ACTING ALONE: THE EROSION OF THE COLLECTIVE ACTION UNDER THE FAIR LABOR STANDARDS ACT

MELISSA GRIFFITH[†]

[†] J.D. Candidate, Wayne State University Law School, 2025; B.F.A. Iowa State University, 2011. I would like to thank Professor Michael Oswalt for his guidance and support.

I. INTRODUCTION

Imagine Jordan Smith opens their paycheck, expecting it to cover their monthly rent and bills, only to face the harsh reality that it will not. This is because Jordan's paycheck does not reflect the hours they actually worked in their job in the fast-food industry. Jordan has heard coworkers grumble about their employer shortchanging them recently—with paychecks reflecting fewer hours than they worked, and no earned overtime pay. Congress has deemed these unfair employment practices illegal and has provided Jordan and their coworkers a way to fight them: the Fair Labor Standards Act (the FLSA or the Act), and most potently, the collective action therein.[1]

A hard-fought battle between the three branches of the United States government created the FLSA.[2] In the early 20th century, the executive and legislative branches worked hard to establish laws imposing worker protections, and the Lochner Era judiciary knocked them all down as violating a now debunked 'implied constitutional freedom of contract.'[3] The executive and legislative branches emerged as the winners after the Great Depression rocked the nation. This Note examines the recent shifts that have created a circuit split in collective actions under the FLSA, questioning whether these shifts are swinging the judiciary back toward the widely denounced pre-FLSA mindset of the now vilified Lochner Court.[4] This Note argues that if the current Supreme Court takes the opportunity, it should not adopt this new shift which aims to unravel over 80 years of judicial precedent and legislative intent.[5]

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1. 29 U.S.C. § 216(b).

2. Samuel Bagenstos, Lochner *Lives On*, ECONOMIC POLICY INSTITUTE (Oct. 7, 2020), https://www.epi.org/unequalpower/publications/lochner-undermines-constitution-law-workplace-protections/#_ref17 [https://perma.cc/UXW7-QB2Z].

3. *See* Lochner v. New York, 198 U.S. 45 (1905) (striking down an act regulating the maximum working hours allowed for employees because it violates the Fourteenth Amendment right to contract freely under the Due Process Clause for both employers and employees.); Hammer v. Dagenhart, 247 U.S. 251 (1918) (striking down an act aimed at regulating products made utilizing child labor from entering interstate commerce); Adair v. United States, 208 U.S. 161 (1908) (ruling that a law that made it illegal for employers to condition employment on the basis of a person's abstention from participation in a labor union is unconstitutional).

4. *See* discussion *infra* Part II.E (discussing the circuit split); *infra* Part IV (discussing the policy repercussions and the Lochner connections).

5. *See* discussion *infra* Part IV (concluding that the Supreme Court should reject the *Clark* and *Swales* approaches).

II. BACKGROUND

The early 20th century was a tumultuous period in United States history that was rife with unsafe and unlivable working conditions.[6] Child labor, rampant discrimination, and truly hazardous work conditions left workers roaring for change.[7] And Congress responded. The FLSA was Congress's answer to this rising vocal demand for labor regulation.[8] The Act has grown and evolved to become the primary protection for the vast scope of basic employment rights workers enjoy today.

A. Lochner and the Need for Worker Protection

Congress passed the FLSA at the conclusion of, and in response to, an era where the Supreme Court prioritized freedom of contract over workers' health and safety.[9] Beginning in 1905 with *Lochner v. New York*, the era's namesake case, the Supreme Court began interpreting the U.S. Constitution through a laissez-faire economic lens.[10] During that time, the Court declared that worker protection laws were unconstitutional violations of the freedom to contract.[11] In *Lochner*, the Court held that a New York state worker protection law violated the Fourteenth Amendment of the U.S. Constitution—the law limited bakers' work hours to a maximum of 10 hours in a day or 60 hours in a week.[12] The Court declared that the freedom to contract for labor, for both workers and businesses, is a liberty guaranteed by the Fourteenth Amendment's Due Process Clause.[13]

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6. Graham Boone, *Labor Law Highlights, 1915–2015*, U.S. BUREAU OF LABOR STATISTICS, https://www.bls.gov/opub/mlr/2015/article/labor-law-highlights-1915-2015.htm#:~:text=Throughout%20the%20early%201900s%2C%20working,hazardous%20working%20conditions%20to%20persist [https://perma.cc/M54R-YVFB] ("Throughout the early 1900s, working conditions for the average American worker were fairly grim. Child labor was well entrenched. Discrimination of all types was common and acceptable. Lax safety regulations allowed hazardous working conditions to persist.").

7. *Id.*

8. Bagenstos, *supra* note 2.

9. *Id.*

10. Lochner v. New York, 198 U.S. 45, 53 (1905) (striking down an act regulating the maximum working hours allowed for employees because it violates the Fourteenth Amendment right to contract freely under the Due Process Clause for both employers and employees.).

11. *Id.* at 52, 57.

12. *Id.* at 52–3, 61.

13. *Id.* at 53 (declaring that "[t]he statute necessarily interferes with the right of contract between the employer and employes, concerning the number of hours in which the latter may labor in the bakery of the employer. The general right to make a contract in relation

The Court's prioritization of this freedom to contract ensured that workers were not able to demand a living wage from their employers.[14] In Jordan's case, for example, there may still be underpayment such that they could not cover their living expenses, however, that would not likely be due to their employer not paying them what the employer owed under their contract. Instead, without any legislation regulating a minimum livable wage, the employer would have simply coerced Jordan into accepting a much lower wage than necessary. Thus, the employer would not actually be in breach by paying a deplorably small amount in return for Jordan's likely unhealthy hours, leaving Jordan with no real remedy.

During the *Lochner* era, the Supreme Court struck down many federal and state labor and employment laws.[15] In 1918's *Hammer v. Dagenhart*, the Supreme Court struck down an Act of Congress prohibiting products made using child labor from entering interstate commerce.[16] In *Adair v. United States*, the Supreme Court quashed an Act prohibiting railroad companies from using union membership as a disqualifying condition for employment.[17] In 1923, in *Adkins v. Children's Hospital,* the Supreme Court invalidated a law setting a minimum wage for female workers in private employment.[18] In *Adkins*, the Court repeatedly declared that workers and employers have a constitutional right to contract for work with whatever terms they both deemed reasonable and desirable, without government interference.[19] In the Court's own words:

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to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution.").

14. *See* Adkins v. Children's Hospital, 261 U.S. 525, 545 (1923) ("employer and the employe[e] have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land." (quoting Adair v. United States, 208 U.S. 161, 174–75 (1908))).

15. *See e.g.*, *Lochner*, 198 U.S. 45 (striking down an act regulating the maximum working hours allowed for employees because it violates the Fourteenth Amendment right to contract freely under the Due Process Clause for both employers and employees.); Hammer v. Dagenhart, 247 U.S. 251 (1918) (striking down an act aimed at regulating products made utilizing child labor from entering interstate commerce); Adair v. United States, 208 U.S. 161 (1908) (ruling that a law that made it illegal for employers to condition employment on the basis of a person's abstention from participation in a labor union is unconstitutional).

16. *Hammer*, 247 U.S. 251 (striking down an act aimed at regulating products made utilizing child labor from entering interstate commerce).

17. *Adair*, 208 U.S. 161 (ruling that a law that made it illegal for employers to condition employment on the basis of a person's abstention from participation in a labor union is unconstitutional).

18. *Adkins*, 261 U.S. 525.

19. *Id.*

> [t]he right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor . . . . In all such particulars the employer and the employe[e] have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land.[20]

This theory, however, required the Court to accept as true an underlying assumption of equal bargaining power between workers and employers that scholars (and any person that has needed a job) observe was not based in reality.[21]

Most workers' lived reality instead proved the opposite. There was a very uneven bargaining power between workers, who required paying work to live and function in society, and employers, who did not require any *particular* employee to be successful.[22] Because of this, the electorate continued to vote for legislators and executives promising protective legislation, but the Court simply would not let that legislation stand.[23] The Court's continuous invalidation of these laws created immense tension throughout the United States and within the government.[24] As the nation descended into the Great Depression, these conflicts only deepened.[25] As production fell, prices fell, and wages inevitably followed suit.[26] Many factories and other businesses were shut down, leading to an almost 25% unemployment rate.[27]

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20. *Id.* at 545 (quoting *Adair*, 208 U.S. at 174–75).

21. Bagenstos, *supra* note 2 (noting that "[b]y the time of the New Deal, however, it had become widely accepted that this premise of formal equality between workers and employers was unrealistic. A new wave of labor legislation—exemplified at the federal level by . . . the Fair Labor Standards Act (FLSA), enacted in 1938—rested explicitly on the contrary premise that workers suffered from a lack of bargaining power vis-à-vis their employers.").

22. *Id.*

23. *Id.* (declaring that "Lochner has become shorthand for a period in which judges invalidated labor laws based on their view that those laws prevented employers and workers from striking the best deal they could with each other.").

24. *Id.*

25. *Great Depression Facts*, Franklin D. Roosevelt Library and Museum, NATIONAL ARCHIVES, https://www.fdrlibrary.org/great-depression-facts [https://perma.cc/C3YB-TTD7] (last visited Apr. 15, 2024).

26. *Id.* (informing that "on March 4, 1933, the banking system had collapsed, nearly 25% of the labor force was unemployed, and prices and productivity had fallen to 1/3 of their 1929 levels. Reduced prices and reduced output resulted in lower incomes in wages, rents, dividends, and profits throughout the economy.").

27. *Id.* (noting that "[f]actories were shut down, farms and homes were lost to foreclosure, mills and mines were abandoned, and people went hungry. . . . At the height

In the early 1930s, President Franklin Delano Roosevelt made it his mission to change the landscape of employment and labor protections.[28] He proposed a court-packing plan in response to the Court's unforgiving rulings in this area.[29] The plan would have increased the number of Supreme Court Justices to thirteen, allowing him to shape the Court by appointing more Justices sympathetic to his cause.[30]

Ultimately, Congress never enacted President Roosevelt's court-packing plan.[31] In 1937, the Supreme Court decided *West Coast Hotel Co. v. Parrish* which stepped back from the Court's protection of contract rights and marked what scholars call the "switch in time that saved nine."[32] In *West Coast Hotel*, the Court upheld a law setting a minimum wage for women workers, expressly overruling *Adkins*.[33] The Court specifically explained its reasoning in that case:

> [t]he exploitation of a class of workers who are in an unequal position with respect to bargaining power and are thus relatively defenseless against the denial of a living wage is not only detrimental to their health and well-being, but casts a direct burden for their support upon the community.[34]

In *West Coast Hotel*, the Court deviated from the decades long *Lochner* era belief system, marking the beginning of the New Deal era in Supreme Court jurisprudence.[35] Some historians hypothesize the Court saw the writing on the wall and changed course due to the political

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of the Depression in 1933, 24.9% of the total work force or 12,830,000 people was unemployed.").

28. *Franklin D. Roosevelt*, WHITE HOUSE, https://www.whitehouse.gov/about-the-white-house/presidents/franklin-d-roosevelt/ [https://perma.cc/9VU7-TVBX].

29. *How FDR Lost his Brief War on the Supreme Court*, NATIONAL CONSTITUTION CENTER, https://constitutioncenter.org/blog/how-fdr-lost-his-brief-war-on-the-supreme-court-2 [https://perma.cc/H9G9-M4QB].

30. *Id.*

31. *Id.*

32. West Coast Hotel Company v. Parrish, 300 U.S. 379 (1937); *See also* Laura A. Cisneros, *Transformative Properties of FDR's Court-Packing Plan and the Significance of Symbol*, 15 U. PA. J. CONST. L. 61, 64 (2012) ("The two predominant phrases used by federal courts, however, are "Court-Packing Plan" and "switch in time that saved nine.").

33. *West Coast Hotel*, 300 U.S. at 400.

34. *Id.* at 399 (cleaned up).

35. For a compelling argument that *Lochner's* theories live on in employment law, *see* Bagenstos, *supra* note 2 (arguing that although "law students have been taught that Lochner died in the New Deal . . . [this assertion] focuses on the rarefied precincts of constitutional law. When we look at the doctrine of labor and employment law, we find something very different. As courts apply the worker protections adopted in the New Deal and later, they continue to be driven by Lochner-ist premises.").

pressure.[36] Regardless of its reasoning, the Court's switch paved the way for employee welfare legislation, and for the enactment of the Fair Labor Standards Act.[37]

B. Enactment of the Fair Labor Standards Act

In 1938, after over a year of effort and ten highly debated revisions, Congress enacted the Fair Labor Standards Act.[38] The Act's foundation was the recognition of the great power imbalances between employers and their employees relying heavily on their jobs to exist in society.[39] The Act's primary purpose was to ensure the law held businesses accountable for establishing working conditions that created great injustices for their workers.[40] In *Tennessee C. v. Muscoda*, the Supreme Court explained the FLSA's Congressional intent*:*

> The Fair Labor Standards Act was not designed to codify or perpetuate those customs and contracts which allow an employer to claim all of an employee's time while compensating him for only a part of it. Congress intended, instead, to achieve a uniform national policy of guaranteeing compensation for all work or employment engaged in by employees covered by the Act. Any custom or contract falling short of that basic policy, like an agreement to pay less than the minimum wage requirements, cannot be utilized to deprive employees of their statutory rights.[41]

To ensure that employers could not coerce workers into accepting working conditions below any reasonable standard, the FLSA created a

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36. There are compelling accounts that the court packing plan may not have been the impetus that caused the change in the court. *See* Richard D. Friedman, *Switching Time and Other Thought Experiments: The Hughes Court and Constitutional Transformation*, 142 U. PA. L. REV. 1891, 1950 (1994) (showing that "Roberts's vote on the merits in West Coast Hotel . . . preceded the unveiling of Roosevelt's Court-packing plan by about six weeks.").

37. John S. Forsythe, *Legislative History of the Fair Labor Standards Act*, 6 LAW & CONTEMPORARY PROBLEMS 464, 465 (Summer 1939), https://scholarship.law.duke.edu/lcp/vol6/iss3/14 [https://perma.cc/V7J5-AU54].

38. Daniel C. Lopez, Note, *Collective Confusion: FLSA Collective Actions, Rule 23 Class Actions, and the Rules Enabling Act*, 61 HASTINGS L.J. 275 (2009); 29 U.S.C. § 216.

39. Bagenstos, *supra* note 2.

40. Kati L. Griffith, *The Fair Labor Standards Act at 80: Everything Old is New Again*, 104 CORNELL L. REV. 557, 558 (2019) (declaring that the FLSA "was an unprecedented governmental effort to demand that businesses across the country eliminate the practice of child labor and provide minimum wages for regular hours and overtime premiums for long hours." (footnote omitted)).

41. Tenn. Coal, Iron & R. Co. v. Muscoda Local No. 123, 321 U.S. 590, 602 (1944).

centralized national regulatory system.[42] This system set a federal minimum wage, federal maximum working hours for regular pay, mandatory premium pay for overtime, and the abolition of abusive child labor.[43]

While the Act provides the Equal Opportunity Employment Agency (the Agency) with the means to act in response to violations, the real teeth of the Act for workers is Section 216(b), which provides workers with a private cause of action to sue their employers on their own behalf for FLSA violations.[44]

At this point in history, Jordan would finally have recourse against their employer's financially abusive employment practices. They could bring a private action to ensure their employer paid them the newly set minimum wage, and to ensure their employer would not force them to work excessive overtime hours without proper compensation. However, the FLSA left some questions unresolved that would affect the amount Jordan could demand. At what point did an employee's workday begin? When they left their front door, or when they arrived at work?

As employees brought these actions, it became clear that Congress's decision to leave parts of the Act vague, which it did intending for the Act to grow as business evolved, was leading to confusion in the courts.[45] As the Supreme Court continued to establish FLSA precedent through the decades, Congress continued to respond in the form of amendments to the Act.[46]

These amendments clarified many aspects of the Act, both narrowing and expanding its reach.[47] The Portal-to-Portal Act, for instance, defined work hours by outlining exactly when work began and ended.[48] In 1961, Congress amended the FLSA to define what is considered a "wage" under the Act.[49] Congress also enacted legislation that ensured equal pay for men

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42. Griffith, *supra* note 40; 29 U.S.C. § 216.

43. 29 U.S.C. § 216.

44. Lopez, *supra* note 38; 29 U.S.C. §§ 216(b)–(c).

45. Griffith, *supra* note 40.

46. 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, 1321 (2008).

47. See Portal to Portal Act of 1947, Pub. L. No. 80–49, 61 Stat. 84 (codified as amended at 29 U.S.C. § 251); Equal Pay Act of 1963, 88 P.L. 38, 77 Stat. 56; Age Discrimination in Employment Act of 1967, 90 P.L. 202, 81 Stat. 602.

48. Portal to Portal Act of 1947, Pub. L. No. 80–49, 61 Stat. 84 (codified as amended at 29 U.S.C. § 251) (establishing that compensable time is time spent on activities that are integral to the job and does not generally include commuting from home to the workplace).

49. 29 U.S.C. § 216 (1961).

and women,[50] prohibited age discrimination,[51] and added protections for specialized workers.[52] Additionally, Congress increased the federal minimum wage in almost every FLSA amendment until the Fair Minimum Wage Act in 2007.[53]

C. Under Enforcement of Individual Violations of the Fair Labor Standards Act

Since 1975, there have been vast budget cuts for labor enforcement agencies across the country.[54] The budget cuts have led to a notable lack of enforcement by agencies of workplace violations, encouraging employers to continue pursuing profit over compliance with the law.[55] As an example, when California passed an anti-sweatshop law for the garment industry, it was documented that the state sanctioned such businesses for investigation noncompliance less than 1% of the time.[56]

Professor of Economics at Boston University David Weil demonstrated in an article how not complying with minimum wage law can be the most economical decision for an employer to make.[57] Further, the decision becomes more tempting as both the wage paid and the

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50. Equal Pay Act of 1963, 88 P.L. 38, 77 Stat. 56 (prohibiting employers from wage discrimination on the basis of sex and requiring equal pay for equal work).

51. Age Discrimination in Employment Act of 1967, 90 P.L. 202, 81 Stat. 602 (prohibiting employers from discrimination on the basis of age).

52. 29 U.S.C. § 216 (1961) (adding coverage for schools, hospitals, and residential care facilities, along with automatic coverage for governmental entities at any level); 29 U.S.C. § 216 (1966) (adding coverage for some farm workers and for federal employees), 29 U.S.C. § 216 (1974) (adding coverage for domestic workers); Migrant and Seasonal Agricultural Worker Protection Act, 97 P.L. 470, 96 Stat. 2583 (extending coverage to migrant and season farm workers), Patient Protection and Affordable Care Act, 111 P.L. 148, 124 Stat. 119 (adding a nursing break for nursing mothers).

53. Fair Minimum Wage Act of 2007, Pub. L. No. 110-28, §§ 8102–03, 121 Stat. 112, 188.

54. *Nat'l Employment Law Project, Holding the Wage Floor: Enforcement of Wage and Hour Standards for Low-Wage Workers in an Era of Government Inaction and Employer Unaccountability* 8–9 (2006), available at https://www.nelp.org/wp-content/uploads/2015/03/Holding-the-Wage-Floor2.pdf [https://perma.cc/8QP6-733K].

55. *Id.*

56. *Id.*; ALS 554 (Cal. 1999); AB 633 (Cal. 1999), 1999 CAL STATS. ch. 554.

57. David Weil, *Compliance with the Minimum Wage: Can Government Make a Difference?*, at 3 (May 2004) (unpublished manuscript) [hereinafter Weil, *Compliance with the Minimum Wage*], https://www.soc.duke.edu/sloan_2004/Papers/Weil_Minimum%20Wage%20paper_May04.pdf [https://perma.cc/YTJ9-A6JL] (explaining that a firm will weigh the benefits of paying below the minimum wage in their profits against the costs of being caught.).

probability of being caught and penalized falls.[58] This is alarming as various studies have shown that the number of both investigators and investigations by federal enforcement agencies has declined greatly in recent years, and that the probability of an inspection by the Department of Labor of an FLSA covered workplace is less than 0.1%.[59] This is likely why many investigations have shown very high rates of noncompliance with FLSA standards.[60]

Despite these violations, many workers cannot find legal representation due to the usually great difference between the cost associated with pursuing these legal actions and the small amount of unpaid wages that are being sought.[61] Further, even if an employee succeeds in filing an FLSA claim either through the U.S. Wage and Hour Division or in state or federal court, and the authority issues a judgment in their favor, the employee does not recover those wage damages 41% of the time.[62] Employees' ability to bring a collective action under the FLSA helps alleviate some of these problems.[63]

D. Evolution of Collective Actions under the FLSA

Jordan heard their coworkers complain that their employer is also underpaying them for the number of hours worked. The FLSA has always provided a way for workers to band together to demand justice.[64] While

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58. *Id.* (explaining that "an employer will choose not to comply with the law if the cost of noncompliance, being the chance of caught (λ) and assessed the penalty (D)" remains lower than the benefit which "grows with the amount of under payment.").

59. *Nat'l Employment Law Project, JUSTICE FOR WORKERS: State Agencies Can Combat Wage Theft*, 10 (Oct 2006), available at https://www.nelp.org/wp-content/uploads/2015/03/Justice_for_Workers.pdf [https://perma.cc/38XX-4BYF] (writing that "over the period from 1975–2004, "[t]he number of Wage and Hour investigators declined by 14%" to only 788 individuals nationwide and "[t]he number of compliance actions completed declined by 36%); David Weil & Amanda Pyles, *Why Complain? Complaints, Compliance, and the Problem of Underenforcement in the U.S Workplace*, 27 COMP. LAB. L. & POL'Y J. 59, 62 (2005) ("The annual probability of receiving an inspection for one of the 7.0 million establishments covered by OSHA or WHD is well below .001.").

60. Becker, *supra* note 46, at 1318.

61. Becker, *supra* note 46, at 1333–38.

62. Marianne Levine, *Behind the Minimum Wage Fight, A Sweeping Failure to Enforce the Law*, POLITICO (Feb. 18, 2018, 06:51 AM), https://www.politico.com/story/2018/02/18/minimum-wage-not-enforced-investigation-409644 [https://perma.cc/C9BR-U2WZ].

63. Joseph Jaramillo, Strength in Numbers, Trial, April 2013, at 22, 23 available at https://gbdhlegal.com/wp-content/uploads/Strength-in-Numbers-jej-article.pdf [https://perma.cc/H6NJ-U8HQ] ("Individual wage-and-hour claims are often too small to support litigation, and a worker's ability to secure legal representation depends on the availability of collective claims.").

64. Becker, *supra* note 46, at 1319–22 ("Prior to [the 1947] amendments, the FLSA contained what appears on its face to be an extraordinary enforcement provision, stating

drafting the Fair Labor Standards Act, Congress enacted the Federal Rules of Civil Procedure (FRCP).[65] Surprisingly, the FLSA included a group action that was more powerful than the original FRCP "spurious class action."[66] The FLSA originally stated that:

> [a]n action . . . may be maintained against any employer . . . by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated.[67]

In 1947, however, Congress fundamentally altered group actions under the FLSA in the Portal-to-Portal Act.[68] The amended Act included the language 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."[69] This was no longer the class action we know and love. In fact, the Supreme Court interpreted this language to preclude any ability to file a Rule 23 class action under the FLSA.[70] A Rule 23 class action is an "opt-out" action, requiring class members to explicitly remove themselves as members after the court certifies a class.[71] Instead, and very importantly, a collective action under the FLSA is an "opt-in" action requiring explicit consent from collective members to join.[72]

Congress did not describe the process to certify this type of collective under the FLSA in the text.[73] However, in *Lusardi v. Xerox Corp*., the

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that a private cause of action could be maintained "by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated.").

65. Federal Rules of Civil Procedure, US COURTS, https://www.uscourts.gov/rules-policies/current-rules-practice-procedure/federal-rules-civil-procedure#:~:text=The%20rules%20were%20first%20adopted,were%20last%20amended%20in%202022 [https://perma.cc/ADP5-FZC2].

66. Becker, *supra* note 46, at 1320 (noting that scholars "characterized this form of "class action" as nothing more than a "permissive joinder device.").

67. *Id.*

68. *Id.*

69. 29 U.S.C. § 216.

70. Becker, supra note 46, at 1319 ("Subsequently, the courts have held that "Rule 23 cannot be invoked to circumvent the consent requirement of the third sentence of FLSA § 16(b).").

71. Lopez, *supra* note 38, at 286.

72. Becker, *supra* note 46, at 1322; 29 U.S.C. § 216(b).

73. Becker, *supra* note 46, at 1322.

Third Circuit established a two-step process for certification.[74] The first step is "conditional certification" where the plaintiff attempts to establish that the other potential plaintiffs they intend to notify of the action are similarly situated.[75] The second step is "final certification" where the court holds a hearing to determine whether each plaintiff that has chosen to join is sufficiently similarly situated to the original plaintiff to be included in the collective.[76] Many lower courts have adopted the *Lusardi* test for certification, despite the Supreme Court's lack of explicitly addressing its adoption.[77]

The Supreme Court did, however, establish a procedure for court facilitated notice in *Hoffmann-La Roche Inc. v. Sperling*.[78] In *Hoffman-La Roche*, a company enacted a workforce reduction where it demoted or discharged approximately 1,200 workers.[79] After the company discharged Sperling, he filed an age discrimination suit under the Age Discrimination in Employment Act (the ADEA), which incorporated the FLSA's collective action language.[80] After over 400 plaintiffs consented to join, Sperling requested the mailing information of all additional similarly situated employees from the defendant and asked the court to send notice to them.[81] The court did so over the defendant's objections, being careful to note that the court had "taken no position on the merits of the case."[82] On appeal of the grant of notice, the Supreme Court held that in FLSA actions, district courts have the discretion to facilitate notice to potential plaintiffs to help realize the Congressional intent of allowing collective actions.[83] The Court pointed to policy considerations of reducing costs to both aggrieved workers and the judiciary.[84] The Court noted that "these benefits . . . depend on employees receiving accurate and timely notice concerning the pendency of the collective action, so that they can make informed decisions about whether to participate."[85]

In response to the Supreme Court's decision in *Hoffman-La Roche*, lower courts established a lenient standard for plaintiffs to achieve "conditional certification" due to the short statute of limitations for filing

74. Lusardi v. Xerox Corp., 118 F.R.D. 351 (D.N.J. 1987).
75. *Id.* at 361.
76. *Id.*
77. Becker, *supra* note 46, at 1324.
78. *Id.* at 1322.
79. Hoffmann-La Roche Inc. v. Sperling, 493 U.S. 165, 168 (1989).
80. *Id.* at 167–68.
81. *Id.* at 168.
82. *Id.* at 169.
83. *Id.*, at 169–70 (1989).
84. *Id.*
85. *Hoffman-La Roche*, 493 U.S. at 169–70.

an FLSA claim combined with the lack of equitable tolling—pausing the clock on the statute of limitations—generally allowed during the process for establishing a collective.[86] In fact, a plaintiff's declaration is usually enough for the court to approve notice since the court will later engage in a more rigorous analysis of actual similarity in final certification.[87] In *Comer v. Wal-Mart Stores, Inc.*, a 2006 case, the Sixth Circuit noted that the determination of similarity at the first stage "is made using a fairly lenient standard" and that it "need only be based on a modest factual showing."[88]

At this time, as late as 2020, Jordan has a strong likelihood of achieving conditional certification, allowing court facilitated notice. Jordan would file a complaint in the district court, then file a discovery request for the mailing addresses of their coworkers that are similarly situated to them. This would generally need to be limited to a scope of time and a similarity of pay structures, among other factors.[89] Jordan has personally heard their coworkers complain about "being shortchanged" on pay, and under this fairly lenient standard, Jordan's declaration would likely be enough for a court to grant approval of the notice request.[90] The FLSA is working smoothly to ensure remedy for workers when their employers violate basic worker protection laws. Then, a couple of circuits threw a wrench in the cogs.

In 2023, the Sixth Circuit decided *Clark v. A&L Homecare & Training Center, LLC* which superseded *Comer*.[91] This decision, along with an earlier Fifth Circuit decision, created a circuit split for the evidentiary standard—the level of proof the Plaintiff must show to simply send notice to other workers—that courts apply for FLSA collective actions.[92]

E. Collective Action "Conditional Certification" Evidentiary Standard Circuit Split

In 2021, the Fifth Circuit issued a landmark decision that was the first to reject the *Lusardi* two-step test for FLSA collective action certification.[93] In *Swales v. KLLM Transp. Servs., L.L.C.*, the plaintiffs

86. Scott Edward Cole & Matthew R. Bainer, *To Certify or Not to Certify: A Circuit-By-Circuit Primer on the Varying Standards for Class Certification in Actions Under the Federal Labor Standards Act*, 13 B.U. PUB. INT. L.J. 167, 169 (2004).

87. *Id.* at 170.

88. Comer v. Wal-Mart Stores, Inc., 454 F.3d 544, 547 (6th Cir. 2006).

89. Keller v. Miri Microsystems LLC, 781 F.3d 799, 807 (6th Cir. 2015).

90. *Comer*, 454 F.3d at 547.

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

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

93. *Id.*

sued KLLM for misclassifying them as independent contractors to avoid paying them minimum wage.[94] The district court granted conditional certification but noted the Fifth Circuit's lack of formal adoption of the *Lusardi* test.[95]

On appeal, the Fifth Circuit declared that the *Lusardi* test "has no anchor in the FLSA's text or in Supreme Court precedent interpreting it."[96] It rejected the *Lusardi* test altogether, then established its own standard for how lower courts should determine the question of similarly situated plaintiffs.[97] The court analyzed the text of FLSA Section 216(b) and stated that it only "declares (but does not define) that only those 'similarly situated' may proceed as a collective."[98] The Fifth Circuit now interprets this to require that lower courts must more rigorously scrutinize a claim of potential plaintiffs being similarly situated from an early stage.[99] The court established a strict standard requiring that a plaintiff show by a preponderance of the evidence that potential plaintiffs receiving notice are similarly situated.[100]

Two years later, in *Clark v. A&L Homecare & Training Center, LLC*, the Sixth Circuit joined the Fifth Circuit in rejecting the *Lusardi* test.[101] In *Clark*, the plaintiffs brought an FLSA collective action against their employer for paying incorrect overtime rates and not reimbursing them for expenses—bringing their pay below minimum requirements.[102] The district court granted conditional certification to the plaintiffs, then certified an interlocutory appeal for the defendant on its objection.[103]

On appeal, the Sixth Circuit considered whether to formally adopt or reject the *Lusardi* standard.[104] While it had never explicitly adopted it, the "court ha[d] repeatedly described the framework as the standard approach."[105] The court chose to officially reject it.[106] The court's first issue with the *Lusardi* test was the terminology of "conditional certification" for the initial notice stage.[107] It reasoned that this initial stage

94. *Id.* at 433.
95. *Swales*, 985 F.3rd at 434.
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.*
101. Clark v. A&L Homecare & Training Ctr., LLC, 68 F.4th 1003, 1009 (6th Cir. 2023).
102. *Id.* at 1008.
103. *Id.*
104. *Clark*, 68 F.4th at 1009.
105. *Id.* at 1016 (White, J., concurring in part and dissenting in part).
106. *Id.* at 1009 (majority opinion).
107. *Id.*

did not provide any type of official certification and calling it conditional certification was confusing and damaging to the process.[108] It relied on Supreme Court precedent to show that "the notice determination has zero effect on the character of the underlying suit."[109]

To determine which standard a court should require to facilitate notice, the court looked to both the *Lusardi* lenient standard and the Fifth Circuit's *Swales* standard.[110] It rejected both as presenting a Goldilocks problem.[111] The *Lusardi* standard is too lenient to account for the many factors that go to determining whether members are similarly situated, and the *Swales* standard was too strict and would work to exclude potential plaintiffs that might prove later to be similarly situated.[112] Instead, the court looked to the 'strong likelihood' standard that courts utilize to grant a preliminary injunction, noting the decision to facilitate notice and the decision to grant a preliminary injunction are both provisional decisions pending a final decision.[113] The Sixth Circuit's new heightened evidentiary standard for a court to grant facilitated notice is that "plaintiffs must show a strong likelihood that those employees are similarly situated to the plaintiffs themselves."[114]

Now, Jordan's likelihood of success is not as clear. Their situation is that of a fast-food worker whose employer is underpaying them for their hours worked, which is notably simpler than a case possibly involving a large corporation with various kinds of employees at different levels in many areas. Nonetheless, Jordan has only heard coworkers mention being "short changed." Is Jordan's statement sufficient for notice under the *Clark* standard? That is unclear, but unlikely. If Jordan needs discovery, will it be completed in time to ensure timely notice for other workers before the two-year statute of limitations runs out?[115] That is also unclear and concerning.

III. ANALYSIS

Strong policy reasons caution against placing a procedural bar such as the "strong likelihood" standard in the way of plaintiffs bringing collective actions. This heightened standard works to unjustifiably prevent collective

108. *Id.*
109. *Id.*
110. *Clark*, 68 F.4th at 1009–10.
111. *Id.* at 1010.
112. *Id.*
113. *Id.* at 1010–11.
114. *Id.* at 1011.
115. *Id.* at 1012 (Bush, J., concurring); 29 U.S.C. § 216(b).

actions, the most effective mechanism for workers to ensure their rights.[116] This standard also reduces judicial efficiency and increases costs for both employers and employees by necessitating additional, possibly extensive briefing and discovery.[117] Last, it thwarts the FLSA's purpose by burdening workers with evidentiary standards that are difficult for employees to meet at such an early stage of the suit.

A. A Heightened Standard Will Unjustifiably Prevent Collective Actions

The ability to proceed as a collective is the FLSA's most potent form of power balancing. It allows workers to utilize their strength in numbers against goliath employers who made it their policy to mistreat them.[118] Without this ability, the monetary damages involved, while perhaps vital for an injured employee, are not enough to cover legal expenses.[119] Thus, the ability for many workers to join together increases the likelihood of being able to hire an attorney to take the case.[120]

Given that fact, it seems counterintuitive that the employee opt-in rates for FLSA collective actions are very low.[121] Multiple factors lead to low rates, but a prominent one is a lack of receiving notice of the pending suit.[122] High turnover rates and relocation being common among low-income workers contribute to this lack of notice.[123] With these complications, combined with the Act's short statute of limitations, increasing the difficulty and time-consuming nature of the notice process can only lead to an even lower opt-in rate.

The Sixth Circuit's decision in *Clark* heightens the level of factual evidence a plaintiff must show at an incredibly early stage of the suit to achieve the simple action of court facilitated notice to other workers.[124]

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116. *See* Joseph Jaramillo, *Strength in Numbers*, Trial, April 2013, at 22, 23 ("Individual wage-and-hour claims are often too small to support litigation, and a worker's ability to secure legal representation depends on the availability of collective claims.").

117. *Clark*, 68 F.4th at 1012 (Bush, J., concurring).

118. *See* Hoffmann-La Roche v. Sperling, 493 U.S. 165, 170 (1989) ("A collective action allows . . . plaintiffs the advantage of lower individual costs to vindicate rights by the pooling of resources.").

119. Jaramillo, *supra* note 116, at 23.

120. *Id.*

121. *See* Andrew C. Brunsden, *Hybrid Class Actions, Dual Certification, and Wage Law Enforcement in the Federal Courts*, 29 BERKELEY J. EMP. & LAB. L. 269, 293–94 (2008) (providing an analysis of 21 cases to detail opt-in rates and discuss causes of why the rates are low). *See also* Becker, *supra* note 46.

122. Becker, *supra* note 46, at 1326.

123. Brunsden, *supra* note 121, at 295. Becker, *supra* note 46, at 1326–27.

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

The court first held that this stage should not be called "conditional certification" because it leads to an unjustified perception that the court has already certified the underlying case as a collective action in some way.[125] The court only noted that this perception is bad because it may make an employer feel obligated to entertain settlement earlier, without explaining why that is a worse outcome than their solution of placing heavier burdens on a plaintiff claiming that their employer has violated their basic employment rights.[126] Additionally, the court's declaration that "the notice determination has zero effect on the character of the underlying suit," makes the court's decision five paragraphs later for a stricter notice standard baffling.[127] This standard now requires that plaintiffs show a "strong likelihood" that workers who are to receive notice are similarly situated to the plaintiff, with the majority noting that this standard may require discovery on the motion itself.[128]

The concurrence in *Clark* noted a concern that this elevated standard could run afoul of the Act's short statute of limitations.[129] The concurrence specifically noted that "implementation of the newly announced standard without consideration of tolling is likely to deplete remedies Congress has duly provided."[130] However, courts have not generally considered equitable tolling available for FLSA collective actions for multiple reasons including the statute's text, precedent, and Congressional inaction.[131] Because the court did not adopt the recommendation to utilize equitable tolling into the majority opinion, it has no guarantee of being effectual.[132]

Given that opt-in rates are already low, and that the statute of limitations is short with equitable tolling unavailable, the decision to make it more difficult and time consuming to send notice will result in an even greater drop in the number of potential plaintiffs that will opt-in to FLSA collective actions. As the Sixth Circuit clarified in *Clark*: notice does not affect the character of the suit.[133] Therefore, this thwarting of the FLSA collective action is unjustified. Without the power of collective action, the promise of FLSA protections will be out of reach for many workers who cannot afford to bring individual actions.

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125. *Id.* at 1009.

126. *Clark*, 68 F.4th at 1007 ("forcing a defendant to settle.").

127. *Id.* at 1009.

128. *Id.* at 1011 (quoting Memphis A. Philip Randolph Inst. v. Hargett, 2 F.4th 548, 554 (6th Cir. 2021)).

129. *Id.* at 1012 (Bush, J., concurring).

130. *Id.* at 1013.

131. Brashear v. SSM Health Care Corp., 2023 U.S. Dist. LEXIS 112350, at *14–15 (E.D. Mo. June 29, 2023); *See also* Becker, *supra* note 46, at 1330.

132. *Clark*, 68 F.4th at 1012 (Bush, J., concurring).

133. *Clark*, 68 F.4th at 1009 (majority opinion).

B. A Heightened Standard Will Create Judicial Inefficiency

In *Clark*, the Sixth Circuit did not eliminate the two-step process for certification of a collective action under the FLSA, but instead altered it.[134] Certification of a collective action now includes the notice step and the certification step.[135] These two stages work in the same way as the previous *Lusardi* test, with the first stage having a different name and a stricter evidentiary standard.[136]

This distinction is important because the court has not altered the second step, which still requires a hearing by a court to determine whether all the plaintiffs that opt in are sufficiently similarly situated to the original plaintiff. Now, however, that hearing follows a newly required additional determination and possible hearing also regarding whether potential plaintiffs are sufficiently similarly situated.[137] Heightening the standard at an early stage in no way removes or reduces the necessity of the hearing that must still occur for a court to determine final certification of all plaintiffs that have joined the action, meaning that courts must hear the same arguments twice.

This new standard also now requires more briefing and the possibility of limited discovery before the notice hearing.[138] It also requires the court to determine if it should apply equitable tolling, if it is willing to entertain that idea.[139] This heightened standard reduces the efficiency for both parties and the court, unless it merely results in no potential plaintiffs receiving notice, preventing the collective action before it begins. However, even that result reduces judicial efficiency by increasing the likelihood of duplicative suits regarding the same defendant by workers that must now file separately.

C. A Heightened Standard Thwarts the Legislative Purpose of the FLSA

The purpose of the FLSA is to give financially abused employees the power to demand fair pay practices from organizations that hold an unfair power over them.[140] In enacting the FLSA, Congress was responding to a history of the law allowing worker abuses to go unchecked by regulating the conditions that those workers could demand.[141]

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134. *Id.*
135. *Id.*
136. *Id.* at 1011.
137. *Id.*
138. *Id.*
139. *Clark*, 68 F.4th at 1012 (Bush, J., concurring).
140. *Id.* at 1015 (White, J., concurring in part and dissenting in part).
141. Bagenstos, *supra* note 2.

This Act establishes the most basic standards for employment such as minimum wage, maximum hours, and overtime pay.[142] To be clear, these basic standards are what plaintiffs are alleging their employers are violating when they file FLSA actions. These employers are denying—illegally—minimal fair employment standards that ensure a basic living condition for the employees they rely on.

The Act also explicitly creates a mechanism to allow employees to join together to more effectively fight against these practices.[143] As discussed above, bringing these actions is more viable as a collective due to the cost of litigation in proportion to the expected monetary damages.[144] Raising the procedural bar at such an early stage of the proceeding will effectively bar many collective actions.

This judicial action will bar many employees from being able to hold their employers accountable for implementing substandard working conditions, directly thwarting the entire purpose of the Act's creation. The dissent in *Clark* noted the "novel approach [of the majority] has the potential to undercut . . . the FLSA's 'broad remedial goal.'"[145] To achieve this goal, the Act "empowers workers to enforce these rights through litigation as a collective."[146]

When determining the procedures and standards under legislative acts, courts should be cognizant of legislative intent.[147] When courts work against the will of the legislature, who act at the will of the people that elect it, it calls into question fundamental principles of democracy. While other factors can be weighed including the text, the history, and judicial efficiency, the legislative intent should remain paramount.

IV. CONCLUSION

Given these strong reasons against raising the evidentiary bar at such an early stage of an employee's FLSA action, the Supreme Court should adopt the *Lusardi* lenient standard and invalidate the approaches of the Fifth and Sixth Circuit.[148] These heightened standards unjustifiably prevent collective actions, the most effective mechanism for workers to

142. 29 U.S.C. § 216.
143. *Id*. at § 216(b).
144. Jaramillo, *supra* note 116, at 23.
145. *Clark*, 68 F.4th at 1015 (White, J., concurring in part and dissenting in part).
146. *Id.*
147. Jacob Scott, *Codified Canons and the Common Law of Interpretation*, 98 GEO. L.J. 341, 348 (2010).
148. *Clark*, 68 F.4th 1003; Swales v. KLLM Transp. Servs., L.L.C., 985 F.3d 430, 430 (5th Cir. 2021); Lusardi v. Xerox Corp., 118 F.R.D. 351 (D.N.J. 1987).

ensure their rights.[149] These rights resulted from the hard-fought battles by Congress and workers throughout the Lochner Era and into New Deal.[150] Adopting a heightened standard would swing the judiciary back to an approach that both the legislature and the public harshly, and conclusively rebuked. The clear conclusion is that this new shift would unravel over 80 years of judicial precedent and legislative intent.

This elevated standard severely hampers the FLSA's protections for Jordan's situation described in the introduction, along with the FLSA's protections of all workers facing abusive employment conditions. With individual private actions being impractical due to legal costs, collective action is the solution. Raising the bar to even simply inform other workers that the action exists will remove the only remedy many workers have under this remedial statute. The cost of this change is too high.

149. Jaramillo, *supra* note 116, at 23.
150. Bagenstos, *supra* note 2.