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Class Actions Under Rule 23 and Collective Actions Under the Fair Labor Standards Act: Preventing the Conflation of Two Distinct Tools to Enforce the Wage Laws

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INTRODUCTION

Wage and hour litigation has played an increasingly important role in enforcing state and federal wage protections for low-income workers. As the law has developed, employees have brought two primary tools to bear in federal courts: class actions under Federal Rule of Civil Procedure 23 asserting violations of state wage laws, and collective actions under Section 216(b) of the Fair Labor Standards Act ("FLSA") alleging violations of that Act. These two collective litigation procedures share a long and intertwined history, both emerging in 1938, and both undergoing major changes at various points in their nearly eighty years of existence. Courts attempting to understand the relationship between the two would do well to understand their history, as certain pronouncements about their relationship that were true when made are no longer true today.

The modern relationship between the two procedures dates from approximately 1995 to the present—the era of the so-called "two step" certification process for FLSA collective actions. It has become common for the two procedures to be used in a single lawsuit—a "hybrid" Rule 23 and FLSA action. Such suits have given rise to increasing discussion by judges of how the required showings for "certification" of a class or collective action differ in the two procedures. A split has emerged in which one court of appeals recently concluded that the two certification "standards" are the same, while another concluded that the showing required to proceed collectively under the FLSA is significantly lower than that required to proceed on a class basis under Rule 23.

In what situation might it matter whether the required showings are the same or different? Consider the following example. A janitor sues her employer claiming that there is a company-wide policy of pressuring janitors to work off-

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the-clock overtime to keep labor costs low. Several hundred janitors are spread among ten different facilities across a state. The plaintiff seeks unpaid overtime on behalf of the whole group under both the FLSA (proposing to proceed as a collective action under Section 216(b)) and the state's wage law (proposing to proceed as a statewide class under Rule 23). The company asserts that proceeding collectively is improper because each location has its own manager and scheduling practices, which would require the court to consider evidence from ten different facilities. The judge agrees with the employer that these differences prevent the plaintiffs from making the required showing under Rule 23 that common questions will predominate over individual ones and denies class certification under Rule 23. Is the employees' only option (other than going without compensation) to commence several hundred individual proceedings against their employer—an option that few, if any, would be likely to pursue? This Article argues that in a case like this, the FLSA's more flexible Section 216(b) would allow the employees to proceed collectively. A court could well find that taking evidence concerning ten different locations is feasible and that doing so will allow the wage laws to be enforced. Thus, several recent court decisions that have conflated the showings that plaintiffs must make to proceed collectively under the two mechanisms have taken the law in the wrong direction.

In Part I, this Article traces the history of class actions and collective actions, an understanding of which is essential in order to evaluate the question of whether and how their requirements differ at present. Then, in Part II, the Article summarizes the general rationales for merging the certification requirements of the two procedures or keeping them separate, many of which arise from the historical relationship between the two. The Article parses what courts actually mean when they refer to the two certification "standards," given that each "standard" consists of multiple steps or requirements—some of which are clearly incompatible, and others of which are similar. Finally, in Part III, the Article considers each of the Rule 23(b)(3) class certification requirements and concludes that the real question courts are grappling with is whether the "predominance" requirement of Rule 23(b)(3) differs from the "Step Two" analysis of the "similarly situated" requirement of Section 216(b). This section then identifies examples of hybrid cases in which judges have certified, or recognized the possibility of certifying, FLSA collective actions even when they have denied Rule 23 class certification on the same substantive claim. The Article argues that courts should continue to apply the two standards separately, so that as cases emerge that can be handled collectively, despite not satisfying the requirements of Rule 23, judges may nonetheless enforce the remedial FLSA. Part III concludes with the application of this conclusion to a hybrid FLSA and Rule 23 wage case currently pending before the Supreme Court, *Tyson Foods v. Bouaphakeo*, arguing that the Court should decline the petitioner-employer's invitation to treat the FLSA and Rule 23 certification analysis as identical.

Because the availability of the class and collective action devices affects the degree to which the wage laws will be enforced in the United States in the near

future—and given the evidence of large gaps in enforcement, particularly among lower-wage workers—this issue has real repercussions for combatting poverty among working Americans.

I. THE LANDSCAPE: BRIEF HISTORY OF RULE 23 AND THE FLSA

A. Federal Rule 23

1. Original Rule 23 (1938 to 1966)

The class action, which has its origins in courts of equity, was incorporated into the original version of the Federal Rules adopted in 1938.[1] The original Rule 23[2] divided class actions into three types based on the nature of the rights being litigated: jointly held rights, several rights concerning the same piece of property, and several rights involving a common question of fact.[3] Actions falling within the last category, which is the predecessor of the modern Rule 23 "damages" class action (current Rule 23(b)(3)), were known as "spurious" class actions.[4]

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1. FED. R. CIV. P. 23 advisory committee's note to subdivision (a) (1937); John G. Harkins, Jr., *Federal Rule 23—The Early Years*, 39 ARIZ. L. REV. 705 (1997). The immediate predecessor of Rule 23 was Equity Rule 38, which stated simply, "When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole." *Id.* at 705 (quoting JAMES LOVE HOPKINS, THE NEW FEDERAL EQUITY RULES 231 (1930)).

2. *See* FED. R. CIV. P. 23 (1938) (revised 1966). The rule stated, in significant part: "a. Representation. If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued when the character of the right sought to be enforced for or against the class is (1) joint, or common, or secondary in the sense that an owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it; or (2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or (3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought. b. [Provision relating to shareholder suits]. c. Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court. If the right sought to be enforced is one defined in paragraph (1) of subdivision (a) of this rule, notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs. If the right is one defined in paragraphs (2) or (3) of subdivision (a), notice shall be given only if the court requires it . . . ." *Id.*

3. These categories became known as "true," "hybrid," and "spurious" class actions; however, this article will focus primarily on the latter "spurious" variety. *See* CHARLES ALAN WRIGHT ET AL., 7AA FEDERAL PRACTICE AND PROCEDURE § 1772 (3d ed.).

4. *See* Harkins, *supra* note 1, at 707; FED. R. CIV. P. 23 advisory committee's note to 1966 amendment. The origin of the term "spurious" is obscure. Professor Moore used the term in an influential article commenting on a draft of the initial version of the Federal Rules of Civil Procedure to describe the type of class action in which the plaintiffs are suing, not concerning a single piece of property or based on a jointly held right, but merely based upon a common question of law or fact. *See* James W. Moore, *Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft*, 25 GEO. L.J. 551, 574–75 (1937). Professor Moore noted that this type of class action was not recognized in England. *Id.* at 575. The term was also used in an earlier treatise on the equity rules to describe class suits asserting personal liability claims on behalf of or against numerous parties, such that absent parties would not be bound by the judgment unless brought before the court in a supplemental proceeding. *See* THOMAS A. STREET, FEDERAL EQUITY PRACTICE § 552 (1909).

Unlike the current rule, the original Rule 23 did not require that notice be provided to absent class members, although courts could permit it.[5] Nor were plaintiffs required to make an affirmative motion for class certification; rather, the onus was on defendants to move to strike class allegations if the requirements of Rule 23 were not satisfied.[6] Spurious class actions bound only plaintiffs who affirmatively intervened in the case, and if the named plaintiffs obtained a favorable ruling, the absent class members could be provided with notice of the victory and a chance to intervene—so-called one-way intervention.[7] Also unlike the present rule, there was no requirement that common questions "predominate" over individual issues; commentators describe the original rule as having given rise to unmanageable, heavily individualized class proceedings.[8]

2. Modern Rule 23 (1966 to the Present)

The 1966 revisions to the Federal Rules significantly changed Rule 23. Section (a) of the new (current) rule provides a set of four requirements that all class actions must satisfy: (a) the class must be so numerous that joinder of all members is impracticable ("numerosity"); (b) there must be questions of law or fact common to the class ("commonality"); (c) the claims or defenses of the representative parties must be typical of the claims or defenses of the class ("typicality"); and (d) the representative parties must fairly and adequately protect the interests of the class ("adequacy").[9] In addition to satisfying Rule 23(a), an action must fall within one of three categories in Rule 23(b) to be entitled to proceed on a class basis. Broadly speaking, Rule 23(b)(1) provides for class actions when separate actions would risk conflicting rulings concerning the

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5. *Compare* FED. R. CIV. P. 23(c) (1938), *with* FED. R. CIV. P. 23(e).

6. *See* Scott A. Moss & Nantiya Ruan, *The Second-Class Class Action: How Courts Thwart Wage Rights by Misapplying Class Action Rules*, 61 AM. U. L. REV. 523, 547–48 (2012) (collecting cases demonstrating that certification under original Rule 23 was assessed on defense motions, not plaintiffs' motions).

7. *See, e.g.*, All Am. Airways v. Elderd, 209 F.2d 247, 248 (2d Cir. 1954) (approaching spurious class action as "an invitation to others affected to join in . . . and an admonition" to courts to proceed with proper care towards non-parties whom, although not legally bound, could be practically affected); Schatte v. Int'l All. of Theatrical Stage Emp. & Moving Picture Mach. Operators of U.S. & Can., 183 F.2d 685, 687 (9th Cir. 1950) (Spurious class action is "merely a permissive joinder device in which the right and liability of each individual plaintiff is distinct and no member of the 'class' is bound by a judgment who does not join as plaintiff or intervenor."); York v. Guaranty Trust Co., 143 F.2d 503, 529 (2d Cir. 1944), *reversed on other grounds*, 326 U.S. 99 (1945); Lipsett v. United States, 37 F.R.D. 549, 552 (S.D.N.Y. 1965) ("The 'spurious' class suit is merely a device for permissive joinder and does not give authority to adjudicate rights as to nonappearing parties or confer additional substantive rights upon plaintiffs; in effect it is but congeries of separate suits."). *But see* Union Carbide & Carbon Corp. v. Nisley, 300 F.2d 561, 589 (10th Cir. 1961) (dismissing majority approach as illogical and counter to the basic purpose of Rule 23 class actions under original Rule 23); WRIGHT, *supra* note 3; Harkins, *supra* note 1, at 709 (citing Moore, *supra* note 4, at 570–76).

8. JACK FRIEDENTHAL, MARY KANE, & ARTHUR MILLER, CIVIL PROCEDURE HORNBOOK 712 (5th ed. 2015); FED. R. CIV. P. 23 advisory committee's note to 1966 amendment.

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

same defendant's conduct, and Rule 23(b)(2) provides for class actions when the relief sought is injunctive or declaratory.[10]

The relevant provision for purposes of this article is 23(b)(3), which provides for class actions seeking damages when "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members ['predominance'], and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy ['superiority']."[11] Rule 23(b)(3) goes on to identify four factors that are relevant in determining whether it has been satisfied: (a) the class members' interests in individually controlling the prosecution or defense of separate actions; (b) the extent and nature of any litigation concerning the controversy already begun by or against class members; (c) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (d) the likely difficulties in managing a class action.[12] While predominance is related to commonality, the Supreme Court has explained that "Rule 23(a)(2)'s 'commonality' requirement is subsumed under, or superseded by, the more stringent Rule 23(b)(3) requirement that questions common to the class 'predominate over' other questions."[13] The predominance prong considers the efficiency of proceeding on a class basis and tests whether "proposed classes are sufficiently cohesive to warrant adjudication by representation."[14]

Under the modern version of the rule, courts must affirmatively rule on whether an action may be certified as a class action.[15] Plaintiffs typically make the motion, and most circuits have held that plaintiffs bear the burden of proving by a preponderance of the evidence that every requirement of Rule 23 has been met.[16]

The Advisory Committee charged with drafting amendments to the Federal Rules prepared a committee note that was published with the 1966 amendments explaining the intended relationship between the new Rule 23 and the existing collective action mechanism: "The present provisions of 29 U.S.C. § 216(b) are not intended to be affected by Rule 23, as amended."[17] A contemporaneous report issued by the advisory committee explains that it viewed wage and hour

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10. FED. R. CIV. P. 23(b)(1), (2).

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

12. *Id.*

13. Amchem Products, Inc. v. Windsor, 521 U.S. 591, 609 (1997).

14. *Id.* at 623.

15. FED. R. CIV. P. 23(c)(1) (requiring the ruling to be made "at an early practicable time").

16. *See, e.g.*, Brown v. Kelly, 609 F.3d 467, 476 (2d Cir. 2010); *In re* Ins. Brokerage Antitrust Litig., 579 F.3d 241, 257–58 (3d Cir. 2009); Alaska Elec. Pension Fund v. Flowserve Corp., 572 F.3d 221, 228 (5th Cir. 2009).

17. FED. R. CIV. P. 23 Advisory Committee's note to 1966 amendment. Advisory committee notes are prepared pursuant to regulations promulgated by the Supreme Court under the Rules Enabling Act, 28 U.S.C. §§ 2071–77. *See* GUIDE TO JUDICIARY POLICY, Vol. 1 § 440. Amendments to the Federal Rules and Advisory Committee notes must be approved by the Supreme Court, after which they are submitted to Congress, which then has seven months to veto them before they become law. "As the explanatory notes are contemporaneously drafted by the same entity charged with drafting the rules, they are a particularly reliable indicator of legislative intent." United States v. Vonn, 535 U.S. 55, 64 n.6 (2002).

cases as "covered by special legislation having a special history."[18] Commentators have speculated that the advisory committee believed that it lacked authority to alter the statutorily defined procedure specified by Congress for FLSA collective actions by means of a change in the Federal Rules.[19]

B. History of the Fair Labor Standards Act

1. Initial Expansive Form (1938-1947)

Like the original Federal Rules of Civil Procedure, the Fair Labor Standards Act ("FLSA") came into being in 1938.[20] The FLSA was a key component of President Franklin Roosevelt's New Deal[21] and was designed to eliminate "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers."[22] It established the rights of workers to a minimum hourly wage and overtime compensation for work beyond forty hours per week.[23] Employers who violated the Act were liable to their workers for back pay, liquidated damages, and attorney's fees.[24] To facilitate the law's enforcement, Section 216(b) of the FLSA provided employees with the right to proceed collectively, seeking recovery not only for their own claims, but also for those of "other employees similarly situated."[25] Neither the text of the statute nor the legislative history sheds light on what the phrase "similarly situated" means, although the phrase was commonly used in pleading class action claims even prior to the adoption of the Federal Rules of Civil Procedure.[26]

In the first decade of the FLSA's existence, courts generally treated Section 216(b) collective actions like spurious class actions under the version of Rule 23 then in effect, requiring plaintiffs to join the suit to be bound by the outcome. There was variation, however, in whether courts described such cases as actually

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18. Statement on Behalf of the Advisory Comm. on Civil Rules 8 n.3 (June 10, 1965).

19. *See* James M. Fraser, *Opt-in Class Actions Under the FLSA, EPA, and ADEA: What Does It Mean to Be "Similarly Situated"?*, 38 SUFFOLK U. L. REV. 95, 122 (2004); Elizabeth K. Spahn, *Resurrecting the Spurious Class: Opting-In to the Age Discrimination in Employment Act and the Equal Pay Act through the Fair Labor Standards Act*, 71 GEO. L.J. 119, 131 (1982).

20. *See* 29 U.S.C. § 201 (1938). To be precise, the FLSA became effective on June 25, 1938, after the Federal Rules had been proposed to Congress but before they became effective on September 16, 1938. *See Formulation of the Federal Rules*, 4 FED. PRAC. & PROC. CIV. § 1004 (3d ed.); Lusardi v. Lechner, 855 F.2d 1062, 1070 (3d Cir. 1988).

21. *See* Jonathan Grossman, *Fair Labor Standards Act of 1938: Maximum Struggle for a Minimum Wage*, U.S DEP'T LABOR, http://www.dol.gov/general/aboutdol/history/flsa1938 (last visited Feb. 9, 2016) (describing in detail legislative battle leading to adoption of FLSA); THE FAIR LABOR STANDARDS ACT 1–2, 1–3 (Ellen C. Kearns et al. eds., 2d ed. 2010, 2014 Suppl.).

22. 29 U.S.C. § 202(a).

23. 29 U.S.C. § 206(a)(1), 207(a)(3).

24. 29 U.S.C. § 216.

25. 29 U.S.C. § 216(b); *see also* Spahn, *supra* note 19, at 124–28 (providing history of opt-in actions under 1938 version of § 216(b)).

26. *See, e.g.*, Carpenter v. Knollwood Cemetery, 198 F. 297, 298 (D. Mass. 1912); Venner v. Great N. Ry. Co., 153 F. 408, 409 (C.C.S.D.N.Y. 1907).

subject to Rule 23 or simply proceeding in the same manner as a Rule 23 spurious class action. Compounding the confusion, some courts referred to Section 216(b) actions as "true" class actions but then treated them like spurious class actions.[27] As a general rule, though, only employees who intervened in the case would be bound by the judgment,[28] and, as in spurious class actions, there was no requirement to move affirmatively for certification.[29]

Under the original Act, employee "representatives" who lacked a personal claim for relief, such as union officials, could bring Section 216(b) collective actions on behalf of employees who did have a claim.[30] The representatives were not required to have authorization from the employees to bring suit.[31] This led to a surge in litigation (or at least the fear of a surge) by plaintiffs who lacked a personal interest in the outcome.[32] Compounding the effect of such litigation, two early rulings by the Supreme Court interpreted the language of the FLSA broadly, requiring compensation for work-related activities that had not previously been viewed as compensable.[33] Congress reacted promptly[34] to this potential for "financial ruin of many employers"[35] by enacting the Portal-to-Portal Act of 1947 ("PPA").[36]

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27. *See* Pentland v. Dravo Corp., 152 F.2d 851, 853–55 (3d Cir. 1945) (describing the varying lines of authority then existing); Lofther v. First Nat. Bank of Chicago, 45 F. Supp. 986 (N.D. Ill. 1941); Fink v. Oliver Iron Min. Co., 65 F. Supp. 316, 318 (D. Minn. 1941) ("[A]ll Congress intended under Section 216 of the [FLSA] was a permissive joinder in any suit brought by an employee for the benefit of others similarly situated."); Spahn, *supra* note 19, at 127–28 (1982) ("FLSA cases . . . were treated as spurious class actions, binding only those similarly situated employees who consented to become parties.").

28. Pentland v. Dravo Corp., 152 F.2d 851, 853–54 (3d Cir. 1945) (collecting cases).

29. *See* Scott A. Moss & Nantiya Ruan, *The Second-Class Class Action: How Courts Thwart Wage Rights by Misapplying Class Action Rules*, 61 AM. U. L. REV. 523, 547 (2012) (noting that prior to 1966, neither spurious class actions nor Section 216(b) collective actions required a motion for certification).

30. Hoffmann-La Roche Inc. v. Sperling, 493 U.S. 165, 173 (1989) (explaining that under the original Act, "representative actions" could be brought "by plaintiffs not themselves possessing claims").

31. *Id.* (noting that even in a representative case, the employees who did possess claims were not required to consent in writing to the pursuing of their claims).

32. *Id*. (describing references in legislative history to increased litigation). *But see* Elizabeth K. Spahn, *supra* note 19, at 125 (contending that, in fact, few "agent or representative" suits were filed, at least in the years immediately following the Act).

33. *See* Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 690–94 (1946) and Tenn. Coal, Iron & R. Co. v. Muscoda Local No. 123, 321 U.S. 590, 598 (1944) (together, interpreting the FLSA's definitions of "work" and "workweek" broadly to require compensation for certain preliminary and postliminary activities—such as walking from a time-clock to the employee's work area or time spent traveling between mine portals—that had not previously been held to be compensable).

34. *See, e.g*., Integrity Staffing Solutions, Inc. v. Busk, 135 S. Ct. 513, 516–17 (2014) (describing how these decisions spurred Congress to enact the Portal to Portal Act).

35. 29 U.S.C. § 251(a)(1) (1947).

36. Portal-to-Portal Act of 1947, Pub. L. No. 80-49, 61 Stat. 84 (1947).

2. The 1947 Portal-to-Portal Act Added an Opt-In Requirement to Section 216(b) to Limit Representative Suits Brought by Litigants With No Claim to Relief

The PPA eliminated the ability of representatives who lacked their own claims to bring suit on behalf of others.[37] Under the PPA's revised Section 216(b), only employees themselves could bring claims; although collective actions on behalf of similarly situated employees continued to be authorized, employees were required to file a written "consent" with the court to become plaintiffs in the case—the "opt-in" requirement—to participate in the case.[38] As a result of the PPA, the statute of limitations continues to run for each individual plaintiff until he or she opts into the case.[39]

The language of 29 U.S.C. § 256, concerning the statute of limitations for Section 216(b) actions, refers to "a collective *or class* action instituted under the [FLSA]." [40] A House committee report concerning this provision suggests that the legislators understood the FLSA as potentially proceeding under Rule 23, by explaining how the statute of limitations would operate in "a collective or class action (a collective action being an action brought by an employee or employees for and in behalf [sic] of themselves and other employees similarly situated, and a class action being an action described in Rule 23 of the Federal Rules of Civil Procedure)."[41] It may be the case that Congress assumed that some federal courts would continue to treat FLSA collective actions as Rule 23 spurious class actions, while state courts, where claimants could expressly bring FLSA collective actions, would not.[42] One early decision recognized the ambiguity of the "collective or class" phrase, noting, "It is not explained whether this language

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37. *See* 29 U.S.C. § 216(b) (2008) (limiting right of action to "any one or more employees for and in behalf of himself or themselves and other employees similarly situated" and adding the provision that "[n]o employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought"); *see also* H.R REP. NO. 80–326, at 5 (1947) (Conf. Rep.) ("Representative Actions Banned."). The PPA also enacted more limited provisions for the compensation of preliminary and postliminary work than the Supreme Court had adopted. *See, e.g.*, 29 U.S.C. § 254.

38. 29 U.S.C. § 216(b) (2008); Hoffmann-La Roche Inc. v. Sperling, 493 U.S. 165, 170 (1989).

39. 29 U.S.C. § 216(b) (2008) (employee does not become party plaintiff until he files a written consent-to-join); *see also* Sandoz v. Cingular Wireless LLC, 553 F.3d 913, 916–17 (5th Cir. 2008) (under Section 216(b), an employee's statute of limitations runs until he or she files consent-to-join form).

40. 29 U.S.C. § 256 (1947) (emphasis added).

41. H.R REP. NO. 80-326, at 14 (1947) (Conf. Rep.) ("[T]he general rule [is] that, for . . . purposes [of the statute of limitations], an action commenced on or after the date of the bill . . . shall be considered to be commenced when the complaint is filed . . . . An exception to the general rule is provided in the case of a collective or class action commenced on or after the date of enactment of the bill under the Fair Labor Standards Act of 1938, as amended . . . . In the case of such a collective or class action (a collective action being an action brought by an employee or employees for and in behalf of themselves and other employees similarly situated, and a class action being an action described in Rule 23 of the Federal Rules of Civil Procedure) the action shall be considered to be commenced . . . .").

42. See Pentland v. Dravo Corp., 152 F.2d 851, 853 (3d Cir. 1945) (noting that, prior to the PPA, the language of Section 216 permitted enforcement in "any court of competent jurisdiction," possibly because some states had refused to permit certain types of spurious class actions); *see also* James W. Moore, *supra* note 4, at 575 (noting that New York did not recognize spurious class actions).

describes collective and class action as one and the same thing, or whether it describes two kinds of actions."[43] Despite some early uncertainty, courts unanimously determined after the 1966 Rule 23 amendments that FLSA actions could not be brought under Rule 23. Surprisingly few courts, however, focused on the "collective or class" language in 29 U.S.C. § 256 and its legislative history, which seems to suggest the contrary.

3. The 1967 Age Discrimination in Employment Act Incorporated Section 216(b), Generating Important Case Law Interpreting the Collective Action Mechanism

To date, Congress has enacted two other statutes that incorporate Section 216(b) as an enforcement mechanism, including its "similarly situated" standard and its opt-in requirement: the Equal Pay Act of 1963 ("EPA")[44] and the Age Discrimination in Employment Act of 1967 ("ADEA").[45] The ADEA has generated important case law interpreting Section 216(b) in decisions that apply equally to FLSA cases.[46] Enacted in 1967, the ADEA prohibits age discrimination in employment.[47] Three years earlier, Congress had declined to include age as a protected category in Title VII of the Civil Rights Act of 1964 but had directed the Secretary of Labor to make recommendations concerning legislation to prohibit age discrimination.[48] The Secretary's original bill featured an enforcement mechanism based on the procedures in the National Labor Relations Act, including the requirement that enforcement proceed in the first instance before an administrative agency with only secondary review in the courts.[49] The final legislation that emerged, however, incorporated the enforcement mechanism of Section 216(b) by reference instead.[50]

It is unclear why Congress chose a different enforcement mechanism for the ADEA than it did for Title VII, which has no opt-in requirement or "similarly situated" language. When Congress enacted Title VII in 1964, spurious class actions were still in place, effectively requiring plaintiffs to opt in. Three years later when Congress enacted the ADEA, the modern (1966) version of Rule 23 had just gone into effect. The legislative history of the ADEA suggests that

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43. Burrell v. La Follette Coach Lines, 97 F. Supp. 279, 282 (E.D. Tenn. 1951). *But see* Clougherty v. James Vernor Co., 187 F.2d 288, 290 (6th Cir. 1951) (holding that Rule 23 did not apply to Section 216(b) action).

44. 29 U.S.C. § 206(d).The EPA was enacted as an addition to the FLSA, and prohibits discrimination in compensation on the basis of sex. That it is enforced through § 216(b) is unsurprising, given that it is part of the FLSA itself and applies to efforts to recover allegedly owed wages on behalf of groups of employees. As noted *infra* Part II.C, equal pay cases are sometimes brought as "hybrid" Section 216(b) and Rule 23 (under Title VII or state anti-discrimination law) cases.

45. 29 U.S.C. § 621 (1967).

46. *See, e.g.*, Hoffman-La Roche Inc. v. Sperling, 493 U.S. 165 (1989); Thiessen v. Gen. Elec. Cap. Corp., 267 F.3d 1095 (10th Cir. 2001); Mooney v. Aramco Servs. Co., 54 F.3d 1207 (5th Cir. 1995).

47. 29 U.S.C. § 623(a)–(c) (1967).

48. Civil Rights Act of 1964, Pub. L. No. 88–352, § 715, 78 Stat. 241, 265 (1964).

49. S. REP. NO. 90–723, at 5 (1964); H.R. Rep. No. 90–805, at 5, 9–10 (1967).

50. 29 U.S.C. § 626(b) (1967).

Congress wished to borrow various features of the FLSA, such as its statute of limitations and provisions concerning the employer's willfulness, making the enforcement provision of Section 216(b) a natural choice for inclusion as well. There is no indication in the legislative history that Congress was specifically focused on the difference between an opt-in regime and an opt-out regime, although one can speculate that members of Congress would have been familiar with litigation under the spurious class action regime but not the new Rule 23.[51] As a result of this choice, Title VII class actions proceed under Rule 23, while ADEA collective actions proceed under Rule 216(b). If this divergence was unintended at the outset, Congress has impliedly reaffirmed it, leaving the ADEA's incorporation of Section 216(b) in place while amending other provisions in the same section of the ADEA in 1986[52] and 1991.[53]

4. Courts Concluded That Section 216(b) Is a Separate Procedural Device From Rule 23 But That Courts May Issue Notice Under 216(b) as Well

Following the adoption of modern Rule 23, courts concluded that Section 216(b) is a separate procedural device. The PPA had been in effect for nearly twenty years when modern Rule 23 was adopted in 1966. The Advisory Committee Note notwithstanding, plaintiffs quickly attempted to import certain advantageous aspects of the new Rule 23 in Section 216(b) collective actions, including the right to send "class notice"[54] and the right to have the judgment apply to all class members, rather than only those who opted in. The latter effort, which litigators attempted in both FLSA[55] and ADEA[56] cases, was relatively easily rejected as incompatible with Section 216(b)'s opt-in requirement,[57] but the former generated a split concerning whether courts could issue notice to potential Section 216(b) opt-in plaintiffs.[58]

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51. S. REP. NO. 90–723, at 5 (1964); H.R. Rep. No. 90-805, at 5, 9–10 (1967).

52. Older Workers Benefit Protection Act, Pub. L. No. 101-433, 104 Stat. 978 (1990).

53. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991).

54. FED. R. CIV. P. 23(c)(2); *see also* Kinney Shoe Corp. v. Vorhes, 564 F.2d 859, 860, 862 (9th Cir. 1977) (The court rejected plaintiffs' effort to send court-supervised notice to potential FLSA opt-in plaintiffs, observing that "[t]he clear weight of authority holds that Rule 23 procedures are inappropriate for the prosecution of class actions under § 216(b)."); McGinley v. Burroughs Corp., 407 F. Supp. 903, 911 (E.D. Pa. 1975) (rejecting argument that notice provision of Rule 23 can be imported into 216(b) ADEA action on the grounds that Congress intended the two to be separate).

55. *See, e.g.*, Schmidt v. Fuller Brush Co., 527 F.2d 532, 536-37 (8th Cir. 1975).

56. *See, e.g.*, LaChapelle v. Owens-Illinois, Inc., 513 F.2d 286, 287 (5th Cir. 1975) (citing additional cases). *But see* Bishop v. Jelleff Assocs., Inc., 1972 WL 211, at *1 (D.D.C. Aug. 1, 1972) (permitting ADEA case to proceed under Rule 23, but requiring class members to opt in).

57. *Id.* (citing cases).

58. *Compare* Braunstein v. Eastern Photographic Labs., Inc., 600 F.2d 335, 336 (2d Cir. 1978) (under FLSA, notice permitted because of remedial nature of FLSA and because notice would avoid a multiplicity of suits), *and* Woods v. New York Life Ins. Co., 686 F.2d 578, 580–81 (7th Cir. 1982) (allowing court-approved notice), *and* United States v. Cook, 795 F.2d 987, 993 (Fed. Cir. 1986), *with* McKenna v. Champion Int'l Corp., 747 F.2d 1211, 1213–17 (8th Cir. 1984) (disapproving court-authorized notice), *and* Dolan v. Project Constr. Corp., 725 F.2d 1263, 1267–69 (10th Cir. 1984), *and*

The Supreme Court resolved the split in 1989 in *Hoffman-La Roche v. Sperling*,[59] an ADEA Section 216(b) case that held courts have discretion to authorize and facilitate notice of a pending ADEA action to absent potential opt-in plaintiffs under Section 216(b).[60] The Court reasoned that by providing for actions on behalf of similarly situated employees, "Congress has stated its policy that ADEA plaintiffs should have the opportunity to proceed collectively."[61] Such collective action "allows age discrimination plaintiffs the advantage of lower individual costs to vindicate rights by the pooling of resources" and also provides the judicial system with the efficiency benefit of resolving "in one proceeding . . . common issues of law and fact arising from the same alleged discriminatory activity."[62] The Court reasoned that these benefits depend on employees receiving accurate and timely notice of the action, and concluded that courts have the authority under Section 216(b) to manage the opt-in process in an orderly, sensible manner not inconsistent with the Federal Rules of Civil Procedure.[63] The Court wrote that "[t]he broad remedial goal of the statute [*i.e.*, Section 216(b)] should be enforced to the full extent of its terms."[64]

The Supreme Court's decision in *Hoffman-La Roche* paved the way for the modern era of FLSA wage and hour litigation. Whereas enforcement prior to the decision depended largely on actions by the Department of Labor,[65] over the next twenty-five years the number of FLSA cases filed in federal court grew steadily from about 900 per year to the current level of over 8,000.[66]

5. Current State of FLSA Certification Law: The Two-Step Analysis

Hoffman La-Roche established that FLSA plaintiffs had good reason to affirmatively move for collective-action-related relief: the authorization to provide notice. From that premise, the contemporary "two-step" certification analysis developed. Two-step analysis originated with the Fifth Circuit's *Mooney v. Aramco Services Co.* opinion in 1995.[67] To date, most circuit courts have adopted the test,[68] and district courts in other circuits have followed them.[69]

Partlow v. Jewish Orphans' Home of S. Cal., Inc., 645 F.2d 757, 758–59 (9th Cir. 1981), *and* Kinney Shoe Corp. v. Vorhes, 564 F.2d 859, 864 (9th Cir. 1977).

59. 493 U.S. 165 (1989).

60. *Id.* at 170.

61. *Id.*

62. *Id.*

63. *Id.* at 170–72.

64. *Id.* at 173.

65. Spahn, *supra* note 19, at 131 (citing G.W. Foster, *Jurisdiction, Rights, and Remedies for Group Wrongs under the Fair Labor Standards Act: Special Federal Questions*, 1975 WISC. L. REV. 295, 340–42 (1975)).

66. *See* Franczek Radelet, *FLSA Minimum Wage, Overtime Lawsuits Smash Records in 2014, Sharp Growth Continues*, WAGE & HOUR INSIGHTS: GUIDANCE & SOLS. FOR EMP'RS (Jan. 16, 2015), http://wagehourinsights.com/dol-news/flsa-minimum-wage-overtime-lawsuits-smash-records-in-2014-sharp-growth-continues/ (displaying chart of FLSA filings from 1990 to 2014, according to PACER).

67. 54 F.3d 1207 (5th Cir. 1995); *see also* Scott A. Moss & Nantiya Ruan, *The Second-Class Class Action: How Courts Thwart Wage Rights by Misapplying Class Action Rules*, AM. U. L. REV. 523, 550–

a. Step One: Notice

The first inquiry concerning whether employees are similarly situated occurs at the "notice" stage, also referred to as "conditional certification," which we refer to as "Step One."[70] This inquiry typically occurs before or very early in the discovery phase of litigation, and plaintiffs often make the motion as soon as practicable in order to provide notice to potential opt-in plaintiffs, whose statutes of limitations continue to run until they opt in. "[T]he 'conditional certification' is not really a certification. It is actually 'the district court's exercise of [its] discretionary power, upheld in *Hoffmann–La Roche*, to facilitate the sending of notice to potential class members,' and 'is neither necessary nor sufficient for the existence of a representative action under [the] FLSA.'"[71]

The court's Step One decision has been described as a "preliminary determination about whether the named plaintiffs and potential opt-in plaintiffs are sufficiently similarly situated to authorize the sending of notice and allow the case to proceed as a collective action through discovery."[72] Because of the minimal record at this early phase, a court's "determination is made using a fairly lenient standard, and typically results in conditional certification of a representative class."[73] Courts often grant the certification based on a small number of declarations, frequently combined with centrally promulgated company documents suggesting that the wage practice challenged in the suit likely affected many or all of the potential class members.[74] Factors that courts consider include geographic scope, variance in job duties, individualized allegations or defenses, interest in joining the action, and similar practices or policies that applied to the potential plaintiffs.[75] The Supreme Court recently

51 (2012) (identifying *Mooney* as the originator of the analysis and tracing the adoption of the analysis by other circuits).

68. *See, e.g.*, Myers v. Hertz Corp., 624 F.3d 537, 554-55 (2d Cir. 2010); Zavala v. Wal-Mart Stores Inc., 691 F.3d 527, 535–37 (3d Cir. 2012); Comer v. Wal-Mart Stores, Inc., 454 F.3d 544, 546–47 (6th Cir. 2006); Hipp v. Liberty Nat'l Life Ins. Co., 252 F.3d 1208 (2001); Thiessen v. Gen. Elec. Capital Corp., 267 F.3d 1095 (2001); Grayson v. K Mart Corp., 79 F.3d 1086, 1095–99 (11th Cir. 1996); *see also* ELLEN C. KEARNS ET AL., THE FAIR LABOR STANDARDS ACT ch. 19, at 19-16, 19-17 (2d ed. 2010 & Supp. 2014) (compiling cases). *But see* Acevedo v. Allsup's Conv. Stores, Inc., 600 F.3d 516, 519 n.1 (5th Cir. 2010) ("[W]e have not adopted any of the varying approaches for determining whether employees' claims are sufficiently similar to support maintenance of a representative action.").

69. Poreda v. Boise Cascade, L.L.C., 532 F. Supp. 2d 234, 238–39 (D. Mass. 2008); Nolan v. Reliant Equity Investors, LLC, 2009 WL 2461008, at *7 (N.D. W. Va. Aug. 10, 2009); *see also* KEARNS ET AL., *supra* note 68, at 19-16 (compiling cases).

70. KEARNS ET AL., *supra* note 68, at 19-16, 19-17 (compiling cases).

71. *Zavala*, 691 F.3d at 536 (quoting Myers v. Hertz Corp., 624 F.3d 537, 555 n.10 (2d Cir. 2010)) (additional quotations omitted).

72. Romero v. H.B. Auto. Grp., Inc., 2012 WL 1514810, *8 (S.D.N.Y. 2012) (quotation marks omitted); *see also* JOSEPH M. MCLAUGHLIN, 1 MCLAUGHLIN ON CLASS ACTIONS § 2:16 (11th ed. 2014).

73. Mooney v. Aramco Servs. Co., 54 F.3d 1207, 1214 (5th Cir. 1995) (quotation marks omitted); *see also* KEARNS ET AL., *supra* note 68, at 19-18 (compiling cases).

74. *See* KEARNS ET AL., *supra* note 68, at 19-55 to 19-71 (compiling cases granting Step One certification in different types of FLSA actions, and describing the quantity of evidence upon which the motions were based).

75. *Id.* at 19-35 to 19-54.

stated that "[w]hatever significance 'conditional certification' may have in § 216(b) proceedings, it is not tantamount to class certification under Rule 23."[76]

If a court grants Step One certification, it will typically approve the form of notice mailed to potential collective class members, require the defendant to provide the names and addresses of such class members, and specify a time by which potential plaintiffs must opt into the case in order to participate. The case will then typically proceed to (or continue with) the discovery phase.

b. Step Two: Decertification

The second, and usually final, inquiry that a court makes concerning whether employees are similarly situated typically arises with a defendant's motion for decertification,[77] although plaintiffs sometimes move affirmatively for Step Two certification.[78] Such a motion is generally filed near the completion of discovery.[79] Regardless of who brings the motion, the plaintiffs bear the burden of demonstrating that they are similarly situated.[80] The decision whether or not to uphold certification at Step Two lies within the discretion of the district court.[81]

"The 'similarly situated' standard at the second stage is less 'lenient' than at the first."[82] The circuit courts that have addressed the nature of the plaintiff's burden at this stage have adopted what is usually called an "ad hoc" approach, consisting of the review of three primary factors on a case-by-case basis: (a) the factual and employment settings of the individual plaintiffs; (b) the various defenses available to defendant which appear to be individual to each plaintiff; and (c) fairness and procedural considerations.[83] Depending on the FLSA violation alleged, the first prong may consider the job duties of the plaintiffs, the geographic scope of the class, the existence or nonexistence of a common policy

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76. Genesis Healthcare Corp. v. Symczyk, 133 S. Ct. 1523, 1532 (2013).

77. *See, e.g.*, Anderson v. Cagle's, Inc., 488 F.3d 945, 953–54 (11th Cir. 2008) (citing *Mooney*, 54 F.3d at 1213). Defendants may also move for decertification at or after trial. *See, e.g.*, KEARNS ET AL., *supra* note 68, at 19-150.

78. *See, e.g.*, Harris v. Vector Marketing Corp., 753 F. Supp. 2d 996, 1002–03 (N.D. Cal. 2010).

79. Morgan v. Family Dollar Stores, Inc., 551 F.3d 1233, 1261 (11th Cir. 2008); KEARNS ET AL., *supra* note 68, at 19-150. But courts have also granted motions for decertification after trials. *Id.* at 19-150 (citing Johnson v. Big Lots Stores, Inc., 561 F. Supp. 2d 567 (E.D. La. 2008)).

80. *E.g.,* Zavala v. Wal-Mart Stores Inc., 691 F.3d 527, 537 (3d Cir. 2012); O'Brien v. Ed Donnelly Enters., 575 F.3d 567, 584 (6th Cir .2009); Anderson v. Cagle's, Inc., 488 F.3d 945, 953 (11th Cir. 2007).

81. Stiller v. Costco Wholesale Corp., 298 F.R.D. 611, 630–31 (S.D. Cal. 2014) (citation and quotation omitted).

82. Anderson v. Cagle's, Inc., 488 F.3d 945, 953 (11th Cir. 2007) (citing Thiessen v. Gen. Elec. Capital Corp., 267 F.3d 1095, 1102 (10th Cir. 2001)); *see Zavala*, 691 F.3d at 535–36.

83. *See* Morgan v. Family Dollar Stores, Inc., 551 F.3d 1233, 1260-61 n.38 (11th Cir. 2008); *Thiessen*, 267 F.3d at 1103; KEARNS ET AL., *supra* note 68, at 19-168; *see also Zavala*, 691 F.3d at 536–37 (describing relevant factors as including (but not being limited to) "whether the plaintiffs are employed in the same corporate department, division, and location; whether they advance similar claims; whether they seek substantially the same form of relief; and whether they have similar salaries and circumstances of employment," and noting that "[p]laintiffs may also be found dissimilar based on the existence of individualized defenses").

or practice, the similarity or divergence of employer supervision, and the manner in which plaintiffs were compensated.[84] The second prong will tend to weigh in favor of decertification if the court will be required to evaluate the employer's defenses on an individualized basis and will tend to weigh in favor of certification if the defenses are applicable to the proposed collective class.[85] The third prong considers whether it will be fair to the parties to proceed on a collective basis and whether trial of the collective class's claims will be feasible.[86] If the court upholds certification, the named and opted-in plaintiffs proceed to trial; if not, the opted-in plaintiffs are dismissed without prejudice.[87]

C. 'Combined' or 'Hybrid' Section 216(b) and Rule 23 Actions

Collective actions under Section 216(b) that allege violations of the FLSA are often brought in the same federal suit as Rule 23 class actions that allege violations of similar state wage laws.[88] These are sometimes referred to as "hybrid" actions. There are many reasons that plaintiffs bring such actions. State statutes may offer advantages to plaintiffs that the FLSA does not, such as a longer statute of limitations,[89] additional substantive rights for non-exempt employees,[90] or more stringent exemptions.[91] The procedural course of a hybrid FLSA and Rule 23 class action often proceeds as follows.[92]

First, a complaint is filed asserting violations of state wage laws on a Rule 23 class action basis (on behalf of employees in the state only) and violations of the FLSA on a Rule 216(b) collective action basis (on behalf of employees located anywhere in the U.S.). This tolls the state law statute of limitations for all potential Rule 23 class members[93] but does not toll the FLSA statute of limitations for anyone other than the named plaintiffs, who submit consent-to-join forms with the complaint.[94]

Second, claimants file FLSA consent-to-join forms to stop the statute of limitations from running for each such opt-in plaintiff.[95] Counsel generally files

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84. *See* KEARNS ET AL., *supra* note 68, at 19-154 to 19-163 (citing cases).

85. *Id.* at 19-163 to 19-166.

86. *Id.* at 19-166 to 19-169.

87. *Id.* at 19-152.

88. Such actions can also be brought in state court, where the class claims would be governed not by Rule 23, but by the state's equivalent procedural mechanism.

89. *See, e.g.*, Dragone v. Bob Bruno Excavating, Inc., 45 A.D.3d 1238, 1239 (N.Y. App. Div. 2007); N.Y. LAB. LAW § 198(3) (six-year statute of limitations under New York law).

90. *See, e.g.*, Rieve v. Coventry Health Care, Inc., 870 F. Supp. 2d 856, 859 (C.D. Cal. 2012) (seeking overtime wages under FLSA and California Labor Code, as well as penalties for failing to provide meal and rest periods under California law).

91. *See, e.g.*, Ramirez v. Yosemite Water Co., Inc., 20 Cal. 4th 785, 797 (1999) (describing how California's "outside sales" exemption does not treat activities "incidental to sales" as exempt activities, while the FLSA "outside sales" exemption does).

92. *See, e.g.*, Talamantes v. PPG Industries, 13-cv-4062-WHO, 2014 WL 4145405 (N.D. Cal. Aug. 21, 2014).

93. *See* American Pipe & Constr. Co. v. Utah, 414 U.S. 538, 551–52 (1974).

94. *See supra* note 39.

95. *Id.*

such forms for state class members to assert their FLSA claims and stop the running of the FLSA statute of limitations, even though their state claims have already been tolled. Early on, a Step One conditional certification motion is filed, seeking leave to notify potential opt-ins of the FLSA collective action. If the court grants conditional certification, the defendant will provide the names of potential class members, and court-approved notice will be sent to the potential FLSA class, setting a deadline for opting in.[96]

After notice is sent, counsel will typically file a large number of additional opt-in forms, and when the opt-in period closes, the the "universe" of the FLSA collective action is established.[97] A motion for class certification is then filed for the state law claims, affecting only class members in the state(s) in question. If the court grants class certification, a second notice will be sent to only members of the state class, informing them of their right to opt out and their deadline for doing so; this notice must be clearly drafted to avoid confusing recipients who may already have opted in.[98] Once the deadline passes, the universe of state class members is also set. A Step Two motion for decertification of the FLSA class may be filed, and if the motion is denied, the FLSA and state claims will proceed to trial. If the case is settled, settlement approval must be sought from the court with respect to both the Rule 23 class and the FLSA collective action.[99] Notice will be sent to all Rule 23 class members explaining their right to object to or opt out of the settlement.[100]

D. The Due Process Landscape in the Context of Rule 23 Class Actions and FLSA Collective Actions

1. Employees' Due Process Issues

From the perspective of employees, Rule 23 class actions present a due process concern regarding the rights of absent class members. Class actions under modern Rule 23(b)(3) are an exception to the rule that a party may not be bound by a judgment *in personam* unless he or she is a party to the action.[101] Although an adverse judgment will not typically result in an absent class member being held liable for damages, it may extinguish his or her affirmative

96. *See, e.g.*, Misra v. Decision One Mortg. Co, LLC, 673 F. Supp. 2d 987, 993 (C.D. Cal. 2008).

97. *See, e.g.*, Boyd v. Bank of America Corp., 13-cv-561 (C.D. Cal.) ECF Nos. 128 through 252 (showing filing of numerous opt-in forms during the court-ordered notice period following grant of Step One conditional certification).

98. *See, e.g.*, Ervin v. OS Restaurant Servs., Inc., 632 F.3d 971, 978 (7th Cir. 2011) (explaining need for notices to explain difference between FLSA opt-in collective action and Rule 23 opt-out class action in hybrid case).

99. *See* Lynn's Food Stores, Inc. v. United States, 679 F.2d 1350, 1353 (11th Cir. 1982).

100. "Hybrid" cases are also brought under the EPA, seeking to proceed as a collective action under 216(b) for violation of the Equal Pay Act, and as Rule 23 class actions for violation of Title VII or state anti-discrimination laws. *See, e.g.*, Kassman v. KPMG LLP, 925 F. Supp. 2d 453 (S.D.N.Y. 2013).

101. *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 808 (1985) (citing Hansberry v. Lee, 311 U.S. 32, 40–41 (1940); Pennoyer v. Neff, 95 U.S. (5 Otto) 714, 727 (1878)).

claims if they were litigated.[102] When the 1966 amendment eliminated the spurious class action and allowed a judgment to bind all plaintiffs who failed to opt *out* of a class action seeking damages, the amendment added detailed notice requirements to protect the due process rights of the class.[103]

Under the current rule, a class action cannot be certified unless the judge, with the input of the named parties, "conducts an inquiry into [1] the common nature of the named plaintiffs' and the absent plaintiffs' claims, [2] the adequacy of the representation, [3] the jurisdiction possessed over the class, and [4] any other matters that will bear upon proper representation of the absent plaintiffs' interest."[104]

If the court grants certification, notice must be provided to Rule 23(b)(3) class members, along with an opportunity to be heard and participate in the litigation or to opt out of it altogether.[105] The notice need not be *actual* notice, but only the "best practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort."[106] Once a class has been certified, the case may not be settled or voluntarily dismissed without the court's approval, and if the proposed settlement would bind class members, the "court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate."[107] Only with these protections is it permissible, under the Due Process Clause, to allow plaintiffs to be bound by an action that they have not affirmatively consented to join and may never have even learned about.[108]

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102. *Id.* at 810.

103. *See* FED. R. CIV. P. 23 (1966) (For a class action to be maintained under Rule 23(b)(3), "the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.").

104. *Phillips Petroleum Co.,* 472 U.S. at 809; *see also* FED. R. CIV. P. 23(d)(1)(B) (giving the court the right to issue orders "to protect class members," such as by giving notice of "any step in the action" or "the members' opportunity to signify whether they consider the representation fair and adequate . . . .").

105. *See* FED. R. CIV. P. 23(c)(2).

106. *See id.*; *see also Phillips*, 472 U.S. at 811–12. Rule 23(c)(2)(A) makes notice optional as a matter of the court's discretion for classes under Rule 23(b)(1) and (b)(2). For classes under Rule 23(b)(3), the rules specify mandatory contents of the notice. *See* FED. R. CIV. P. 23(c)(2)(B). The Supreme Court has generally observed that notice will pass Due Process muster if it is "fully descriptive" and is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Phillips*, 472 U.S. at 812 (quoting Mullane v. Central Hanover Bank & Tr. Co., 339 U.S. 306, 314–15 (1950)).

107. FED. R. CIV. P. 23(e)(2).

108. *Phillips*, 472 U.S. at 811–12.

2. Employers' Due Process Issues

Employers have raised due process concerns regarding the use of common or "representative" evidence to establish liability as to all members of a class or collective action. Among other arguments, employers have contended that such an approach impermissibly precludes the opportunity to cross-examine employees seeking to recover damages.[109] Courts have addressed this issue in various ways but have generally held that due process does not require the opportunity to cross-examine every class member.[110]

The California Supreme Court recently held that a wage-and-hour trial had run afoul of due process principles because the trial court had refused the employer's requests to introduce evidence pertaining to employees, other than a small "sample" from whom conclusions about classwide liability would be drawn.[111] The court went on to observe that "[n]o case, to our knowledge, holds that a defendant has a due process right to litigate an affirmative defense [*e.g.*, an exemption to the overtime laws] as to each individual class member."[112] The court seemed to envision a middle ground in which a trial plan would permit the use of representative evidence and provide the employer an adequate opportunity to prove its defenses, but the court did not go so far as to require that the employer be permitted to examine every single class member. In the pending *Tyson v. Bouaphakeo* case, the employer has urged the Supreme Court to hold that its due process rights were violated under both Rule 23 and the FLSA when the lower courts permitted the plaintiffs to prove entitlement to unpaid overtime through representative evidence, rather than evidence demonstrating that each individual class member worked overtime.[113] This argument relies on Supreme Court decisions standing for the general proposition that due process ensures "an opportunity to present every available defense," but these cases hail from contexts very different from *Bouaphakeo*.[114]

II. RATIONALES FOR TREATING THE RULE 23 AND SECTION 216(B) CERTIFICATION REQUIREMENTS SIMILARLY OR DIFFERENTLY

At various points in the evolution of Rule 23 and Section 216(b) up through the present, courts have discussed the extent to which Rule 23 certification

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109. *See, e.g.,* Brief for Petitioner at 36-37, Tyson Foods, Inc. v. Bouaphakeo, 135 S. Ct. 2806 (2015) (No. 14-1146), 2015 WL 4720265.),

110. *See, e.g.*, Duran v. U.S. Bank Nat. Assn., 59 Cal. 4th 1, 35 (2014).

111. *Id*.

112. *Id.* at 38.

113. Brief for Petitioner, Tyson Foods, Inc. v. Bouaphakeo, 135 S. Ct. 2806 (2015) (No. 14-1146), 2015 WL 4720265, at *4.

114. *Id.* (citing Lindsey v. Normet, 405 U.S. 56, 66 (1972) (considering due process rights of tenants under state eviction law that required trial within six days and restricted trial to question of whether tenant had paid rent); Am. Surety Co. v. Baldwin, 287 U.S. 156, 168 (1932) (considering due process rights of surety company that issued supersedeas bond in dispute as to whether surety had agreed to entry of judgment against it upon losing party's failure to pay judgment)).

requirements are the same as, or different from, Section 216(b)'s "similarly situated" requirement. When discussing the extent to which these two standards, or sets of requirements for certification, are similar under the current state of the law, it is necessary to be precise about which requirements are being discussed.

With respect to Section 216(b)'s similarly-situated standard, the required showing at Step One is very different from that at Step Two. Still, courts often cite prior judicial pronouncements about the similarity or difference between the FLSA and Rule 23 standards without specifying whether the pronouncement was made in the context of Step One or Step Two, or, as is sometimes the case, before the modern two-step process had even been developed. With respect to the Rule 23 certification standard, courts are not always clear about whether they are referring to the requirements of Rule 23(a) and (b) together or to the requirement in Rule 23(b)(3) that common questions "predominate." Being more precise when using this terminology allows one to separate easy questions about how the two standards differ from the more difficult question: how the plaintiff's required showing at the Step Two decertification stage differs from his or her required showing to establish predominance under Rule 23(b)(3).

A. Rationales for Treating the Two 'Standards' Similarly

Over the years, courts have considered a number of rationales for treating the showing required for certification under the FLSA as similar to that of Rule 23. The phrase "similarly situated" was commonly used in pleading class action claims at the time the FLSA was adopted.[115] In the decade after the FLSA was enacted and before the PPA, many courts expressly referred to FLSA collective actions as Rule 23 spurious class actions.[116] In a sense, this resulted in a limiting effect on FLSA actions, requiring employees to intervene in the action in order to be bound even before the PPA's opt-in requirement came into existence in 1947. The PPA itself includes a reference to "collective or class" actions, with the legislative history suggesting that the FLSA could be enforced through Rule 23 class actions—a suggestion that the courts declined to accept over the following decades. The introduction of the opt-in requirement in the PPA was intended not to differentiate Section 216(b) from the spurious Rule 23 class actions of the day, but to address a separate concern regarding representative suits brought by non-employees on behalf of un-consenting employees. Thus, until 1966, there was good reason to view the two regimes as similar, and courts often did so.

The introduction of modern Rule 23 in 1966, along with its committee note stating that Section 216(b) was not intended to be affected, created a divergence between the two regimes by establishing that Rule 23(b)(3) class actions would bind all class members who did not affirmatively opt out.[117] The procedural steps that we take for granted today as the defining features of class actions, such as

115. *See Carpenter*, 198 F. at 928; *Venner*, 153 F. at 409.
116. *See supra* Part II.B.1.
117. *See supra* Part II.D.1.

the requirements to move for class certification and provide notice to the class, were introduced at this time as protections to account for the new power of class actions to bind absent class members. The 1966 amendment to Rule 23 was a significant and novel change in class action law, with no corresponding equivalent change made to Section 216(b) collective actions.

In 1989, the *Hoffman-La Roche* decision moved Section 216(b) partway along the same path as Rule 23 class actions by providing for court-ordered notice. Providing such notice early in the case and allowing potentially large numbers of plaintiffs to opt in would give rise to extensive discovery obligations by defendants. Some courts reacted to *Hoffman* by concluding that the powerful machinery of court-ordered notice and class discovery could not be mobilized against employers without some showing by the plaintiffs akin to the requirements of Rule 23(a), *i.e.*, that the class was numerous, that the named plaintiffs were adequate and typical, and that the issues were common.[118] Noting the absence of guidance in Section 216(b) as to what showing would satisfy the "similarly situated" requirement—and hesitant to impose the burden of court-ordered notice lightly—one court in an early application of *Hoffman* concluded that, to the extent the Rule 23(a) requirements were not inconsistent with Section 216(b), plaintiffs were required to satisfy them before Section 216(b) notice could be issued.[119]Although this requirement never gained traction,[120] subsequent courts have acknowledged that the goals behind the adequacy and typicality requirements of Rule 23—ensuring that absent class members are effectively represented by class counsel and class representatives—may also merit consideration in Section 216(b) opt-in cases. Yet this consideration takes place to a lesser degree because an opt-in plaintiff who has affirmatively joined a case is less in need of protection than an absent Rule 23 class member who may never actually learn of the case; but the opt-in will still benefit from the court's assistance in, for example, determining whether the collective class representative has a conflict of interest.[121]

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118. *See* Shushan v. Univ. of Colo. at Boulder, 132 F.R.D. 263, 266 (D. Colo. 1990) ("If Rule 23 were wholly inapplicable," then Section 216(b) collective actions "would be practically formless: the only requirement in the statute itself is embodied in the vague provision that the representatives and the class members must be 'similarly situated.'").

119. *Id.* at 268 ("I cannot accept the extraordinary assertion that an aggrieved party can file a complaint, claiming to represent a class whose preliminary scope is defined by him, and by that act alone obtain a court order which conditionally determines the parameters of the potential class and requires discovery concerning the members of that class. Before I conditionally determine the scope of the class, plaintiffs will need to satisfy me that there exists a definable, manageable class and that they are proper representatives of the class. They will, in other words, need to show that they satisfy the requirements of rule 23 or convince me that a particular requirement is inconsistent with 29 U.S.C.A. § 216(b) (West Supp. 1965).").

120. *See infra* Part III.B.

121. *See, e.g.*, *id.* at 267; *see also* Church v. Consolidated Freightways, Inc., 137 F.R.D. 294, 306 (N.D. Cal. 1991) (disagreeing with *Shushan* that Rule 23 applies at the Section 216(b) notice phase, but agreeing with the reasoning of *Shushan* as to why "some of Rule 23's procedures may be helpful in the management of" a Section 216(b) collective action).

As the modern two-step Section 216(b) certification standard has developed from 1995 to the present, courts have continued to note, particularly in hybrid FLSA/Rule 23 cases, that Section 216(b)'s "similarly situated" inquiry at Step Two often turns on the same considerations and results in the same conclusions as the analysis of commonality or predominance under Rule 23.[122] The most recent court of appeals to highlight the similarities between the FLSA and Rule 23 standards was the Seventh Circuit, which addressed the matter in *Espenscheid v. DirectSat USA, LLC*.[123] The opinion, written by Judge Posner, asserts in very broad terms that "there isn't a good reason to have different standards for the certification of the two different types of action, and the case law has largely merged the standards, though with some terminological differences."[124] However, an examination of the *Espenscheid* case shows that Judge Posner was actually making a narrower contention: that the FLSA Step Two standard is indistinguishable from the commonality and/or predominance inquiry. Judge Posner was not suggesting that the Rule 23(a) requirements apply to FLSA cases, nor was he making any comment on the Step One certification standard.[125] His broad language, however, has already been picked up by lower courts to justify importing Rule 23 principles more broadly into the FLSA context.[126]

Espenscheid was a hybrid case involving a class of approximately 1,000 FLSA opt-in plaintiffs and 2,341 Rule 23 class members.[127] The plaintiffs were

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122. *See, e.g.*, Thiessen v. General Electric Capital Corp., 267 F.3d 1095, 1105 (10th Cir. 2001) (Rule 23 and FLSA certification rules should be kept distinct; "[t]hat said, however, there is little difference in the various approaches. All approaches allow for consideration of the same or similar factors, and generally provide a district court with discretion to deny certification for trial management reasons."); Mendez v. Radec Corp., 232 F.R.D. 78, 94 (W.D.N.Y. 2005) ("For essentially the same reasons that I have granted plaintiffs' class certification motion, I also deny defendants' motion to decertify the FLSA claims.").

123. 705 F.3d 770, 772 (7th Cir. 2013).

124. *Id.* Probing Judge Posner's assertion that the case law has "largely merged the standards" for Rule 23 and 216(b) certification, we will see that most courts have been careful to state that the standards are not the same. Judge Posner cited only three cases in support of the contention. In *Alvarez v. City of Chicago*, 605 F.3d 445, 449 (2010), the Court stated that plaintiffs may be similarly situated if common questions predominate, thus borrowing the language of Rule 23 but making no reference to the rule itself. In *Thiessen,* 267 F.3d at 110, the Court praised the district court for "not" relying on "the Rule 23 standards," although the Court did opine: "That said, however, there is little difference in the various approaches. All approaches allow for consideration of the same or similar factors, and generally provide a district court with discretion to deny certification for trial management reasons." Lastly, Judge Posner cited the 1990 district court opinion in *Shushan v. University of Colorado*, 132 F.R.D. 263 (D. Colo. 1990), a case which predates the modern jurisprudence on FLSA certification, which was dealing with the issuance of "notice," and which has been rejected by the subsequent development of the law).

125. Judge Posner stated that "[t]he only difference of moment between the two types of action is that in a collective action the members of the class (of the 'collective') must opt into the suit to be bound by the judgment or settlement in it, while in a class action governed by Rule 23(b)(3) (a class action seeking damages) they must opt out not to be bound." *Id*. at 771. In that particular case, Judge Posner concluded that the differences between Rule 23 and 216(b), such as the need to inform absent class members of the right to opt out, did not bear on the certification issue. *Id*. at 771–72.

126. *See, e.g.*, Blakes v. Illinois Bell Tel. Co., No. 11 CV 336, 2013 WL 6662831, at *13 (N.D. Ill. Dec. 17, 2013).

127. *Id.* at 772; Espenscheid v. DirectSat USA, LLC, No. 09–cv–625–bbc, 2011 WL 2009967, at *1 (W.D. Wis. May 23, 2011).

cable installers who alleged that their employer had a policy of pressuring them to work off the clock by under-recording their hours or recording lunch breaks that they had not actually taken.[128] The district court initially denied the defendant's Step Two motion for FLSA decertification, concluding that—despite differences among the employees' deposition testimony—their "primary challenge was to defendants' uniform policies and practices" and that the differences could be managed by subclassing.[129] As the case approached trial, however, the district judge became concerned with the plaintiffs' trial plan, which did not comply with the subclassing directive but rather proposed using a representative group of forty-two testifying plaintiffs to determine liability for the entire class without regard to the subclasses identified by the court.[130] Therefore, on its own motion, the court decertified both the FLSA and Rule 23 classes on the eve of trial.[131]

Judge Posner's opinion primarily dealt with whether there was a feasible way of trying the Rule 23 or FLSA claims on a representative basis.[132] He began by stating that he would address the Rule 23 and FLSA claims as if they were governed by the same certification standard. In addition to his assertion that the case law has largely merged the two standards, he offered two general rationales for doing so. First, he reasoned that treating the two standards as the same would serve the goal of simplification of the law, allowing him to analyze the propriety of certification under Rule 23 and FLSA in one fell swoop.[133] Indeed, rather than recite either the Step Two decertification standard that courts have developed or the Rule 23 predominance standard, he simply proceeded to analyze whether it was feasible to try the claims collectively from a practical perspective, relying on both FLSA and Rule 23 case law interchangeably.[134] He also found that Rule 23's goal of "promoting efficiency" was "as relevant to collective actions as to class actions."[135] His opinion generally concluded that the proposed "representative" evidence in the plaintiffs' trial plan was not representative, and that it would not provide a reasonable basis for determining whether each employee had been underpaid and by how much.[136] Thus, the Court affirmed the decertification of both classes. The decision is now the standard-bearer for treating the certification requirements under the FLSA and Rule 23 as the same.

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128. *See Espenscheid*, 2011 WL 2009967, at *2.

129. *Id.*

130. *Id.* at *1, 5.

131. *Id.* at *7–8.

132. One district court, declining to follow *Espenscheid* in a very similar case, concluded that *Espenscheid* was not so much a condemnation of certification as an example of a litigant simply failing to follow the court's guidance about how a complicated action with subclasses should be tried. *See* Thompson v. Bruister & Assocs., Inc., 967 F. Supp. 2d 1204, 1216–17 (M.D. Tenn. 2013).

133. *Espenscheid*, 705 F.3d at 772. Judge Posner has written extensively about his view that simplification of the law is an important goal for judges. *See* RICHARD A. POSNER, REFLECTIONS ON JUDGING 1-10 *et seq.* (2013)

134. *Espenscheid*, 705 F.3d at 772–75.

135. *Id*. at 772 (citing American Pipe & Construction Co. v. Utah, 414 U.S. 538, 555–56 (1974) and FED. R. CIV. P. 23 note on subdivision (b)(3) (1966)).

136. *Id.* at 773–76.

B. Rationales That Courts Have Offered for Treating the Two 'Standards' Differently

Most courts have taken pains to emphasize that the required showings for certification under Rule 23 and the FLSA are not the same. The Supreme Court recently stated in *Genesis Healthcare Corp. v. Symczyk*: "Lower courts have borrowed class-action terminology to describe the process of joining co-plaintiffs under 29 U.S.C. § 216(b). While we do not express an opinion on the propriety of this use of class-action nomenclature, we do note that there are significant differences between certification under Federal Rule of Civil Procedure 23 and the joinder process under § 216(b)."[137] A number of rationales have been offered for treating the two "standards" differently.

1. Statutory Silence

The fact that Section 216(b) explicitly provides for collective action so long as the plaintiffs are "similarly situated," without including any requirements that the representative plaintiffs or counsel be adequate, that the class be numerous, or that any other requirement be met, has led courts to conclude that such requirements do not apply.[138] Although the reference in 29 U.S.C. § 256 of the FLSA (regarding the statute of limitations) to "collective or class actions" is ambiguous, it does suggest that collective actions are something different from class actions and that a collective action need not satisfy the requirements for class actions.

2. The 'Remedial' Nature of Section 216(b), and Congress's Expression of a Policy Preference for Collective Actions

A number of courts have reasoned that the "remedial" goals of the FLSA and the ADEA support the conclusion that the Section 216(b) standard is less

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137. Genesis Healthcare Corp. v. Symczyk, 133 S. Ct. 1523, 1527 n.1 (2013).

138. *See* O'Brien v. Ed Donnelly Enters., Inc., 575 F.3d 567, 584 (6th Cir. 2009) ("While Congress could have imported the more stringent criteria for class certification under FED. R. CIV. P. 23, it has not done so in the FLSA."); Thiessen v. General Electric Capital Corp., 267 F.3d 1095, 1105 (10th Cir. 2001) ("Congress clearly chose not to have the Rule 23 standards apply to class actions under the ADEA, and instead adopted the 'similarly situated' standard. To now interpret this 'similarly situated' standard by simply incorporating the requirements of Rule 23 (either the current version or the pre 1966 version) would effectively ignore Congress' directive."); Hoffman v. Sbarro, Inc., 982 F. Supp. 249, 263 (S.D.N.Y. 1997) (At Step One: "[w]hile this type of judicial scrutiny [regarding adequacy] may be required for Rule 23 class actions, it is not required for collective actions under the FLSA. Section 216(b), which provides for collective actions under the FLSA, is silent on the issue of adequacy of representation, nor does it direct courts to follow the dictates of Rule 23 in certifying a class. Consequently, the prevailing view among federal courts, including courts in this Circuit, is that § 216(b) collective actions are *not* subject to Rule 23's strict requirements, particularly at the notice stage."); Jackson v. New York Telephone Co., 163 F.R.D. 429, 431 (S.D.N.Y.1995) (At Step One: "[i]mposing the demanding requirements of Rule 23 on plaintiffs in the context of notice authorization would frustrate plaintiffs' efforts to proceed collectively and preclude the benefits noted by the Supreme Court [in *Hoffmann–La Roche*].").

demanding than Rule 23, which is merely an all-purpose procedural device detached from any particular substantive scheme.[139] While this observation has typically been made in the context of Step One decisions, the Sixth Circuit has observed that requiring a showing of predominance at Step Two would "undermine[] the remedial purpose of the collective action device."[140] In *Hoffmann–La Roche, Inc.*, the Court noted, "Congress has stated its policy that ADEA plaintiffs should have the opportunity to proceed collectively."[141] Although courts have not focused on it, it could be argued that after the advent of modern Rule 23, the FLSA is *less* effective than state statutes in enforcing wage violations; *i.e.*, a successful state claim under Rule 23 will provide relief to *all* eligible plaintiffs (unless they opt out), whereas an FLSA claim will provide relief only to the (often small) subset who take the more onerous step of affirmatively opting in.[142] Thus, to the extent that the Rule 23 certification requirements are, as many courts state, "more stringent" than the FLSA "similarly situated" requirement, there is an argument that FLSA claims could help ensure that the statute is effectively enforced notwithstanding its comparatively onerous opt-in requirement. This is particularly true given that, as "courts have consistently recognized," the "fear of economic retaliation will force workers quietly to accept substandard conditions, dissuading employees from participating in lawsuits against their employers."[143]

3. The Committee Note Excluding Section 216(b) From Being Affected by the 1966 Revision of Rule 23

Courts have taken note of the Advisory Committee comment excluding Section 216(b) from being affected by the 1966 amendment to Rule 23.[144] Section 216(b), in its modern form, dates back to the PPA in 1947, so courts and commentators have observed that, if anything, the spurious class action—not the modern Rule 23 class action—is the relevant comparator to Section 216(b).[145]

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139. *See, e.g.*, Benitez v. Demco of Riverdale, *LLC*, No. 14 Civ. 7074, 2015 WL 3780019, at *4 (S.D.N.Y. June 15, 2015) (Step One case); Garner v. G.D. Searle Pharms. & Co., 802 F. Supp. 418, 422–23 (M.D. Ala. 1991) (Step One case); Church v. Consol. Freightways, Inc., 137 F.R.D. 294, 306 (N.D. Cal. 1991) (Notice Phase); Bayles v. Am. Med. Response of Colorado, Inc., 950 F. Supp. 1053, 1067 (D. Colo. 1996) on reconsideration, 962 F. Supp. 1346 (D. Colo. 1997) (Step Two case).

140. *O'Brien*, 575 F.3d at 58–86 (6th Cir. 2009).

141. *Hoffmann-La Roche*, 493 U.S. at 170.

142. *See, e.g.*, Craig Becker & Paul Strauss, *Representing Low-Wage Workers in the Absence of a Class: The Peculiar Case of Section 16 of the Fair Labor Standards Act and the Underenforcement of Minimum Labor Standards*, 92 MINN. L. REV. 1317, 1330–32 (2008) (noting that, in addition to fewer employees benefitting from enforcement, the amounts per employee tend to be smaller under the FLSA).

143. *See* Rutti v. Lojack Corp., Inc., No. SACV 06-350 DOC, 2012 WL 3151077, at *6 (C.D. Cal. July 31, 2012) (quotation omitted); *see also* Craig Becker & Paul Strauss, *Representing Low-Wage Workers in the Absence of a Class: The Peculiar Case of Section 16 of the Fair Labor Standards Act and the Underenforcement of Minimum Labor Standards*, 92 MINN. L. REV. 1317, 1325–29 (2008).

144. *See, e.g.*, Chase v. AIMCO Props., L.P., 374 F. Supp. 2d 196, 199 (D.D.C. 2005).

145. *See* Lusardi v. Lechner, 855 F.2d 1062, 1074 n.15 (3d Cir. 1988); Bayles v. Am. Med. Response of Colo., Inc, 950 F. Supp. 1053, 1064–66 (D. Colo. 1996); Spahn, *supra* note 19, at 119.

There is little reason to think that the dramatic revision of Rule 23 in 1966 had, merely by implication, an equivalent dramatic effect on Section 216(b).

4. The Opt-In v. Opt-Out Distinction

From the first efforts by FLSA and ADEA plaintiffs to take advantage of the 1966 version of Rule 23,[146] to the wake of *Hoffman-La Roche*[147] and up through the present, courts have highlighted the key distinction of opting in and opting out as a justification for treating the two regimes separately.[148] In *Espenscheid*, Judge Posner described this as "[t]he only difference of moment between the two types of action," explaining that "in a collective action the members of the class (of the 'collective') must opt into the suit to be bound by the judgment or settlement in it, while in a class action governed by Rule 23(b)(3) (a class action seeking damages) they must opt out *not* to be bound. That difference can have consequences, one being the need to protect the right of Rule 23(b)(3) class members to opt out."[149]

5. Differing Operation of Statutes of Limitations

Whereas the filing of a Rule 23 class action complaint stops the running of the statute of limitations for absent class members, the filing of an FLSA complaint does not; rather, the statute continues to run as to every individual unless and until he or she files an opt-in with the court. Thus, courts have recognized that there is an urgency to providing notice in FLSA cases that does not exist in Rule 23 cases.[150]

C. The Non-Controversial Distinction Between 216(b) 'Step One' Certification and Rule 23 Certification

At present, courts appear to be in universal agreement that the showing required at Step One is considerably less demanding than that under Rule 23.[151]

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146. Schmidt v. Fuller Brush Co., 527 F.2d 532, 536–37 (8th Cir. 1975); LaChapelle v. Owens-Illinois, Inc., 513 F.2d 286, 287 (5th Cir. 1975).

147. Church v. Consol. Freightways, Inc., 137 F.R.D. 294, 306 (N.D. Cal. 1991).

148. McElmurry v. U.S. Bank Nat'l Ass'n, 495 F.3d 1136, 1139 (9th Cir. 2007).

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

150. See, e.g., Benitez v. Demco of Riverdale, LLC, No. 14 Civ. 7074, 2015 WL 3780019, at *3–4 (S.D.N.Y. June 15, 2015).

151. *Benitez*, 2015 WL 3780019, at *4 (At Step One, "the 'similarly situated' standard is far more permissive than class certification under Rule 23. Accordingly, 'no showing of numerosity, typicality, commonality, and representativeness need be made." (quoting Lewis v. Nat'l Fin. Sys., Inc., 2007 WL 245130, at *2 (E.D.N.Y. Aug. 23, 2007)); Lewis v. Wells Fargo & Co., 669 F. Supp. 2d 1124, 1127 (N.D. Cal. 2009) (noting, in a Step One case, that required showing under Section 216(b) is "considerably less stringent than the requisite showing under Rule 23" (quoting Wertheim v. Ariz., No. CIV 92-453 PHX RCB, 1993 WL 603552, at *1 (D. Ariz. Sept. 30, 1993)); Jackson v. N.Y. Tel. Co., 163 F.R.D. 429, 431 (S.D.N.Y. 1995) ("Imposing the demanding requirements of Rule 23 on plaintiffs in the context of notice authorization would frustrate plaintiffs' efforts to proceed collectively and preclude the

Indeed, the Supreme Court has stated: "Whatever significance 'conditional certification' may have in § 216(b) proceedings, it is not tantamount to class certification under Rule 23."[152] The reasons for this are straightforward. The purpose of Step One certification is to permit the mailing of notice to potential class members to alert them of their right to opt in, not to determine conclusively whether the plaintiffs will be permitted to proceed collectively at trial.[153] Even if there is an argument for taking into account the adequacy or typicality of the named plaintiffs or counsel at some point in an FLSA case in order to protect collective action opt-ins, there is no need to do so before notice is disseminated. Requiring a robust showing before authorizing notice would result in delays in informing potential opt-in plaintiffs of the pending case while their statutes of limitations run.

Thus, when courts state that the Rule 23 certification standard is "more stringent" than that of the FLSA, it is important to determine whether they are referring to Step One, in which case the statement is non-controversial, or Step Two, which presents a closer question. Answering the latter question also requires precision about whether the court is referring to all of the Rule 23 requirements, or only, for example, the predominance requirement.

III. THE FLSA STEP TWO STANDARD IS NOT (AND SHOULD NOT BE) THE SAME AS THE RULE 23 PREDOMINANCE REQUIREMENT

A. Many of the Rule 23 Requirements Do Not Make Sense to Impose as Prerequisites to a FLSA Collective Action

In a wage case, when a court discusses whether the Section 216(b) Step Two standard is similar to or different from the Rule 23 certification standard without being more precise, this could suggest that the court is referring to all of the Rule 23 requirements: numerosity, typicality, commonality, adequacy, and, for (b)(3) classes, predominance and superiority. But upon closer inspection, courts are usually referring to some combination of the commonality, predominance, and/or superiority prongs. It is easy to see why this is the case. Considering Rule 23's requirements one at a time, it becomes evident that many of them would not serve a sufficiently beneficial purpose in the Section 216(b) context to justify imposing them as hurdles to collective enforcement of the statute.

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benefits noted by the Supreme Court" in *Hoffman-La Roche*.); Abrams v. Gen. Elec. Co., No. 95-CV-1734, 1996 WL 663889, at *1 n.3 (N.D.N.Y. 1996) (noting, in a Step One case, that courts in the Second Circuit hold that Rule 23 requirements do not apply to § 216(b) actions); Severtson v. Phillips Beverage Co., 137 F.R.D. 264, 267 (D. Minn. 1991) (noting, in case decided prior to development of two-step certification process, that at notice phase plaintiffs need only submit "evidence establishing at least a colorable basis for their claim that a class of 'similarly situated' plaintiffs exist").

152. Genesis Healthcare Corp. v. Symczyk, 133 S. Ct. 1523, 1532 (2013).

153. *Id.* at 1530.

1.The Numerosity Requirement

The numerosity requirement serves purposes that are inconsistent with those of Section 216(b). The numerosity requirement exists because the power of class actions to bind absent class members carries due process risks and should be invoked only when is necessary. Hence, class actions are not permitted when joinder could be used instead.[154] The default rule is that forty class members is sufficient.[155] The numerosity requirement also prevents unnecessary use of the "often costly class machinery."[156]

Due to its opt-in requirement, Section 216(b) does not present the risk of binding absent class members, eliminating the primary justification for requiring numerosity under Rule 23. There is good reason to allow similarly situated class members to join together to bring their claims, even if there are few of them: they can pool resources; there are efficiency gains even when the number of opt-in plaintiffs is small; there are lower barriers to asserting employment rights if an employee can simply opt in rather than being joined as a traditional plaintiff; and the fear of retaliation may be lessened if plaintiffs asserting wage violations against their employers can band together as opt-in plaintiffs rather than named individual plaintiffs. In addition, if the number of potential opt-in plaintiffs is small, the cost of sending Step One notice will be small. Thus, imposing a numerosity requirement would serve only to prevent potentially meritorious group claims from proceeding.

2. The Commonality Requirement

The commonality requirement serves to protect absent class members but shares the manageability goals of Section 216(b) Step Two analysis. The Rule 23(a)(2) requirement that there be questions of law or fact common to the class bears a resemblance to the Section 216(b) requirement that employees be similarly situated. In particular, it overlaps with the first of the three Step Two factors: whether the employees present disparate factual and employment settings. The commonality requirement is motivated in part by the need to ensure that the rights of absent class members will be effectively represented by the representative plaintiffs,[157] but it also serves a manageability concern. If there is a "common contention . . . that is capable of classwide resolution," then there is

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154. FED. R. CIV. P. 23(a)(1).

155. *See, e.g.*, Rannis v. Recchia, 380 F. App'x 646, 651 (9th Cir. 2010) (noting that the general rule is forty and that Supreme Court has said fifteen is too few, but making an exception and permitting a class of twenty to proceed).

156. FRIEDENTHAL, KANE, & MILLER, *supra* note 8, at 712–15 (2015).

157. Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2550 (2011) ("Rule 23(a) ensures that the named plaintiffs are appropriate representatives of the class whose claims they wish to litigate."); Amchem Products, Inc. v. Windsor, 521 U.S. 591, 626 n.20 (1997) (noting that two goals of Rule 23(a) are to ensure that maintenance of class action is "economical" and to ensure that the named plaintiff's claims are "so interrelated" with those of the class that the class's interests will be represented and protected).

"cause to believe that all of [the class members'] claims can *productively* be litigated at once."[158] The former rationale carries little weight in an opt-in case, but the latter is very close to the analysis in which courts engage in Step Two FLSA analysis: will it be productive to litigate all of the opt-in plaintiffs' claims at once, or will the court need to engage in individualized inquiries; if the latter, will that be feasible? As such, the commonality requirement is worth considering in more depth, as will be done below.[159]

3. The Typicality and Adequacy Requirements Serve Purposes That Are Not Necessary in Opt-In Cases

The typicality requirement is geared toward protecting absent class members: a named class plaintiff can be expected to press absent class members' "claims or defenses" vigorously only if he or she possesses the same claims or defenses as the rest of the class.[160] This concern is lessened in the context of Section 216(b) opt-in actions, in which a plaintiff is free not to opt in if he or she feels that his or her claims are not similar to those of the named plaintiff. The requirement also reflects the goal of economy: if the class representative's claims are not typical of those of other class members, the efficiency goals of proceeding on a class basis may not be served. In an opt-in action, however, even if not all plaintiffs possess the same claims and defenses, it may be feasible to litigate their claims together.[161] Thus, while the typicality requirement overlaps to some extent with the "similarly situated" requirement, adopting a bright line typicality requirement could unnecessarily prevent some viable collective actions from going forward.

The adequacy requirement seeks to ensure that the named plaintiffs and their chosen counsel will adequately protect absent class members.[162] As such, it requires courts to ensure that the class representatives do not possess conflicts of interest with the class and that they possess the motivation, legal expertise, and resources to prosecute the class's claims effectively.[163] Because opt-in plaintiffs are necessarily aware of the existence of the case, having affirmatively chosen to join it, they have had an opportunity to investigate whether the class

158. *Dukes*, 131 S. Ct. at 2551 (emphasis added); *Amchem*, 521 U.S. at 626 n.20.

159. *See infra* Part IV.A.5.

160. FED. R. CIV. P. 23 (a)(3).

161. *See, e.g.*, O'Brien v. Ed. Donnelly Enters. Inc., 575 F.3d 567, 584 (6th Cir. 2009) ("Both the district court and the defendant note that to determine whether a particular violation of the FLSA took place in this case requires an individualized analysis that examines the facts of each alleged violation. For this reason, the district court decertified, determining that individualized issues predominated. But such a collection of individualized analyses is required of the district court" under the less stringent "similarly situated" requirement of Rule 216(b).).

162. *See, e.g.*, Hanlon v. Chrysler Corp., 150 F.3d 1011, 1020 (9th Cir. 1998) (The adequacy requirement exists because "[t]o satisfy constitutional due process concerns, absent class members must be afforded adequate representation before entry of a judgment which binds them.").

163. *Id.* ("Resolution of two questions determines legal adequacy: (1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?").

representatives are adequate,[164] so the critical need to protect absent class members in a Rule 23 action does not exist in FLSA cases. In addition, because opt-in plaintiffs are parties to the action, they have the option of speaking out if they determine that their class representatives are not representing them adequately. Thus, this requirement would also be an unjustified hurdle in the FLSA context.

4. The Predominance and Superiority Requirements Are Geared Primarily Toward Efficiency and Manageability, Goals Shared by FLSA Step Two

As noted above, the predominance requirement is a stricter form of the commonality requirement: not only must there be a common question, but the common question(s) must predominate over individualized questions.[165] Again, the requirement can be viewed as serving the two goals of efficiency and protection of absent class members. The efficiency point comes to the fore, given that Rule 23(a), which has already been satisfied by the time Rule 23(b) is considered, focuses on concerns about due process. However, it is difficult to imagine how a single representative or counsel could adequately represent absent class members effectively if his or her own individualized circumstances were to "predominate" over issues common to the class. The predominance requirement appears to align fairly closely with analysis appearing in many Step Two decisions. Predominance, to some extent, overlaps with all three of the Step Two factors—(a) disparate factual and employment settings, (b) potential defenses and (c) fairness and procedural considerations—and therefore is worth considering in more depth.[166]

The superiority requirement asks whether "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy."[167] Aside from the efficiency goal, the requirement also asks courts to consider "the interest of members of the class in individually controlling the prosecution or defense of separate actions"[168]—what the Supreme Court has referred to as "the competing tug[] of individual autonomy for those who might prefer to go it alone or in a smaller unit."[169] This is a particular concern when each individual's potential recovery is large.[170] Such a concern does not exist, of course, in an opt-in action, where there is no risk of requiring an employee to be part of a class

164. In practice, opt-in plaintiffs may or may not actually inquire into the adequacy of the representative plaintiffs and their counsel, but, unlike absent class members, they have the ability and right to do so.

165. *Amchem Prods., Inc.*, 521 U.S. at 609; see also Amgen, Inc. v. Conn. Ret. Plans & Tr. Funds, 133 S. Ct. 1184, 1196 (2013) (noting that concern of predominance requirement is that individualized questions not predominate over, or overwhelm, questions common to the class).

166. *See infra* Parts IV.A.5, IV.B-C.

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

168. FED. R. CIV. P. 23 (b)(3)(A).

169. *Amchem Prods., Inc.*, 117 S. Ct. at 2246–47.

170. *Id.* at 2247.

when he would prefer to proceed individually because such an employee would simply choose to file his own case rather than opting in to a collective action.

5. Requirement-by-Requirement Consideration of Rule 23 Demonstrates That the Relevant Comparison Is Predominance on the One Hand and FLSA Step Two on the Other

Those factors that are geared primarily toward protecting absent class members—typicality and adequacy—serve less purpose in Section 216(b) cases. The commonality, predominance, and superiority prongs, on the other hand, overlap to a large degree with the Step Two concerns. To the extent that those requirements are geared toward ensuring that absent class members have adequate representation, or considering whether individual plaintiffs would be better off having the right to proceed on their own, they serve less purpose in opt-in cases. To the extent they seek to ensure that numerous claims can be resolved efficiently and fairly in a single proceeding, they are similar to the factors courts consider in FLSA Step Two decisions. Thus, when courts express the broad view that the two standards are similar—as in Judge Posner's assertion that "there isn't a good reason to have different standards for the certification of the two different types of action"—this claim should be viewed as referring only to some combination of the commonality, predominance, and superiority requirements. Because the commonality requirement is subsumed in the predominance requirement, and because the efficiency concerns of the superiority requirement are reflected in the predominance requirement, one can simplify the contention as being that the Rule 23 predominance standard and the Section 216(b) Step Two standard are the same.

This raises a number of questions to which we turn next: from a positive perspective, have courts viewed the standards as different, and if so, when, and what is the difference? What do courts mean when they say that the Rule 23 predominance requirement is "more stringent" than the Step Two similarly-situated analysis? If the Step Two standard is lower, then are there cases in which certification of a wage claim has passed muster under FLSA Step Two analysis but not under Rule 23 analysis? And from a normative perspective, should there be a difference, or is Judge Posner correct that "there isn't a good reason to have different standards" for the two?

B. Courts Preserve the Distinction Between the Step Two Standard and the Predominance Requirement

Espenscheid is something of a novelty in suggesting that courts need not even evaluate the Rule 23 factors and the Step Two FLSA factors separately.[171]

171. Some district courts, however, have followed suit. *See, e.g.*, Johnson v. Wave Comm. GR LLC, 4 F. Supp. 3d 453, 458 (N.D.N.Y. 2014) (stating that both standards are the same at Step Two,

The vast majority of district courts considering hybrid claims under Rule 23 and FLSA Step Two certification have separately reviewed the Rule 23 requirements and the three Step Two factors, applying the respective governing precedents.[172] Some courts have observed that, as a general matter, the Section 216(b) and Rule 23 standards are simply separate inquiries, and the fact that one is met does not determine whether the other is met.[173] Others have observed that, given similarities between the two tests, "it is not mere coincidence that courts facing parallel motions to decertify an FLSA collective action under Section 216(b) and to certify a class action under Rule 23 have tended to allow either both actions or neither to proceed on a collective basis."[174] Still others have concluded that if a proposed class meets the Rule 23 standard for class certification, it "necessarily meets the much lower bar for FLSA collective action certification."[175]

The Sixth Circuit in *O'Brien v. Ed Donnelly Enterprises, Inc.* opined that the Rule 23(b)(3) standard is "a more stringent standard" than the Step Two standard.[176] That case, like *Espenscheid*, was an off-the-clock case in which workers alleged that their manager required them to perform uncompensated work on either end of their official shifts. Unlike *Espenscheid*, however, it involved a very small number of opt-in plaintiffs.[177] In reversing the district court's decertification decision, the court observed:

> Both the district court and the defendant note that to determine whether a particular violation of the FLSA took place in this case requires an individualized analysis that examines the facts of each alleged violation. For this reason, the district court decertified, determining that individualized issues predominated. But such a collection of individualized analyses is required of the district court.[178]

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citing *Espenscheid*, applying only the Step Two three-factor analysis, and concluding that certification was proper under both Rule 23 and the FLSA).

172. *See* Indergit v. Rite Aid Corp., 293 F.R.D. 632, 651 (S.D.N.Y. 2013); Hill v. R+L Carriers, Inc., No. C 09-1907 CW, 2011 WL 830546, at *6 (N.D. Cal. Mar. 3, 2011); Harris v. Vector Marketing Corp., 753 F. Supp. 2d 996, 1017 (N.D. Cal. 2010).

173. *See, e.g.*, Lillehagen v. Alorica, Inc., No. SACV 13-0092-DOC, 2014 WL 2009031, at *6 (C.D. Cal. May 15, 2014) ("Courts have mostly held that Section 216(b) collective actions are not subject to Rule 23 class certification requirements, rather, the requirements for Section 216(b) collective action certification are independent of, and unrelated to, the requirements for Rule 23 class certification."); Norris-Wilson v. Delta-T Grp., Inc., No. 09CV0916-LAB (RBB), 2010 WL 2196066, at *4 (S.D. Cal. June 1, 2010) ("[T]he modest point that class certification under the FLSA and Rule 23 will often come out the same way . . . doesn't mean, at all, that one analysis binds or controls the other."); *Indergit*, 293 F.R.D. at 651 (describing the two as "disparate legal standards").

174. *See* Ruiz v. Citibank, N.A., 93 F.3d 279, 298 (S.D.N.Y. 2015); Gardner v. W. Beef Props., Inc., 2013 WL 1629299, at *6 n.3 (collecting cases).

175. Lukas v. Advocate Health Care Network & Subsidiaries, No. 1:14-CV-2740, 2015 WL 5006019, at *8 (N.D. Ill. Aug. 19, 2015).

176. O'Brien v. Ed Donnelly Enter., 575 F.3d 567, 584–85 (6th Cir. 2009).

177. *Id.* at 573.

178. *Id.* at 584.

The court later noted:

> Granted, it is clear that plaintiffs are similarly situated when they suffer from a single, FLSA-violating policy, and when proof of that policy or of conduct in conformity with that policy proves a violation as to all the plaintiffs. In the instant case, *proof of a violation as to one particular plaintiff does not prove that the defendant violated any other plaintiff's rights under the FLSA. Nevertheless, the plaintiffs are "similarly situated" according to § 216(b)*.[179]

However, the court went on to affirm the decertification on other grounds.[180]

Following *O'Brien*, some courts addressing cases with a small number of opt-ins have simply proceeded to evaluate each opt-in plaintiff's individualized facts.[181] One district court attempted to harmonize the differing views of *O'Brien* and *Espenscheid* as follows: "The similarly situated analysis can be viewed, in some respects, as a sliding scale. The more opt-ins there are in the class, the more the analysis under § 216(b) will mirror the analysis under Rule 23."[182] Cases with fewer opt-ins could potentially be brought under Rule 20's joinder mechanism, but such an approach would not afford the employees certain benefits that come with proceeding under Section 216(b).[183] In addition, one court of appeals opined in the early days of the two-step analysis that "the 'similarly situated' requirement of [FLSA] § 216(b) is more elastic and less stringent than the requirements found in Rule 20 (joinder)."[184]

A line of district court cases in the Second Circuit has passed down, over the years, a quotation stating that the Step Two analysis is "considerably less stringent than the" Rule 23 predominance requirement,[185] but the origin of the

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179. *Id.* at 585 (emphasis added).

180. *Id.* at 583.

181. *See, e.g.*, Bassett v. Tennessee Valley Auth., No. 5:09-CV-00039, 2013 WL 665068, at *3 (W.D. Ky. Feb. 22, 2013); Hathaway v. Masronry, No. 5:11-CV-121, 2013 WL 1878897, at *3 (W.D. Ky. May 3, 2013); *see also* Pefanis v. Westway Diner, Inc., No. 08 CIV 002 DLC, 2010 WL 3564426, at *4 (S.D.N.Y. Sept. 7, 2010).

182. Gardner v. W. Beef Props., Inc., No. 07–CV–2345, 2013 WL 1629299, at *6 (E.D.N.Y. Mar. 25, 2013).

183. For example: the transaction costs for joining as an opt-in plaintiff are lower (simply filing a consent-to-join form); the Rule 20 requirement of appearing as a named plaintiff on the pleadings could have a deterrent effect on employees who are afraid to step into the spotlight; opt-in plaintiffs may sign simplified representation agreements; and such plaintiffs are often subject to less discovery than named plaintiffs. In addition, the availability of class representative enhancement payments provides an efficient system for designating a small number of plaintiffs to take on burdens to benefit the group and to receive an additional payment for that service.

184. Grayson v. K Mart Corp., 79 F.3d 1086, 1095 (11th Cir. 1996). A number of district courts have followed that approach. *See id.*; Adkins v. Illinois Bell Tel. Co., No. 14 C 1456, 2015 WL 1508496, at *5 (N.D. Ill. Mar. 24, 2015) (citing cases).

185. *See* McGlone v. Contract Callers, Inc., 49 F. Supp. 3d 364, 367 (S.D.N.Y. 2014); Perkins v. S. New England Tel. Co., 669 F. Supp. 2d 212, 218 (D. Conn. 2009); Ayers v. SGS Control Servs., Inc.,

quotation is a case predating *Hoffman La-Roche* that was decided before the modern two-step certification test had developed.[186] Moreover, although this quotation has been recited many times, one court has observed that "[n]one of these decisions actually addresses the ramifications of this distinction between §216(b) and Rule 23 because, in each of these cases, the court either ultimately concluded that common questions did, in fact, predominate over individual issues, or . . . allowed both types of actions to proceed for the same reasons."[187] And, indeed, this is by far the most common result: courts assessing the predominance requirement and the Step Two requirement in the same case almost always reach the same conclusion about whether proceeding collectively is appropriate.

One way of attempting to isolate the difference between the two standards is to look at examples of hybrid cases in which courts have held that a particular FLSA wage claim satisfies the Section 216(b) Step Two standard even though its state law equivalent fails the Rule 23 predominance requirement. These cases should provide a clear illustration of what, exactly, it means to say that the Step Two standard is "less stringent" than the Rule 23 standard. Such examples are few to date, but they exist.[188]

In *Morrison v. Ocean State Jobbers, Inc.*, a district judge in Connecticut addressed competing motions for class certification and FLSA decertification in a case alleging that assistant store managers had been misclassified as exempt under the FLSA, Connecticut law, and Massachusetts law.[189] The court granted class certification to the Connecticut class, but denied it to the Massachusetts class, holding that differences in testimony among assistant store managers in Massachusetts prevented Plaintiffs from satisfying the predominance requirement.[190] The court then turned to the Step Two decertification motion, and even though the twenty-seven opt-in plaintiffs were from seven different states, including Massachusetts,[191] the court denied decertification. The court concluded that, although there were variations among the actual job duties of the opt-in plaintiffs, they were all subject to a single exemption determination; each was covered by the same job description; and, for purposes of the lower Section 216(b) standard, their differences did not "outweigh the similarities in the

No. 03 Civ. 9077, 2007 WL 646326, at *4 (S.D.N.Y. Feb. 27, 2007); Rodolico v. Unisys Corp., 199 F.R.D. 468, 481 (E.D.N.Y. 2001).

186. *See* Heagney v. European Am. Bank, 122 F.R.D. 125, 127 n.2 (E.D.N.Y. 1988).

187. *See* Gardner v. W. Beef Props., Inc., No. 07-CV-2345 (AWG), 2013 WL 1629299, at *5 n.3 (E.D.N.Y. Mar. 25, 2013). *But see* Morrison v. Ocean State Jobbers, Inc., 290 F.R.D. 347, 353–60 (D. Conn. 2013) (relying on quoted language to reach different outcomes under the Rule 23 and the Step Two analysis, as discussed *infra* Part IV.B).

188. *See, e.g.*, *Morrison*, 290 F.R.D. 347; Evans v. Lowe's Home Ctrs., Inc., No. 3:CV-03-0438, 2006 WL 1371073 (M.D. Pa. May 18, 2006).

189. *Morrison*, 290 F.R.D. at 349–50.

190. *Id.* at 353–60.

191. See Morrison v. Ocean State Jobbers, Inc., 3:09-CV-1285 (AWT), Defendant's Memorandum of Law in Support of Motion to Decertify FLSA Collective Action, 2011 WL 10923780 (D. Conn. Aug. 9, 2011).

practices to which they claim to have been subjected."[192] Although it did not say as much, the court may have been swayed by the relatively small size of the opt-in class. The court also opined that while it was permissible to take a careful look at the merits for purposes of Rule 23 (citing *Wal-Mart v. Dukes*), it was not permissible to consider the merits under Section 216(b).[193]

In *Evans v. Lowe's Home Centers, Inc.*, a district judge in Pennsylvania denied a Step Two motion to decertify a collective action in a case involving the fluctuating workweek.[194] There, plaintiffs had opted in from thirty-six stores in Pennsylvania. The employer argued that each store would have to be evaluated individually to assess the merits of the plaintiffs' claim; the court reasoned:

> Finding out the method utilized by Defendant's thirty-six Pennsylvania stores, however, does not provide such an undue hardship as to bar certification of Plaintiff's FLSA[] claim. I agree that the objective of FLSA's section 216(b) of lowering cost and limiting the controversy to one proceeding to efficiently resolve the common issues of law and fact will be met by certifying the FLSA plaintiffs.[195]

The court went on to find that although Step Two certification was proper, the same claim failed the Rule 23 predominance standard, precluding class certification.[196] The reasoning rested, however, on the court's view that evaluating the fluctuating workweek doctrine under state law would require an individual-by-individual inquiry, while doing so under the FLSA would require only a store-by-store inquiry—a more manageable task. Thus, the case is not a pure comparison of the two procedural mechanisms because, as will often be the case, the substantive legal tests under state and federal law differed.[197]

Finally, in *Davenport v. Charter Communications, LLC*,[198] the court denied Rule 23 class certification in an off-the-clock case on predominance grounds, holding that individualized evidence would be necessary to assess whether class members had been pressured by Defendant's policies to work off the clock, and that this did not satisfy the "demanding" Rule 23 predominance standard.[199] The

192. *Morrison*, 290 F.R.D. at 361.

193. *Id.* at 361 n.9. In *Dukes*, the Supreme Court explained that class certification decisions may require courts to look ahead at the merits of the claims at stake. Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551–52 (2011). There, the Court reversed a grant of class certification for a class of 1.5 million employees alleging Title VII sex discrimination, holding that the plaintiffs' showing on commonality was insufficient because there was no common question that could be resolved in a single stroke to advance the resolution of the merits of the class's claims. *Id*. at 2552.

194. *Evans,* No. 3:CV-03-0438, 2006 WL 1371073, at *9.

195. *Id.* at *5.

196. *Id.* at *8–9.

197. *Id.* at *9.

198. Davenport v. Charter Commc'ns, LLC, No. 4:12CV00007 AGF, 2015 WL 164001, at *5 (E.D. Mo. Jan. 13, 2015).

199. *Id.* at *2.

defendant then moved to decertify the plaintiffs' similar conditionally certified FLSA class, arguing that "the Court's denial of class certification of Plaintiffs' Missouri claims under Rule 23(b)(3) effectively precludes Plaintiffs from proceeding collectively on their FLSA claim under 29 U.S.C. § 216(b)."[200] The Court rejected the argument, concluding that "while there may be some analytical overlap, the Court's ruling on Plaintiffs' Rule 23 motions does not moot the FLSA certification issue."[201] To somewhat similar effect, numerous courts have denied Rule 23 class certification motions while at the same time granting Section 216(b) Step One motions, suggesting that they did not view the denial of Rule 23 certification as fatal to eventual FLSA Step Two certification.[202]

Thus, while the majority of courts in hybrid cases recognize the two tests as separate and independent and run through the analysis of each test independently, they nearly always reach the same conclusion on the Rule 23 predominance prong as on the Step Two test. The Seventh Circuit has held that the two tests are indistinguishable, while the Sixth Circuit has held the Step Two test to be less stringent, instructing district courts that the need to engage in individualized inquiries does not necessarily prevent plaintiffs from satisfying the "similarly situated" prong. Only a handful of courts have actually come out different ways when applying the two tests to the same set of facts, seemingly doing so on the view that undertaking individualized inquiries on the FLSA claim, to the extent it is necessary at trial, will be feasible.

C. The Importance of Preserving the Distinction Between the Step Two Standard and the Rule 23 Predominance Standard

It is preferable for courts to continue to apply each test independently and, to the extent possible, grant FLSA Step Two certification when feasible, even when Rule 23 predominance is not satisfied. This is consistent with the separate origins and histories of the two regimes, the express language of Section 216(b), the Advisory Committee Note to the 1966 Amendment to Rule 23, the weight of the case law, the remedial nature of the FLSA (and the ADEA), and the benefits accruing to employees from being able to press their wage claims collectively. It is reinforced by the notion that the FLSA, by virtue of its opt-in requirement, is already less effective at enforcing the wage laws than state laws brought under Rule 23—a scenario that Congress never contemplated. But while it is easy enough to say, in the abstract, that the Step Two test should be less demanding, it

200. *Id.* at *5.

201. *Id.*; *see also* Sherman v. Am. Eagle Express, Inc., No. 09-575, 2012 WL 748400, at *12 n.10 (E.D. Pa. Mar. 8, 2012) (denying class certification, but noting that the decision has no bearing on future decertification of FLSA claim based on the same misclassification theory, because "[a]lthough the law in this Circuit is unclear on how Federal Rule of Civil Procedure 23 compares to the requirements for collective certification found in 29 U.S.C. § 216(b)—requiring the collective action group to be 'similarly situated'—the two standards are not identical").

202. *E.g.*, Bobryk v. Durand Glass Mfg. Co., 50 F. Supp. 3d 637, 642 (D.N.J. 2014); Guan Ming Lin v. Benihana Nat'l Corp., 275 F.R.D. 165, 174, 177 (S.D.N.Y. 2011); Rudd v. T.L. Cannon Corp., No. 3:10-CV-0591 (TJM/DEP), 2011 WL 831446, at *1 (N.D.N.Y. Jan. 4, 2011).

is more difficult to identify specific scenarios in which this difference in standards means the difference between granting or denying certification.

One simple example that courts have already identified is the case of the relatively small opt-in class. Even if individualized issues predominate in a class of only forty employees, or if those employees are divided among different work locations that all need to be evaluated separately, courts should still permit the case to proceed on a collective basis whenever they can determine a workable method of doing so. In the example of the off-the-clock janitor case described in the Introduction, differences in policy at several locations might result in a denial of Rule 23 class certification, but a court might nonetheless conclude that the FLSA claims can be tried using evidence from several or all of the different locations. This accords with the goal of allowing employees to challenge wage violations collectively.

A more complicated question, and one that courts have not yet grappled with, is whether there are ways in which the normal rules that apply in civil litigation should be altered in cases where litigants seek to recover unpaid wages. For example, an early Supreme Court case interpreting the FLSA, *Anderson v. Mount Clemens Pottery*,[203] announced the following rule, which has become a cornerstone of FLSA litigation: employees are not required to demonstrate the amount of their wage losses with exactitude if the employer has not kept records that would allow such a demonstration; rather, in such a situation, employees need only show that they have been undercompensated and must provide a "reasonable inference" about the amount of their damages, at which point the burden shifts to the employer to demonstrate that the wages owed are lower.[204] In *Anderson*, the Sixth Circuit had held that the employees bore a burden of proving their damages with evidence of the actual amount of their underpayment rather than with an "estimated average of overtime worked."[205] The Supreme Court reversed, describing the lower court's ruling as "impos[ing] upon the employees an improper standard of proof, a standard that has the practical effect of impairing many of the benefits of the Fair Labor Standards Act."[206] The Supreme Court held that when an employer has kept inaccurate or inadequate records, the solution is "not to penalize the employee by denying him any recovery," as such a rule would "allow the employer to keep the benefits of an employee's labor without paying due compensation."[207] Thus, the Court implemented a uniquely lessened burden for FLSA plaintiffs in order to ensure that violations could effectively be remedied on a collective basis.[208]

The Supreme Court's use of the phrase "improper standard of proof," although somewhat confusing—the standard of proof presumably remains that

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203. Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680 (1946).

204. *Id.* at 687–88.

205. *Id.* at 686.

206. *Id.* at 686–87.

207. *Id.* at 687.

208. Note that some states have followed *Mt. Clemens* and adopted the same rule for enforcement of their wage laws. *See, e.g.*, Hernandez v. Mendoza, 199 Cal. App. 3d 721, 726 (1988).

the plaintiffs must prove the elements of their case by a preponderance of the evidence—is nonetheless an example of a special departure from the normal presumptions of civil litigation in the context of wage law violations. A similar departure may be appropriate in the context of determining when proof of FLSA liability can be established on a collective basis. For example, when a large group of employees shows that an employer has been requiring many of them to work off the clock, as in *Espenscheid*, should a court be more willing to allow them to establish a classwide wage violation under the FLSA than under Rule 23? Should it tolerate a greater margin of error? Should it be more willing to allow the group to recover a rough approximation of the compensation owed, notwithstanding the risk that some plaintiffs will be overcompensated as a result? Courts may begin to find ways that the remedial purpose of the FLSA causes an increasing departure between the Rule 23 predominance prong and the "less stringent" FLSA Step Two standard.

On the other hand, the risk of allowing the Rule 23 standard to bleed into the FLSA Step Two standard is that courts will erect hurdles to the recovery of wages in an opt-in case when such hurdles are justified only in a Rule 23 opt-out case. This would interfere with the enforcement of the wage laws. For example, some courts have relied on *Espenscheid* to import major Rule 23 decisions, such as *Wal-Mart v. Dukes*,[209] into the Step Two analysis.[210] As we have seen, the commonality requirement is, in part, driven by the need to protect absent class members in an opt-out scenario—a need that does not exist in FLSA cases. In addition, Rule 23 imposes a mandatory requirement on district courts that they not permit class certification unless the plaintiff proves that every requirement in the Rule has been satisfied,[211] whereas courts applying the Step Two analysis have more flexibility and need only find that "based on the totality of evidence" the employees "are similarly situated."[212]

By many accounts, despite an increase in wage and hour litigation, wage law violations remain a widespread problem, disproportionately harming low-wage workers.[213] The existence of the opt-in requirement of Section 216(b) also

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

210. *See, e.g.*, Blakes v. Illinois Bell Tel. Co., No. 11 CV 336, 2013 WL 6662831, at *13 (N.D. Ill. Dec. 17, 2013); MacGregor v. Farmers Ins. Exchange, No. 2:10–CV–03088, 2011 WL 2981466, at *14–15 (D.S.C. July 22, 2011). Most courts, however, have concluded that this is improper. *See, e.g.,* Lillehagen v. Alorica, Inc., No. SACV 13-0092-DOC, 2014 WL 2009031, at *6 (C.D. Cal. May 15, 2014) (citing Jasper v. C.R. England, Inc., No. 08–05266 (C.D. Cal. June 30, 2011)); Spellman v. Am. Eagle Express, No. 10–1764, 2011 WL 4014351 (E.D. Pa. July 21, 2011); Butcher v. United Airlines, Inc., No. 09–11681 (D. Mass. July 22, 2011); Sliger v. Prospect Mortg., LLC, 789 F. Supp. 2d 1212 (E.D. Cal. 2011).

211. *See, e.g.*, Prescott v. Prudential Ins. Co., 729 F. Supp. 2d 357, 365 n.8 (D. Me. 2010) ("The Circuit Courts have not held that certification of an FLSA collective action requires" factual findings that every prong is satisfied by a predominance, as they have for Rule 23 certification.).

212. Davenport v. Charter Commc'ns, LLC, No. 4:12CV00007 AGF, 2015 WL 164001, at *6 (E.D. Mo. Jan. 13, 2015).

213. *See, e.g.*, News Release, Dep't of Labor, Wage & Hour Division, *US Labor Department's Wage and Hour Division Launches Enforcement and Education Initiative Focused on Los Angeles area Restaurants* (Apr. 8, 2012) (on file with author) (reporting that over 70% of restaurants investigated in Los Angeles violated wage and hour laws, often by requiring off-the-clock work); Bradley Meixell and

disproportionately affects low-wage workers, largely because the consequences of retaliation for affirmatively joining a litigation effort against one's employer are more severe for such workers.[214] When considering how to apply the FLSA, courts should acknowledge the procedural barriers to enforcement created by the opt-in requirement and should apply Section 216(b) as broadly as feasible to ensure that the statute is actually enforced. Enforcement of the FLSA by the Department of Labor is not remotely adequate to cover the American economy, making private enforcement through collective actions essential to incentivize compliance with the wage laws. The preferable course to ensure that courts have the flexibility to enforce the FLSA to the greatest possible extent is to continue to distinguish the requirements for collective action under Section 216(b) from the restrictions of Rule 23. Conflating the two standards would eliminate that flexibility. Although it is hard to identify the full potential divergence between the two standards, courts should retain the freedom to identify cases in which the FLSA permits enforcement when Rule 23's predominance requirement does not.

D. Tyson v. Bouaphakeo*: The Supreme Court Should Preserve the Distinction Between Rule 23 and the Step Two Standard in the Context of Representative Proof*

The pending *Bouaphakeo* case brings these issues before the Supreme Court. In *Bouaphakeo*, a hybrid Rule 23 (Iowa wage laws) and FLSA collective action case, the plaintiffs were employees at a Tyson meat-processing plant.[215] They alleged that they were not compensated for off-the-clock work consisting of donning and doffing clothing and protective equipment. For a portion of the time in question, the employer paid its employees for four minutes of donning and doffing time regardless of how long it actually took to put on and take off the protective equipment. (Employees alleged that it took significantly longer.) The case proceeded to a nine-day trial at which the "plaintiffs proved liability and damages by using individual time sheets, along with average donning, doffing, and walking times calculated from 744 employees' observations."[216] The jury

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Ross Eisenbrey, *An Epidemic of Wage Theft is Costing Workers Hundreds of Millions of Dollars a Year* (Economic Policy Institute Issue Brief No. 385 Sep. 11, 2014), http://www.epi.org/publication/epidemic-wage-theft-costing-workers-hundreds/ (citing survey evidence that wage theft is widespread, describing the disproportionately harmful effect of wage violations on the lowest level earners); Annette Bernhardt et al., *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities* (2009), http://www.unprotectedworkers.org/index.php/broken_laws/index (describing study of workers in low-wage industries in New York, Chicago, and Los Angeles, and finding that in any given week, two-thirds experienced at least one pay-related violation).

214. *See, e.g.*, Andrew C. Brundsen, *Hybrid Class Actions, Dual Certification, and Wage Law Enforcement in the Federal Courts*, 29 BERKELEY J. EMP. & LAB. L., 269, 291–97 (2008) (describing empirical data on opt-in rates and noting that rates are particularly low among low-wage workers because, among other reasons, fear of reprisal is high, transaction costs to obtaining legal representation are higher, and job turnover and frequent relocations make it difficult for opt-in notices to reach low-wage workers).

215. *See* Bouaphakeo v. Tyson Foods, Inc., 765 F.3d 791, 794 (8th Cir. 2014).

216. *Id.* at 796.

returned a verdict of just under $3 million, which, with liquidated damages, resulted in a judgment of about $5.8 million.[217]

On appeal, Tyson challenged the district court's certification of a collective action under Section 216(b) and Rule 23, arguing that factual differences concerning the equipment that class members used, the varying routines of employees, and differences in management among departments made class certification improper.[218] Tyson also argued that the evidence at trial showed that some class members had not worked overtime, such that liability could not be determined on a classwide basis.[219] The Eighth Circuit affirmed. Without distinguishing between the plaintiffs' Rule 23 claims and their FLSA claims, the Court discussed both *Mt. Clemens* (FLSA) and *Wal-Mart v. Dukes* (Rule 23) in concluding that the representative evidence put on by the plaintiffs was sufficient to support a reasonable inference by the jury that classwide liability had been established.[220]

The Supreme Court granted *certiorari* on June 8, 2015.[221] Tyson's two questions presented are:

> 1. Whether differences among individual class members may be ignored and a class action certified under Federal Rule of Civil Procedure 23(b)(3), or a collective action certified under the Fair Labor Standards Act, where liability and damages will be determined with statistical techniques that presume all class members are identical to the average observed in a sample.
>
> 2. Whether a class action may be certified or maintained under Rule 23(b)(3), or a collective action certified or maintained under the Fair Labor Standards Act, when the class contains hundreds of members who were not injured and have no legal right to any damages.[222]

As is apparent from the face of the questions presented, Tyson presumes that there is no difference between the certification analysis under Rule 23 and Section 216(b) when it comes to the use of representative proof at trial and when it comes to the possibility that some class members have not, in fact, been injured.

For the most part, this presumption seems unjustified. Were the Supreme Court to hold that, as a matter of constitutional due process, an employer cannot

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217. *Id.*

218. *Id.* at 797.

219. *Id.*

220. *Id.* at 799–800.

221. Tyson Foods, Inc. v. Bouaphakeo, 593 Fed. App'x. 578 (8th Cir. 2014), *cert. granted*, 83 USLW 3888 (U.S. June 8, 2015) (No. 14-1146).

222. Brief for Petitioner at *i, Tyson Foods, Inc. v. Bouaphakeo, 135 S. Ct. 2806 (2015) (No. 14-1146).

be liable for overtime violations on a classwide basis unless the plaintiffs prove that every single class member worked uncompensated overtime, such a holding would have a similar impact on both Rule 23 and collective actions. That is, it would greatly inhibit employees' ability to enforce their wage rights under either regime. Such a sweeping holding seems unlikely, as it would dramatically disrupt the longstanding approach to wage law enforcement. Consider, for example, a blatant case of misclassification of employees as exempt from the overtime requirements. Under Tyson's logic, even if it were established that the employer willfully violated the exemption laws and that the great majority of employees worked many hours of uncompensated overtime under mandatory instructions by the employer, the presence of a single employee who worked for only 40 hours per week would prevent a classwide recovery due to the asserted "due process" rights of the employer.

What seems more likely is that the Supreme Court will weigh in on the nature of representative proof used to establish the plaintiffs' claims in that case and whether the evidence was sufficient for the jury to conclude that the employer was liable on a classwide basis for violating the FLSA and the Iowa wage provisions. If the Supreme Court accepts Tyson's view of the questions presented, it will presume that the answer is necessarily the same as to both the FLSA and Rule 23 claims. This would be a mistake. The two regimes are separate, and it is quite possible that the FLSA allows for a lower showing of certainty that every class member has been harmed, a lesser degree of precision about the extent of each class member's damages, and greater leeway for plaintiffs to prove that unlawful wage practices were subjected on broad groups of employees. Whether the Supreme Court concludes that the evidence in *Bouaphakeo* was sufficient or not to support a finding of liability for the Rule 23 class under Iowa law, and whether it concludes that the evidence was sufficient or not to support a finding of liability under the FLSA, the Court should recognize that the answers will not necessarily be the same in every case. Such a ruling would allow lower courts the flexibility in the future to continue developing a body of Section 216(b) case law to facilitate effective enforcement of the wage laws, separate and apart from the development of Rule 23's predominance requirement.

CONCLUSION

To understand the current relationship between Rule 23 wage claims and FLSA collective action claims, an understanding of the history of the two devices is necessary. Despite the long history of the FLSA, it is only in the last twenty years that the modern approach to certification of "similarly situated" employees has been developed and refined by courts. As courts continue to wrestle with important questions about how to enforce the wage laws on the collective basis that Congress prescribed, the best path forward is to allow the Section 216(b) jurisprudence to continue to develop without tethering it to the restrictions of Rule 23.