part and dissenting in part) (quoting *Brooklyn Sav. Bank* 324 U.S. at 707 n.18) (declaring the "prime purpose" of the FLSA is the protection of the "unprotected, unorganized, and lowest paid of the nation's working population").

[101] *See* JOHN RAWLS, A THEORY OF JUSTICE 302 (1971) (prioritizing justice over efficiency in second priority principle).

[102] *See Clark*, 68 F.4th at 1019 (White, J., concurring in part and dissenting in part) (debunking cause for concern with solicitation of claims).

[103] *See* Hoffman-La Roche Inc. v. Sperling, 493 U.S. 165, 174 (1989) (instructing courts to "avoid even the appearance of judicial endorsement of the merits"); *Clark*, 68 F.4th at 1019 (White, J., concurring in part and dissenting in part) (observing enduring limits on court notice). Justice White's partial dissent acknowledges that although notice may "inspire employees who are ultimately determined not to be similarly situated to pursue their own litigation . . . employers are already required to conspicuously post information explaining the FLSA . . . and workers and lawyers have First Amendment rights to share information about joining FLSA litigation." *Id.*

[104] *See infra* notes 80–104 and accompanying text.