

No. 25-

IN THE
Supreme Court of the United States

CRACKER BARREL OLD COUNTRY STORE, INC.,

Petitioner,

v.

ANDREW HARRINGTON, KATIE LIAMMAYTRY,
JASON LENCHERT, AND DYLAN BASCH,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

JAMES M. COLEMAN
JASON D. FRIEDMAN
CONSTANGY, BROOKS, SMITH
& PROPHETE LLP
12500 Fair Lakes Circle,
Suite 300
Fairfax, VA 22033

STEVEN B. KATZ
Counsel of Record
CONSTANGY, BROOKS, SMITH
& PROPHETE LLP
2029 Century Park East,
Suite 1100
Los Angeles, CA 90067
(310) 909-7775
skatz@constangy.com

Counsel for Petitioner



QUESTION PRESENTED

Ninety percent of the 163.4 million workers in the United States are covered by the Fair Labor Standards Act,¹ one of the few statutes in which Congress chooses to impose express conditions on collective litigation, rather than leaving the matter to the rules of civil procedure. In § 16(b) of the Act as amended (codified at 29 U.S.C. § 216[b]), Congress allowed actions brought on behalf of coworkers who are “similarly situated” to named parties, but only if those coworkers elect in writing to join. The case law interpreting § 16(b) is in total disarray. First, the circuits are split *five* ways in how to interpret § 16(b). Second, only one of the five is consistent with last term’s unanimous decision in *E.M.D. Sales v. Carrera*, 604 U.S. 45 (2025).

The question presented is:

Whether a district court may authorize notice inviting joinder to an FLSA collective action before a plaintiff shows by a preponderance of the evidence that the members of the collective receiving notice are “similarly situated” to the named plaintiff within the meaning of 29 U.S.C.

1. See U.S. Bureau of Labor Statistics, EMPLOYMENT STATUS OF THE CIVILIAN POPULATION BY SEX AND AGE (Aug. 2025) (163.4 million U.S. workers) (available on the internet at <https://www.bls.gov/news.release/empstat01.htm>); U.S. Dep’t of Lab., Wage & Hour Div., SMALL ENTITY COMPLIANCE GUIDE TO THE FAIR LABOR STANDARDS ACT’S EXEMPTIONS FOR EXECUTIVE, ADMINISTRATIVE, PROFESSIONAL, OUTSIDE SALES, AND COMPUTER EMPLOYEES (April 24, 2024) (FLSA covers 143 million workers) (available on the internet at https://www.dol.gov/agencies/whd/overtime/rulemaking/small-entity-compliance-guide?utm_source=chatgpt.com).

§ 216(b)? If not, what showing must be made before this notice may be authorized?

The Act is “intended . . . to achieve a uniform national policy of guaranteeing compensation for all work or employment engaged in by employees covered by the Act.” *Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 602–03 (1944) (footnote omitted). But “[c]onsensus as to the proper standard for [joinder] notice remains elusive.”² *Richards v. Eli Lilly & Co.*, 149 F.4th 901, 907 (7th Cir. 2025). “[H]ow stringently, and how soon, district courts should enforce § 216(b)’s ‘similarly situated’ mandate” is “an issue that has been under-studied but whose importance cannot be overstated.” *Swales v. KLLM Transp. Servs., L.L.C.*, 985 F.3d 430, 443 (5th Cir. 2021).

Today, to secure court authorization to send notice to a collective inviting joinder, a plaintiff must make different showings in different circuits, inviting forum-shopping. One recent commentator urges: “it is imperative” that this Court address “the recent circuit split surrounding notice under § 216 of the FLSA.”³ This petition is a vehicle for doing so.

2. Contrast this petition with the pending one in *Eli Lilly & Co. v. Richards*, No. 25-476.

Although the *Eli Lilly* petition generally raises a similar question to the one raised here, this petition does not join it in arguing that *Hoffmann-La Roche v. Sperling*, 493 U.S. 165 (1989), need be overruled, and *Eli Lilly* makes only brief reference to *E.M.D. Sales*, which this petition addresses in detail. See *Eli Lilly*, No. 25-476, *Petition for Certiorari*, pp. 17-32.

3. Maguire Tausch, *Defying Goldilocks: Why the FLSA Collective Action Notice Standard Set Forth in Lusardi is “Just Right,”* 74 EMORY L.J. 1513, 1548 (2025).

CORPORATE DISCLOSURE STATEMENT

Petitioner Cracker Barrel Old Country Store Incorporated is a nongovernmental corporation. The following publicly-owned companies own over 10% of its stock: BlackRock, Inc.; GMT Capital Corp.; and Vanguard Group, Inc.

STATEMENT OF RELATED PROCEEDINGS

This case arises from or is related to these proceedings:

- In the Ninth Circuit: *Harrington, et al. v. Cracker Barrel Old Country Store Incorporated*, Nos. 23-15650 & 24-1979 (9th Cir. July 1, 2025) (affirming in part and reversing in part order granting preliminary certification of FLSA collective)
- In the District of Arizona: *Gillespie, et al. v. Cracker Barrel Old Country Store Incorporated*, No. CV-21-00940-PHX-DJH (D. Ariz. March 31, 2023) (granting second motion to certify collective), *amended on reconsideration in part* sub nom. *Harrington v. Cracker Barrel Old Country Store Incorporated*, 713 F.Supp.3d 568 (D. Ariz. 2024). *See also Gillespie* (D. Ariz. July 22, 2022 (denying amended motion for collective certification); *id.* (D. Ariz. Jan. 21, 2022) (denying without prejudice motion for conditional certification of collective); *id.* (D. Ariz. Nov. 12, 2021) (same).
- In this Court: *Harrington, et al. v. Cracker Barrel Old Country Store Incorporated*, No. 25-534 (petition for *certiorari* pending⁴).

There are no other proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

4. The petition filed in No. 25-534 by plaintiffs raises a completely different question than the questions raised here.

TABLE OF CONTENTS

	<i>Page</i>
QUESTION PRESENTED	i
CORPORATE DISCLOSURE STATEMENT	iii
STATEMENT OF RELATED PROCEEDINGS	iv
TABLE OF CONTENTS.....	v
TABLE OF APPENDICES	vii
TABLE OF CITED AUTHORITIES	ix
PETITION FOR WRIT OF CERTIORARI.....	1
OPINIONS BELOW.....	1
JURISDICTION.....	1
STATUTORY PROVISION INVOLVED	2
STATEMENT.....	2
A. Statutory Background	8
B. Factual and Procedural Background	9
REASONS FOR GRANTING THE PETITION.....	14
I. The Circuits Are Split Five Ways Over The Showing Necessary For Joinder Notice To Be Authorized In FLSA Collective Actions	15

Table of Contents

	<i>Page</i>
1. Step One Leniency: The <i>Lusardi</i> Framework.....	15
2. Step One Leniency Plus: The Ninth Circuit's <i>Campbell</i> Framework.....	17
3. Preponderance: The Fifth Circuit's <i>Swales</i> Framework.....	18
4. Strong Likelihood: The Sixth Circuit's <i>Clark</i> Framework	19
5. Material Factual Dispute: The Seventh Circuit's <i>Richards</i> Framework	19
II. Only One Of the Five Approaches— The Fifth Circuit's—Can Be Reconciled With Last Term's Decision In <i>E.M.D.</i> <i>Sales v. Carrera</i>	20
III. The Question Presented Is Recurring, Important, and Squarely Presented.....	26
CONCLUSION	29

TABLE OF APPENDICES

	<i>Page</i>
APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED JULY 1, 2025	1a
APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, SUBMITTED JULY 1, 2025...	17a
APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA, FILED JANUARY 30, 2024	20a
APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA, FILED MARCH 31, 2023	56a
APPENDIX E — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA, FILED JULY 22, 2022.....	99a
APPENDIX F — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA, FILED JANUARY 21, 2022	108a
APPENDIX G — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA, FILED NOVEMBER 12, 2021	115a

Table of Appendices

	<i>Page</i>
APPENDIX H — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED AUGUST 8, 2025 . . .	130a
APPENDIX I — EXCERPT OF 29 U.S.C. § 216(b) . . .	132a

TABLE OF CITED AUTHORITIES

	<i>Page</i>
CASES:	
<i>Anderson v. Mount Clemens Pottery Co.</i> , 328 U.S. 680 (1946).....	9
<i>Arrington v. National Broadcasting Co., Inc.</i> , 531 F.Supp. 498 (D.D.C. 1982)	9
<i>AT&T Mobility LLC v. Concepcion</i> , 563 U.S. 333 (2010).....	28
<i>Bigger v. Facebook, Inc.</i> , 947 F.3d 1043 (7th Cir. 2020).....	27
<i>Braxton v. U.S.</i> , 500 U.S. 344 (1991).....	20
<i>Bristol-Myers Squibb Co. v. Superior Ct.</i> , 582 U.S. 255 (2017).....	11, 12
<i>Butler v. DirectSAT USA, LLC</i> , 876 F.Supp.2d 560 (D. Md. 2012)	16
<i>Byrd v. Aaron’s Inc.</i> , 784 F.3d 154 (3d Cir. 2015)	24
<i>Calloway v. AT&T Services, Inc.</i> , No. 1:18-CV-06975, 2024 WL 1328823 (N.D. Ill., Mar. 28, 2024)	8

Cited Authorities

	<i>Page</i>
<i>Camesi v. Univ. of Pittsburgh Med. Ctr.</i> , 729 F.3d 239 (3d Cir. 2013)	20
<i>Campbell v. City of Los Angeles</i> , 903 F.3d 1090 (2018) . . . 4, 5, 11, 13, 15, 17, 18, 20, 21, 23, 25	
<i>Canaday v. Anthem Companies, Inc.</i> , 9 F.4th 392 (6th Cir. 2021), <i>cert. denied</i> , 142 S. Ct. 2777 (2022).	12
<i>Clark v. A&L Homecare & Training Ctr., LLC</i> , 68 F.4th 1003 (6th Cir. 2023).	6, 15, 19, 23
<i>County of Allegheny v. ACLU Greater Pittsburgh Chapter</i> , 492 U.S. 573 (1989).	13
<i>Dempsey v. Smith’s Food & Drug Centers, Inc.</i> , No. 3:24-CV-00269-ART-CSD, 2025 WL 326644 (D. Nev., Jan. 28, 2025)	17
<i>E.M.D. Sales v. Carrera</i> , 604 U.S. 45 (2025)	6, 12-15, 18-20, 22, 26, 29
<i>Encino Motorcars, LLC v. Navarro</i> , 584 U.S. 79 (2018).	22
<i>Enying Li v. Holder</i> , 738 F.3d 1160 (9th Cir. 2013).	13, 14

Cited Authorities

	<i>Page</i>
<i>Epic Sys. Corp. v. Lewis</i> , 584 U.S. 497 (2018).....	28
<i>Exxon Mobil Corp. v. Allapattah Servs., Inc.</i> , 545 U.S. 546 (2005)	21
<i>Fernandez v. Tox Corp.</i> , 677 F.Supp.3d 1089 (C.D. Cal. 2023)	17
<i>Fischer v. Fed. Express Corp.</i> , 42 F.4th 366 (3d Cir. 2022)	12
<i>Freeman v. MedStar Health Inc.</i> , 187 F.Supp.3d 19 (D.D.C. 2016).....	16
<i>General Telephone Co. of Southwest v. Falcon</i> , 457 U.S. 147 (1982)	26
<i>Genesis HealthCare Corp. v. Symczyk</i> , 569 U.S. 66 (2013).....	4
<i>Halle v. West Penn Allegheny Health System Inc.</i> , 842 F.3d 215 (3d Cir. 2016)	7
<i>Henson v. Santander Consumer USA Inc.</i> , 582 U.S. 79 (2017))	22
<i>Herman v. Palo Group Foster Home, Inc.</i> , 183 F.3d 468 (6th Cir. 1999).....	8

Cited Authorities

	<i>Page</i>
<i>Hipp v. Liberty Nat’l Life Ins. Co.</i> , 252 F.3d 1208 (11th Cir. 2001).....	16
<i>Hoffmann-La Roche v. Sperling</i> , 493 U.S. 165 (1989).....	3, 9, 18, 21, 23, 25
<i>In re JPMorgan Chase & Company</i> , 916 F.3d 494 (5th Cir. 2019).....	7
<i>In re Nexium Antitrust Lit.</i> , 777 F.3d 9 (1st Cir. 2015).....	24
<i>Intel Corporation Investment Policy Committee</i> <i>v. Sulyma</i> , 589 U.S. 178 (2020).....	26
<i>Johnson v. Nextel Communications Inc.</i> , 780 F.3d 128 (2d Cir. 2015)	24
<i>Johnson v. Walmart Inc.</i> , 57 F.4th 677 (9th Cir. 2023).....	30
<i>Karlo v. Pittsburgh Glass Works, LLC</i> , 849 F.3d 61 (3d Cir. 2017)	15
<i>Knepper v. Rite Aid Corp.</i> , 675 F.3d 249 (3d Cir. 2012)	23
<i>Kwoka v. Enter. Rent-A-Car Co. of Bos., LLC</i> , 141 F.4th 10 (1st Cir. 2025)	5, 15, 16

Cited Authorities

	<i>Page</i>
<i>Lawrence on Behalf of Lawrence v. Chater</i> , 516 U.S. 163 (1996)	30
<i>Lederman v. Frontier Fire Prot., Inc.</i> , 685 F.3d 1151 (10th Cir. 2012)	27
<i>Lundeen v. 10 West Ferry St. Ops. LLC</i> , No. 24-3375, – F.4th –, 2025 WL 2935340 . . .9, 21, 23	
<i>Lusardi v. Xerox</i> , 118 F.R.D. 351 (D.N.J. 1987), <i>rev'd on other</i> <i>grounds sub nom. Lusardi v. Lechner</i> , 855 F.2d 1062 (3d Cir. 1988) 3-6, 11, 12, 15-19, 28	
<i>Marmet Health Care Center, Inc. v. Brown</i> , 565 U.S. 530 (2012)	29, 30
<i>Martin v. Blessing</i> , 571 U.S. 1040 (2013)	20
<i>Messner v. Northshore Univ. HealthSystem</i> , 669 F.3d 802 (7th Cir. 2012)	24
<i>Miller v. Gammie</i> , 335 F.3d 889 (9th Cir. 2003)	13
<i>Monroe v. FTS USA, LLC</i> , 860 F.3d 389 (6th Cir. 2017), <i>cert. denied</i> , 138 S. Ct. 980 (2018)	25

Cited Authorities

	<i>Page</i>
<i>Myers v. Hertz Corp.</i> , 624 F.3d 537 (2d Cir. 2010)	15
<i>Noohi v. Toll Bros., Inc.</i> , 708 F.3d 599 (4th Cir. 2013)	30
<i>O'Donnell v. Robert Half Intern., Inc.</i> , 534 F.Supp.2d 173 (D. Mass. 2008)	7
<i>Pacific Merchant Shipping Ass'n v. Aubry</i> , 918 F.2d 1409 (9th Cir. 1990)	8
<i>Richards v. Eli Lilly & Co.</i> , 149 F.4th 901 (7th Cir. 2025)	6, 19
<i>Rittmann v. Amazon, Inc.</i> , No. C16-1554-JCC, 2025 WL 331031 (W.D. Wash. Jan. 29, 2025)	7, 17
<i>Robinson v. Maricopa County Special Health Care Dist.</i> , 696 F.Supp.3d 769 (D. Ariz. 2023)	17
<i>Russell v. Educational Commission for Foreign Medical Graduates</i> , 15 F.4th 259 (3d Cir. 2021)	24
<i>Scott v. Chipotle Mexican Grill, Inc.</i> , 954 F.3d 502 (2d Cir. 2020)	5, 16, 28

Cited Authorities

	<i>Page</i>
<i>Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.,</i> 559 U.S. 393 (2010)	28
<i>Swales v. KLLM Transp. Servs., L.L.C.,</i> 985 F.3d 430 (5th Cir. 2021) . . . 6, 7, 11, 18, 19, 23, 25, 26, 28	
<i>Taylor v. Pilot Corporation,</i> 697 Fed. App’x 854 (6th Cir. 2017)	7
<i>Thiessen v. Gen. Elec. Cap. Corp.,</i> 267 F.3d 1095 (10th Cir. 2001)	16
<i>Thornton v. Tyson Foods, Inc.,</i> 683 F.Supp.3d 885 (W.D. Ark. 2023)	16
<i>United States v. Ingham,</i> 486 F.3d 1068 (9th Cir. 2007)	13
<i>United States v. McAdory,</i> 935 F.3d 838 (9th Cir. 2019)	13
<i>Vallone v. CJS Sols. Grp., LLC,</i> 9 F.4th 861 (8th Cir. 2021)	12
<i>Vanegas v. Signet Builders, Inc.,</i> 113 F.4th 718 (7th Cir. 2024)	12
<i>Viking River Cruises, Inc. v. Moriana,</i> 596 U.S. 639 (2022)	29

Cited Authorities

	<i>Page</i>
<i>Villarreal v. Caremark LLC</i> , 85 F.Supp.3d 1063 (D. Ariz. 2015)	7
<i>Wal-Mart Stores, Inc. v. Dukes</i> , 564 U.S. 338 (2011).....	25, 26
<i>Waters v. Day & Zimmermann NPS, Inc.</i> , 23 F.4th 84 (2022).....	12
<i>Yamaha Motor Corp., U.S.A. v. Calhoun</i> , 516 U.S. 199 (1996)	8
<i>Zabriskie v. Fed. Nat’l Mortg. Ass’n</i> , 940 F.3d 1022 (9th Cir. 2019).....	22
<i>Zavala v. Wal Mart Stores Inc.</i> , 691 F.3d 527 (3d Cir. 2012)	15, 16, 21, 23
<i>Zeman v. Twitter, Inc.</i> , 747 F.Supp.3d 1275 (N.D. Cal. 2024)	17

STATUTES AND OTHER AUTHORITIES:

28 U.S.C. § 1254(1).....	1
28 U.S.C. § 1291	7
28 U.S.C. § 1292(b)	7, 12

Cited Authorities

	<i>Page</i>
29 U.S.C. § 216(b)	2-4, 6, 9, 18, 20-25
29 U.S.C. § 626(b)	3
Craig Becker and Paul Strauss, <i>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</i> , 92 MINN. L. REV. 1317 (2008)	2
93 CONG. REC. 2194, 80th Cong., 1st Session (Remarks of Senator Wheeler)	9
Duane Morris LLP, CLASS ACTION REVIEW 2024, https://online.flippingbook.com/view/954167557/	27, 28
Duane Morris LLP, CLASS ACTION REVIEW 2025, https://online.flippingbook.com/view/1027553609/476/	27, 28
EMPLOYMENT STATUS OF THE CIVILIAN POPULATION	26
FED. R. CIV. PROC. 23	2, 3, 17, 24-27
FED. R. CIV. PROC. 23(a)	24
FED. R. CIV. PROC. 23(b)	24

Cited Authorities

	<i>Page</i>
Jarod S. Gonzalez, <i>Solving Fair Labor Standards Act Collective Action Law</i> , 58 TULSA L. REV. 45 (2022)	2, 3
1 Joseph M. McLaughlin, McLAUGHLIN ON CLASS ACTIONS, § 2:16 (16th ed. 2019)	24
9 J. Moore & B. Ward, MOORE’S FEDERAL PRACTICE ¶ 110.25(1 (2d ed. 1995)	8
7 NEWBERG AND RUBENSTEIN ON CLASS ACTIONS § 23:37 (6th ed. June 2025 update)	15, 16
Pub. L. 49, c. 52, § 5(a), 61 Stat. 84 (May 14, 1947)	9
Pub. L. 718, c. 676, § 16(b), 52 Stat. 1069 (June 25, 1938)	9
Antonin Scalia, <i>The Rule of Law as a Law of Rules</i> , 56 U. CHI. L. REV. 1175 (1989)	13, 14
Stephen M. Shapiro, <i>et al.</i> , SUPREME COURT PRACTICE ch. 6, § 6.37(i)(1) (11th ed. 2019)	12
SMALL ENTITY COMPLIANCE GUIDE	26
SUP CT. R. 10(A)	29
SUP CT. R. 10(C)	29

Cited Authorities

	<i>Page</i>
Maguire Tausch, <i>Defying Goldilocks: Why the FLSA Collective Action Notice Standard Set Forth in Lusardi is “Just Right,”</i> 74 EMORY L.J. 1513 (2025)	8, 29
7B Charles A. Wright, <i>et al.</i> , FEDERAL PRACTICE & PROCEDURE § 1807 (3d ed. 2005)	2, 4, 5, 24, 28

PETITION FOR WRIT OF CERTIORARI

Petitioner Cracker Barrel Old Country Store Incorporated respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The court of appeals' opinion is reported at 142 F.4th 678. (Pet.App. 1a-16a.) *See also* 2025 WL 1806691 (9th Cir., July 1, 2025) (Pet.App. 17a-19a). The district court's collective certification opinions are partially reported, and partially unreported. *See* 2023 WL 2734459 (D. Ariz., Mar. 31, 2023) (Pet.App. 56a-98a), *amended on reconsideration in part* sub nom. *Harrington v. Cracker Barrel Old Country Store Incorporated*, 713 F.Supp.3d 568 (D. Ariz. 2024); 2022 WL 2905041 (D. Ariz., July 22, 2022) (Pet.App. 99a-107a), 2022 WL 194532 (D. Ariz., Jan. 21, 2022) (Pet.App. 108a-114a), and 2021 WL 5280568 (D. Ariz., Nov. 12, 2021) (Pet.App. 115a-129a).

JURISDICTION

The court of appeals entered judgment on July 1, 2025 and denied rehearing *en banc* on August 8, 2025. (Pet.App. 130a-131a.) This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

29 U.S.C. § 216(b) provides in relevant part:

“An action to recover the liability prescribed in the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in [*sic.*] behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.”

STATEMENT

The FLSA “provides a unique mechanism that permits employees to join together in a suit to vindicate their rights under a collective action.”⁵ FLSA collective actions “diverge from virtually all other forms of group litigation in the federal courts since Rule 23 was amended in 1963.”⁶ Where nearly all federal statutes leave the matter of group litigation to the general operation of Rule

5. Jarod S. Gonzalez, *Solving Fair Labor Standards Act Collective Action Law*, 58 TULSA L. REV. 45, 46-47 (2022). *See also* 7B Charles A. Wright, *et al.*, FEDERAL PRACTICE & PROCEDURE § 1807 (3d ed. 2005) (“unique species of group litigation”).

6. Craig Becker and 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, 1346 (2008).

23, § 16(b) of the FLSA allows a collective action only if members of the collective are “similarly situated” to the parties, and each files “consent in writing to become . . . a party.” 29 U.S.C. § 216(b).⁷

In *Hoffmann-La Roche*, this Court held trial courts enjoy broad—but not “unbridled”—“discretion in managing” the process for determining whether the requirements of § 16(b) are met. *Hoffmann-La Roche*, 493 U.S. at 174. This discretion is cabined by the principle that court-supervised notice must not solicit joinder. “[C]ourts must be *scrupulous* to respect judicial neutrality” and notice must be “distinguishable in form and function from the solicitation of claims.” *Id.* (emphasis added). But short of these outside limits on discretion, this Court has never addressed the proper standard for a “similarly situated” determination or what process should apply to making it. The silence left it to lower courts to “piece[] together FLSA collective action procedural law over time like a puzzle.” Gonzalez, *Solving*, 58 TULSA L. REV. at 47.

Today, a five-way split has emerged:

- “[T]he driving force in FLSA collective action procedure for three decades^[8] has been” *Lusardi v. Xerox*, 118 F.R.D. 351 (D.N.J. 1987), *rev’d on other grounds* sub nom. *Lusardi v. Lechner*, 855 F.2d 1062 (3d Cir. 1988). Gonzalez, 58 TULSA L. REV. at 51.

7. Section 7(b) of the Age Discrimination in Employment Act incorporates the FLSA’s enforcement provisions, including § 16(b). *See* 29 U.S.C. § 626(b).

8. Now, nearly four.

This is the approach that prevails in the majority of circuits. Two critical features distinguish the *Lusardi* framework—

- o *A two-step process*: Certification is addressed in two steps.
 - At step one plaintiff moves for “conditional” certification. The “sole consequence” of conditional certification is the sending of court-approved written notice to the employees. *Genesis HealthCare Corp. v. Symczyk*, 569 U.S. 66, 75 (2013).
 - At step two—“at or after the close of relevant discovery”—the *employer* may move for “decertification.” *Campbell v. City of Los Angeles*, 903 F.3d 1090, 1109, 1113-16 (2018); 7B Wright, FEDERAL PRACTICE § 1807, pp. 495-96 & n.62. Only then will a district court make a definitive determination, based on all evidence in the record, whether plaintiff has shown that members of the collective are “similarly situated” within the meaning of § 16(b). *See Id.*, § 1807, pp. 496-97. If decertification is ordered, the opt-in plaintiffs are dismissed from the action; if not, “the action proceeds to trial

on a representative basis.” *Id.*, § 1807, p. 503; *see Campbell*, 903 F.3d at 1110.

- o *Step one leniency*: The criteria for determining whether members of a proposed collective are “similarly situated” at step one are “*ad hoc*” and the standard of proof is “lenient.” *See, e.g., Kwoka v. Enter. Rent-A-Car Co. of Bos., LLC*, 141 F.4th 10, 22 (1st Cir. 2025) (“lenient”); *Campbell*, 903 F.3d at 1109, 1113-16 (2018) (“lenient” and “*ad hoc*”). Only the Second Circuit has expressly adopted this approach. *See Scott v. Chipotle Mexican Grill, Inc.*, 954 F.3d 502, 515 (2d Cir. 2020). Seven other circuits either acquiesce to it, or have not addressed it, leaving the overwhelming majority of their district courts to follow *Lusardi*.
- The Ninth Circuit modifies the *Lusardi* framework slightly by requiring at step one the demonstration of some common material question. *See Campbell*, 903 F.3d 1090, 1117 (2018). But *Lusardi*’s step one leniency is left undisturbed and remains widely followed by district courts in the circuit.
- The Fifth Circuit rejects *Lusardi* and requires district courts to “rigorously enforce at the outset of the litigation” the

FLSA’s “similarly situated” requirement. *Swales*, 985 F.3d at 443. This effectively requires a plaintiff to show others are “similarly situated” by a preponderance before court-supervised joinder notice may be sent.

- The Sixth Circuit rejects *Lusardi* but imposes a weaker standard than the Fifth. The Sixth requires at step one a “strong likelihood” that collective members are “similarly situated.” *Clark v. A&L Homecare & Training Ctr., LLC*, 68 F.4th 1003, 1010 (6th Cir. 2023).
- The Seventh Circuit too rejects *Lusardi* but imposes an even weaker standard than the Sixth. The Seventh requires at step one a “material factual dispute as to whether the proposed collective is similarly situated.” *Richards*, 149 F.4th at 913.

Of these five approaches, only the Fifth Circuit’s can be reconciled with last term’s decision in *E.M.D. Sales*, where this Court held that the standard of proof for an FLSA claim is preponderance, absent a statutory, constitutional or common-law warrant to depart from it. There is no more warrant for departing from preponderance for § 16(b) “similarly situated” determinations, then there was for § 13(a)(1) “outside salesman” determinations (the issue in *E.M.D. Sales*). Yet *Lusardi*’s step one lenience—even when ‘plussed-up’ under the approaches adopted by the Sixth, Seventh and Ninth Circuits—does precisely that: it (downwardly) departs from predominance for showing

that collective members are “similarly situated”—a statutory element of relief for which the burden of proof is on the plaintiff—unless a defendant assumes the burden of moving to decertify.

The proper standard for “similarly situated” determinations consistently evades Supreme Court review. As the Fifth Circuit points out, “FLSA collective actions rarely (if ever) reach the courts of appeals at the notice stage because ‘conditional certification’ is not a final judgment.” *Swales*, 985 F.3d at 436. Conditional certification orders are interlocutory and not immediately appealable under 28 U.S.C. § 1291. *See, e.g., Taylor v. Pilot Corporation*, 697 Fed. App’x 854 (6th Cir. 2017); *Halle v. West Penn Allegheny Health System Inc.*, 842 F.3d 215, 226-27 (3rd Cir. 2016). Courts consistently refuse § 1292(b) interlocutory appeal because such orders involve temporary, preliminary determinations rather than controlling questions of law. *See, e.g., Rittmann v. Amazon, Inc.*, No. C16-1554-JCC, 2025 WL 331031, at *2 (W.D. Wash. Jan. 29, 2025); *Villarreal v. Caremark LLC*, 85 F.Supp.3d 1063, 1068-70 (D. Ariz. 2015); *O’Donnell v. Robert Half Intern., Inc.*, 534 F.Supp.2d 173, 181 (D. Mass. 2008). And when cases proceed to final judgment, conditional certification becomes “moot once [the employer] has provided the required contact information and notice has been sent to putative collective members.” *In re JPMorgan Chase & Company*, 916 F.3d 494, 499 (5th Cir. 2019).

But the question is squarely presented here.⁹

9. Although the district court denied § 1292(b) certification of the *issue*, it granted certification (based on a different issue) of

Because this “Court has failed to instruct district courts as to the required showing of similarity a case’s named plaintiffs must make before they can send notice,” “the lower courts await Supreme Court instruction on FLSA collective certification.” Tausch, *Defying Goldilocks*, 74 EMORY L.J. at 1528 (“Court has failed . . .”); *Calloway v. AT&T Services, Inc.*, No. 1:18-CV-06975, 2024 WL 1328823, at *3 (N.D. Ill., Mar. 28, 2024) (“the lower courts await . . .”).

In the face of a five-way split, only this Court can correct an arbitrary geographic inconsistency in federal employment law, which constantly recurs in FLSA collective litigation. Employers in the Ninth Circuit should not be subject to collective actions impermissible in other circuits. This case cleanly presents the pre-notice burden-of-proof issue on which the circuits are now divided. This Court should grant *certiorari* to resolve this intolerable conflict.

A. Statutory Background

1. “[T]he purpose behind the FLSA is to establish a national floor under which wage protections cannot drop.” *Pacific Merchant Shipping Ass’n v. Aubry*, 918 F.2d 1409, 1425 (9th Cir. 1990) (emphasis in original). *Accord, e.g., Herman v. Palo Group Foster Home, Inc.*, 183 F.3d 468, 471 (6th Cir. 1999).

the *order* permitting joinder notice to be issued. *See Harrington*, 713 F.Supp.3d at 585-86. “[T]he appellate court may address any issue fairly included within the certified order because ‘it is the order that is appealable, and not the controlling question identified by the district court.’” *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 205 (1996) (quoting 9 J. Moore & B. Ward, MOORE’S FEDERAL PRACTICE ¶ 110.25[1], p. 300 [2d ed. 1995]).

2. Since its original enactment in 1938, § 16(b) of the Act allowed “employees” to sue employers to enforce FLSA requirements on behalf of “themselves and other employees similarly situated.” Pub. L. 718, c. 676, § 16(b), 52 Stat. 1069 (June 25, 1938). It originally allowed “such . . . employees [to] designate an agent or representative to maintain such action.” *Id.*

But the latter provision was removed nine years later by § 5(a) of the Portal-to-Portal Act and replaced by a requirement 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.” Pub. L. 49, c. 52, § 5(a), 61 Stat. 84 (May 14, 1947). The amendment was made “for the purpose of *limiting* private FLSA plaintiffs . . .” *Hoffmann-La Roche*, 493 U.S. at 173 (emphasis added). It was intended to address an “appalling national problem” and “national emergency”—the “flood” of lawsuits brought by unions on behalf of their members unleashed following this Court’s decision in *Anderson v. Mount Clemens Pottery Co.*, 328 U.S. 680 (1946). 93 CONG. REC. 2194, 80th Cong., 1st Session (Remarks of Senator Wheeler) (“national emergency”); *id.* at 2098 (Remarks of Senator Donnell) (“appalling national problem”); *Arrington v. National Broadcasting Co., Inc.*, 531 F.Supp. 498, 500 (D.D.C. 1982) (“flood”). *See generally* *Lundeen v. 10 West Ferry St. Ops. LLC*, No. 24-3375, – F.4th –, 2025 WL 2935340, *5-6 (3rd Cir. Oct. 16, 2025) (history of § 16[b]).

B. Factual and Procedural Background

1. Petitioner Cracker Barrel Old Country Store, Inc. is a comfort-food restaurant chain. Founded in 1969 in Lebanon, Tennessee, it operates stores all over the

country, offering southern-inspired meals and a warm, nostalgic atmosphere.

2. Respondents are four former Cracker Barrel servers who worked for Cracker Barrel in Ohio, North Carolina, Florida, and Arizona respectively.

3. This FLSA collective action was originally filed on May 28, 2021. From the outset, and through extensive motion practice, the parties litigated whether plaintiffs' claims could go forward even though they signed arbitration agreements as part of Cracker Barrel's Alternative Dispute Resolution Program, and despite the existence of defects in the district court's personal jurisdiction over the claims.

In response to the original complaint and first motion for conditional certification, Cracker Barrel moved to compel named plaintiffs to individual arbitration and dismiss. The district court entered an order granting Cracker Barrel's motion and dismissing the complaint, holding that the named plaintiffs—and any opt-in plaintiff whose claims were subject to the arbitration agreement—were bound to resolve their claims through arbitration. The district court granted leave to amend to add new plaintiffs who were not bound to individual arbitration. (Pet.App. 115a-129a.)

4. Plaintiffs then filed a first amended complaint adding three substitute named plaintiffs. None of the three lived in Arizona, worked for Cracker Barrel in Arizona, or asserted claims based on any activities in Arizona. Cracker Barrel again moved to dismiss (this time for jurisdictional reasons). The district court again

dismissed the complaint, but granted leave to amend. (Pet.App. 99a-107a.)

5. Plaintiffs then filed a second amended complaint, naming the three out-of-state plaintiffs previously dismissed and a fourth who worked for Cracker Barrel in Arizona. Shortly after that, plaintiffs moved for conditional certification.

Cracker Barrel again moved to compel individual arbitration and dismiss. The district court denied the motion, reasoning (1) because the Arizona plaintiff signed his arbitration agreement when he was a minor, he repudiated the agreement by suing, and (2) his presence cured any defects in personal jurisdiction over all named plaintiffs (including the three the district court previously dismissed).

The district court also granted conditional certification in part, making one ruling relevant to this petition: the court declined to follow the FLSA’s similarly situated standard from *Swales*, using instead the two-step conditional certification framework established in *Lusardi* and *Campbell*.¹⁰ (Pet.App. 56a-98a.)

10. The district court also erroneously certified a conditional collective of individuals who could not establish specific personal jurisdiction in the district of Arizona. The Ninth Circuit reversed, holding “the reasoning of *Bristol-Myers* [*Squibb Co. v. Superior Ct.*, 582 U.S. 255 (2017)] applies in FLSA collective actions, and the district court erred in its assumption that the participation of a single plaintiff with a claim arising out of Cracker Barrel’s business in Arizona was sufficient to establish personal jurisdiction over Cracker Barrel for all claims in the collective action.” (Pet. App. 15a-16a.)

6. Cracker Barrel timely appealed the order denying its motion to compel arbitration, and secured 28 U.S.C. § 1292(b) certification of the district court’s order conditionally certifying the FLSA collective action. (Pet. App. 20a-55a.) The Ninth Circuit granted leave to appeal the latter, and the two proceedings were consolidated for briefing and argument.

After the appeal was briefed, this Court handed down its decision in *E.M.D. Sales*. Cracker Barrel sought leave to file a supplemental brief addressing *E.M.D. Sales*, which Cracker Barrel argued cannot be reconciled with *Lusardi*’s step one leniency.

This portion of the Ninth Circuit’s decision brings the Ninth into line with the majority of other circuits (4 of 5) that have addressed the same question. *See Vanegas v. Signet Builders, Inc.*, 113 F.4th 718, 730 (7th Cir. 2024); *Fischer v. Fed. Express Corp.*, 42 F.4th 366, 370–71 (3d Cir. 2022); *Vallone v. CJS Sols. Grp., LLC*, 9 F.4th 861, 865–66 (8th Cir. 2021); *Canaday v. Anthem Companies, Inc.*, 9 F.4th 392, 397 (6th Cir. 2021), *cert. denied*, 142 S. Ct. 2777 (2022). Only the First Circuit disagrees. *See Waters v. Day & Zimmermann NPS, Inc.*, 23 F.4th 84 (2022). But the Third, Seventh, and Ninth all addressed First’s reasoning directly and rejected it.

Plaintiffs have filed their own petition for *certiorari* on the issue (No. 25-534). But “some cases are not sufficiently important to warrant Supreme Court review despite the existence of a conflict.” Stephen M. Shapiro, *et al.*, SUPREME COURT PRACTICE ch. 6, § 6.37(i)(1) (11th ed. 2019) (ebook). As will be explained more thoroughly in the opposition to that petition, this case is one of them with respect to the question raised by plaintiffs. With respect to the questions raised in this petition, this case *is* “sufficiently important.” Unlike the recent 5-1 split over *Bristol-Meyers*, the 7-1-1-1-1 split here is longstanding and the circuits have failed to coalesce around one standard.

The Ninth Circuit held it “has already endorsed the two-step approach, and we are bound by that precedent” and “the district court did not abuse its discretion by following the two-step approach . . .” (Pet.App. 6a-7a.) Although it denied leave to file the proffered supplemental brief raising *E.M.D. Sales*, it still discussed *E.M.D. Sales*, distinguishing it because it “said nothing about how a district court should manage a collective action or the procedure it should follow when determining whether to exercise its discretion to facilitate notice to prospective opt-in plaintiffs.”¹¹ (Pet.App. 6a-7a n.3.)

11. The Ninth Circuit ignored this Court’s precedent—and its own—to reach these conclusions.

Regarding the law-of-the-circuit holding, the Ninth Circuit contradicted itself. It (correctly) pointed out that the case it cited as law of the circuit—*Campbell*—“did not address the standard the district court should apply in evaluating a preliminary certification motion.” (Pet.App. 7a n.4.) Its “endorse[ment of] the two-step approach” was *dicta*— “comments ‘made casually and without analysis . . . [done as] a prelude to another legal issue that commands the panel’s full attention.’” *United States v. McAdory*, 935 F.3d 838, 843 (9th Cir. 2019) (interpolation in original) (*quoting Enying Li v. Holder*, 738 F.3d 1160, 1164 n.2 [9th Cir. 2013] and *United States v. Ingham*, 486 F.3d 1068, 1078 n.8 [9th Cir. 2007]). It does not bind later panels. *McAdory*, 935 F.3d at 843.

Regarding its distinction of *E.M.D. Sales*, the precedential force of this Court’s decision is not limited to the narrow doctrinal question presented. “As a general rule, the principle of *stare decisis* directs us to adhere not only to the holdings of our prior cases, but also to their explications of the governing rules of law.” *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 668 (1989) (Kennedy, J., concurring in part and dissenting in part). “[L]ower courts . . . [are] bound not only by the holdings of higher courts’ decisions but also by their ‘mode of analysis.’” *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (*quoting* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L.

Cracker Barrel sought rehearing *en banc*, asking the Ninth Circuit to properly apply *E.M.D. Sales*. The Circuit denied rehearing.

REASONS FOR GRANTING THE PETITION

This petition is an ideal vehicle for resolving an intractable, acknowledged five-way circuit split over the burden of proof before issuing joinder notice in collective FLSA cases. As it stands, where a plaintiff files determines the burden they shoulder, with some courts “rigorously enforce[ing]” the standard, some applying a “strong likelihood” standard, some requiring merely a “threshold showing,” and some permitting notice on a “modest” and “lenient” standard. These stark differences lead to forum shopping and uneven, unpredictable and unjust enforcement of the FLSA. Only this Court’s intervention can resolve this clear split, which courts and commentators have long recognized.

This Court’s intervention is imperative. This issue recurs in every one of the thousands of cases filed each year seeking collective FLSA relief. Due to the formidable settlement pressures that preliminary certification imposes, the burden applied to certification motions will often decide the outcome of the case, no matter the underlying merits of the claim. As it stands, employees who sue in the Ninth and other circuits enjoy a relaxed legal burden that is untethered to statutory text and

REV. 1175, 1177 [1989]). *E.M.D. Sales*’s “mode of analysis”—the framework it establishes for evaluating when courts may depart from the default preponderance standard of proof for statutory elements of the FLSA—as well as its unambiguous rejection of constructions of the FLSA grounded in the presumed remedial purpose of the law—are no less binding than the particular legal question to which the opinion applied that framework.

inconsistent with *E.M.D. Sales*. This Court should grant certiorari to restore uniformity to a critical federal statute litigated constantly.

I. The Circuits Are Split Five Ways Over The Showing Necessary For Joinder Notice To Be Authorized In FLSA Collective Actions.

1. Step One Leniency: The *Lusardi* Framework

In *Lusardi* the District of New Jersey established the dominant approach to handling FLSA collective certification. There are two facets to this approach: First, certification is addressed in two phases. “Preliminary” or “conditional” certification comes before substantial discovery takes place. If conditional certification is granted, court-supervised joinder notice to members of the collective is issued. Following discovery, the employer may elect to move for decertification of the collective (if the case has not already settled). Second, only a “lenient” or “modest” showing that collective members are “similarly situated” is necessary at step one—something “loosely akin to a plausibility standard” or a “low standard of proof.” See, e.g., *Kwoka*, 141 F.4th at 22 (“lenient”); *Clark*, 68 F.4th at 1010 (“lenient” and “modest”); *Campbell*, 903 F.3d at 1109 (“plausibility”); *Karlo v. Pittsburgh Glass Works, LLC*, 849 F.3d 61, 85 (3d Cir. 2017) (“modest”); *Myers v. Hertz Corp.*, 624 F.3d 537, 555 (2d Cir. 2010) (“low”). Only at step two—if a defendant elects to move for decertification rather than settle—must a plaintiff “show by a preponderance of the evidence that they are similarly situated.” *Zavala v. Wal Mart Stores Inc.*, 691 F.3d 527, 534 (3d Cir. 2012).

“[M]ost courts throughout the country utilize[.]” *Lusardi*’s two-step framework.⁷ NEWBERG AND RUBENSTEIN

ON CLASS ACTIONS § 23:37 (6th ed. June 2025 update). But only the Second Circuit has expressly adopted it. *See Scott*, 954 F.3d at 515 (“Procedurally, we have endorsed a two-step process for certifying FLSA collective actions based on the ‘similarly situated’ requirement . . .”). Four circuits (the First, Third, Tenth and Eleventh) have acquiesced to its application without express adoption.¹² Three more circuits (D.C., Fourth and Eighth) have not addressed the question, but district courts in those circuits follow the *Lusardi* framework.¹³ The Fifth, Sixth, Seventh and Ninth Circuits reject *Lusardi* for four alternatives:

12. *See Kwoka*, 141 F.4th at 22 (acknowledging “loose consensus” among district courts around a “lenient review” to “assess whether the proposed members of a collective are similar enough to receive notice of the pending action.”); *Zavala*, 691 F.3d at 534 (“While we have made clear that the standard for final certification is more stringent than the standard for conditional certification, the exact test to be applied has been left specifically unresolved by our Court.”); *Thiessen v. Gen. Elec. Cap. Corp.*, 267 F.3d 1095, 1105 (10th Cir. 2001) (*Lusardi* framework is “arguably . . . the best of the three approaches”); *Hipp v. Liberty Nat’l Life Ins. Co.*, 252 F.3d 1208, 1219 (11th Cir. 2001) (“suggest[ing]” district courts adopt *Lusardi* framework).

13. *See, e.g., Thornton v. Tyson Foods, Inc.*, 683 F. Supp. 3d 885, 888 (W.D. Ark. 2023) (“Nor has the Eighth Circuit announced standards that district courts must use in evaluating FLSA collective actions. In the absence of such guidance, numerous district courts in this Circuit, including this Court, have approved of the two-step certification process.”); *Freeman v. MedStar Health Inc.*, 187 F. Supp. 3d 19, 22 (D.D.C. 2016) (courts in this circuit settled on two-step *Lusardi*-based approach, including the “modest factual showing” standard for conditional certification); *Butler v. DirectSAT USA, LLC*, 876 F. Supp. 2d 560, 566 (D. Md. 2012) (only a “relatively modest factual showing” is needed to satisfy the “similarly situated” standard).

2. Step One Leniency Plus: The Ninth Circuit’s *Campbell* Framework.

Of the four alternatives to *Lusardi*, the Ninth Circuit least departs from it. In *Campbell*, the Ninth Circuit in *dicta*¹⁴ criticized *Lusardi*’s “*ad hoc*” character, calling it “a balancing test with no fulcrum.” *Campbell*, 903 F.3d at 1114. The Circuit explained that *Lusardi*’s test is pitched “at such a high level of abstraction that it risks losing sight of the statute underlying it. . . . [It] offers no clue as to what *kinds* of ‘similarity’ matter under the FLSA.” *Id.* (emphasis in original). “The natural answer to the proper inquiry—what ‘similarly situated’ means—is, in light of the collective action’s reason for being within the FLSA, that party plaintiffs must be alike with regard to some *material* aspect of their litigation.” *Id.* It analogized this standard to commonality analysis under FED. R. CIV. PROC. 23—but with no requirement that common issues predominate. *See id.* at 1114-15.

Still, the Circuit retained *Lusardi*’s two-step process and step one leniency. *See, e.g., Dempsey v. Smith’s Food & Drug Centers, Inc.*, No. 3:24-CV-00269-ART-CSD, 2025 WL 326644, at *5 (D. Nev., Jan. 28, 2025); *Zeman v. Twitter, Inc.*, 747 F.Supp.3d 1275, 1283 (N.D. Cal. 2024); *Rittmann*, 2024 WL 4932745, at *2; *Robinson v. Maricopa County Special Health Care Dist.*, 696 F.Supp.3d 769, 784 (D. Ariz. 2023); *Fernandez v. Tox Corp.*, 677 F.Supp.3d 1089, 1097-98 (C.D. Cal. 2023). In this case, it accorded *Campbell* law-of-the-circuit status (despite *Campbell*

14. The Circuit was candid on this point: “Because preliminary certification is not challenged in this case, we address only the standard the district court should apply to post-discovery decertification.” *Campbell*, 903 F.3d at 1117.

being *dicta* on this point) and held the district court did “not abuse its discretion by following the two-step” approach rooted in *Lusardi. Harrington*, 142 F.4th at 683 & n.4 (citing *Campbell*, 903 F.3d at 1117) (Pet.App. 7a).¹⁵

3. Preponderance: The Fifth Circuit’s *Swales* Framework.

In *Swales*, the Fifth Circuit rejected the *Lusardi* framework for a standard requiring a plaintiff to show “similarly situated” by a preponderance of the evidence before notice may be sent.

Swales held that “district courts should rigorously enforce at the outset of the litigation” the FLSA’s “similarly situated” requirement. *Swales*, 985 F.3d at 443. It rejected *Lusardi*’s two-step framework because the latter “has no anchor in the FLSA’s text or in Supreme Court precedent interpreting it.” *Id.* Section 216(b) declares that “only those [who are] ‘similarly situated’ may proceed as a collective.” *Id.* This mandate, coupled with “the Supreme Court’s admonition that while a district court may ‘facilitat[e] notice to potential plaintiffs’ for case-management purposes, it cannot signal approval of the merits or otherwise stir up litigation,” compels the conclusion that the “similarly situated” mandate be “rigorously enforce[d] at the outset of the litigation” *Id.* at 434 (citing *Hoffmann-La Roche*, 493 U.S. at 169).

15. The Ninth Circuit was given the opportunity to apply this Court’s ruling in *E.M.D. Sales* to the FLSA’s “similarly situated” requirement but declined to do so.

4. Strong Likelihood: The Sixth Circuit’s *Clark* Framework.

The Sixth Circuit too rejects the *Lusardi* framework but imposes a different standard than the Fifth. In *Clark*, it held that district courts should not “facilitate notice upon merely a ‘modest showing’ or under a ‘lenient standard’ of similarity.” *Clark*, 68 F.4th at 1010. But it declined to adopt the standard articulated in *Swales* and instead adopted a standard akin to that of a preliminary injunction. *Id.* at 1011. The court continued that “for a district court to facilitate notice of an FLSA suit to other employees, the plaintiffs must show a ‘strong likelihood’ that those employees are similarly situated to the plaintiffs themselves. That standard requires a showing greater than the one necessary to create a genuine issue of fact, but less than the one necessary to show a preponderance.” *Id.* (citation omitted).

5. Material Factual Dispute: The Seventh Circuit’s *Richards* Framework.

The Seventh Circuit became the third one to reject *Lusardi* but declined to adopt the standards in *Swales* or *Clark*. It created instead a fifth distinct standard. While it noted *E.M.D. Sales* requires a plaintiff eventually to show “similarly situated” by a preponderance of the evidence, “[w]hether a plaintiff can reasonably be expected to make this showing before notice . . . is a different question altogether.” *Richards*, 149 F.4th at 912. “[T]o secure notice, a plaintiff must first make a threshold showing that there is a material factual dispute as to whether the proposed collective is similarly situated.” *Id.* at 913.

* * *

This Court is “not a court of error correction”—its “principal purpose . . . is to resolve conflicts among the United States courts of appeals . . . concerning the meaning of provisions of federal law.” *Braxton v. U.S.*, 500 U.S. 344, 347 (1991) (“principal purpose . . .”); *Martin v. Blessing*, 571 U.S. 1040, 1045 (2013) (Alito, J., concurring in denial of *certiorari*) (“not a court of error correction”). The five-way split among the circuits over § 16(b)’s “similarly situated” requirement by itself calls for *certiorari*. Here, the end of error correction too is served, as only one of the standards—applied in only one circuit—arguably can be reconciled with last term’s unanimous decision in *E.M.D. Sales*.

II. Only One Of the Five Approaches—The Fifth Circuit’s—Can Be Reconciled With Last Term’s Decision In *E.M.D. Sales v. Carrera*.

1. *E.M.D. Sales* holds the “preponderance-of-the-evidence standard has remained the default standard of proof in American civil litigation” and applies to the FLSA. *E.M.D. Sales*, 604 U.S. at 50. Courts may deviate only where there is a statutory, constitutional or common-law warrant to do so. *Id.* at 50-51. There is no more warrant for departing from preponderance for § 16(b) “similarly situated” determinations, as there was for the “outside salesman” determination under § 13(a)(1) at issue in *E.M.D. Sales*.

But that is precisely what step one leniency does. It allows notice when the statutory requirement is only “facially satisfied.” *Campbell*, 903 F.3d at 1100. “The level of consideration is ‘lenient.’” *Id.* (quoting *Camesi v. Univ. of Pittsburgh Med. Ctr.*, 729 F.3d 239, 243 [3d Cir. 2013]).

Rather than a preponderance, the standard is “loosely akin to a plausibility standard.” *Campbell*, 903 F.3d at 1100. In making this determination “the district court’s analysis is typically focused on a review of the pleadings but may *sometimes* be supplemented by declarations or limited other evidence.” *Id.* at 1109 (emphasis added).

2. *Hoffmann-La Roche* held that “district courts have discretion, in appropriate cases, to implement 29 U.S.C. § 216(b) . . . by facilitating notice to potential plaintiffs” based on “[t]he broad remedial goal” of the FLSA which “should be enforced to the full extent of its terms.” 493 U.S. at 169, 174. *See also id.* at 180 (holding is grounded in “a justification in policy but not in law,”) (Scalia, J., dissenting). Decisions adopting step one leniency generally follow this canon of construction. *See, e.g., Zavala*, 691 F.3d at 537 (rejecting preponderance at step one because adopting it “would be inconsistent with Congress’ intent that the FLSA should be liberally construed.”)

3. This approach has three fatal flaws:

First, the policy goals of a statute are relevant to its construction only when they “shed a reliable light on the enacting Legislature’s understanding of otherwise ambiguous terms.” *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005). There is no ambiguity here to be examined through any lens of policy. “Section 216(b)’s natural meaning is not elusive. It creates a private right of action and requires employees to opt-in [*sic.*] to litigate their claims” *Lundeen*, 2025 WL 2935340 at *5.

Second, this is precisely the sort of “policy-laden argument[]” that *E.M.D. Sales* rejects. *E.M.D. Sales*, 604 U.S. at 52. Following previous criticism of the “flawed premise that the FLSA ‘pursues’ its remedial purpose ‘at all costs,’” and directive that the FLSA be given a “fair reading,” *E.M.D. Sales* holds:

“[T]he public interest in Fair Labor Standards Act cases does not fall entirely on the side of employees. Most legislation reflects a balance of competing interests. So it is here. Rather than choose sides in a policy debate, this Court *must apply the statute as written and as informed by the longstanding default rule regarding the standard of proof.*” *Id.* at 53 (emphasis added). *See also Encino Motorcars, LLC v. Navarro*, 584 U.S. 79, 80 (2018) (“flawed premise . . .” and “fair reading”).

The mandate to give the FLSA a “fair reading” displaces any interpretative canon that the statute be read broadly to further its remedial purpose. “[I]t is quite mistaken to assume,” the Ninth Circuit pointed out in *Zabriskie v. Fed. Nat’l Mortg. Ass’n*, 940 F.3d 1022 (9th Cir. 2019), “that ‘whatever’ might appear to ‘further [a] statute’s primary objective must be the law.’” *Id.* at 1029 (quoting *Henson v. Santander Consumer USA Inc.*, 582 U.S. 79, 89 [2017]).

Third, even if § 16(b) were allowed a broad reading to further its remedial purpose, this reading provides no support to step one leniency. “Congress did not have worker-protection in mind when it later adopted the opt-in

mechanism.” *Lundeen*, 2025 WL 2935340 at *5. It “created the opt-in scheme . . . ‘primarily as a check against the power of unions’ and a bar to ‘one-way intervention.’” *Id.* at *6 (quoting *Knepper v. Rite Aid Corp.*, 675 F.3d 249, 260 [3d Cir. 2012].) Thus, as this Court concluded in *Hoffmann-La Roche*, § 16(b)’s joinder requirement was added “for the purpose of *limiting* private FLSA plaintiffs” *Hoffmann-La Roche*, 493 U.S. at 173 (emphasis added). A construction which furthers § 16(b)’s remedial purpose—if it were allowed—would *reject* step one leniency and instead require employees to show “similarly situated” by a preponderance of the evidence before court-authorized notice is mailed.

4. Step one leniency cannot be saved by characterizing it as a procedural device grounded in a district court’s inherent case management discretion, rather than grant of a statutory remedy under § 16(b), as the Third and Ninth Circuits try to do. *See Zavala*, 691 F.3d at 536; *Campbell*, 903 F.3d at 1101 (observing that step one “conditional” or “provisional certification” is a misnomer because “the district court in a collective action plays no . . . gatekeeping role”). *Hoffmann-La Roche* cautions notice cannot “in form or function” resemble “solicitation of claims.” 493 U.S. at 174. But sending notice to employees who are not eligible to join the suit inherently “amounts to solicitation of those employees to bring suits of their own.” *Clark*, 68 F.4th at 1010. *Accord Swales*, 985 F.3d at 434.

Much like a broken clock that shows the correct time twice a day, an application of a lenient standard at step one which does not result in solicitation is purely a matter of happenstance.

5. While the FLSA does not incorporate the requirements of Rule 23, the similarities between the two are obvious. Both are forms of representative litigation in which the lead plaintiffs prosecute the claims of others in a single action. And both are designed to ensure the “efficient resolution of similar disputes where issues particular to individual plaintiffs do not outnumber the collective concerns of the group.”¹ Joseph M. McLaughlin, *McLAUGHLIN ON CLASS ACTIONS*, § 2:16, at p. 155 (16th ed. 2019). *See* 7B Wright, *FEDERAL PRACTICE* § 1807, p. 469. Even if some parts of class-action law are not pertinent to § 16(b), there is no principled basis for erecting an artificial wall between two areas of the law that so naturally overlap. The similarities highlight why there is no warrant to depart from the preponderance standard for § 16(b)—even at step one of a two-step process.

It is settled that “the party seeking to certify a class ‘bears the burden of affirmatively demonstrating by a preponderance of the evidence her compliance with the requirements of Rule 23.’” *Russell v. Educational Commission for Foreign Medical Graduates*, 15 F.4th 259, 265 (3d Cir. 2021) (quoting *Byrd v. Aaron’s Inc.*, 784 F.3d 154, 163 [3d Cir. 2015]). *Accord, e.g., In re Nexium Antitrust Lit.*, 777 F.3d 9, 27 (1st Cir. 2015); *Johnson v. Nextel Communications Inc.*, 780 F.3d 128, 137 (2d Cir. 2015); *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 811 (7th Cir. 2012). The similarities between class certification under Rule 23 and collective certification under § 16(b) shows why the latter’s “similarly situated” requirement too must be satisfied by a preponderance at step one, just as the requirements of Rule 23(a) and (b) must be shown to a preponderance before a class may be certified.

The FLSA does not define the phrase “similarly situated.” But the purpose of § 16(b) is obvious: “similarly situated” to litigate claims on a collective basis in a single proceeding. “A collective action allows . . . plaintiffs the advantage of lower individual costs to vindicate rights by the pooling of resources. The judicial system benefits by efficient resolution in one proceeding of common issues of law and fact arising from the same alleged . . . activity.” *Hoffmann-La Roche*, 493 U.S. at 170. The “core inquiry” for a court in determining whether to certify a collective action under the FLSA is whether the employees are “similarly situated such that their claims of liability and damages can be tried on a class-wide and representative basis.” *Monroe v. FTS USA, LLC*, 860 F.3d 389, 417 (6th Cir. 2017), *cert. denied*, 138 S. Ct. 980 (2018) (Sutton, J., concurring in part and dissenting in part). Thus, as with Rule 23, “[w]hat matters” in determining whether plaintiffs are “similarly situated” under § 16(b) “is not the raising of common ‘questions’—even in droves—but rather, the capacity of a [collective] proceeding to generate common *answers* apt to drive the resolution of the litigation.” *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). As the Ninth Circuit observed in *Campbell*, it “would hardly be consistent with the FLSA’s remedial purpose” to permit employees to proceed collectively when, “as a practical matter, no material dispute truly could be heard on a collective basis.” *Campbell*, 903 F.3d at 1116.

6. Only the Fifth Circuit’s requirement that “district courts . . . rigorously enforce[]” § 16(b)’s “similarly situated” requirement “at the outset” arguably calls for demonstration of similarly situated by a preponderance before court-approved notice may be mailed. *See Swales*,

985 F.3d at 443. It requires, “*before* notice is sent to potential opt-ins” that a district court decide “whether putative plaintiffs are similarly situated—not *abstractly but actually*.” *Id.* at 433 (first emphasis in original; second emphasis added). “Actually” means “existing in fact or reality.” *Intel Corporation Investment Policy Committee v. Sulyma*, 589 U.S. 178, 184 (2020). Thus, the Fifth Circuit requires that “similarly situated” be made out to the applicable standard of proof before notice is mailed.

Indeed, in *Dukes* this Court used the same word to describe the burden a plaintiff bears to satisfy Rule 23—to which predominance applies—as the Fifth Circuit used in *Swales* to describe the burden a plaintiff bears to satisfy § 16(b)’s “similarly situated” requirement: “rigorous.” *Dukes*, 564 U.S. at 352 (*quoting General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 161 [1982]); *Swales*, 985 F.3d at 443 (“rigorously”).

* * *

Step one leniency cannot be reconciled with the either the letter *or* the spirit of *E.M.D. Sales*.

III. The Question Presented Is Recurring, Important, and Squarely Presented.

1. The standard for permitting joinder notice in FLSA collective actions is a question of exceptional and recurring importance. The FLSA has a massive reach, covering nearly 90% of the nation’s workforce. *See* EMPLOYMENT STATUS OF THE CIVILIAN POPULATION (163.4 million workers in U.S.); SMALL ENTITY COMPLIANCE GUIDE (FLSA covers “more than 143 million” workers).

2. What burden of proof applies in FLSA cases is “almost always crucial to the outcome.” *Lederman v. Frontier Fire Prot., Inc.*, 685 F.3d 1151, 1155 (10th Cir. 2012) (applying preponderance to overtime exemptions). This is no less true about the showing to justify collective notice.

In the two-year period 2023-24, the likelihood of conditional certification and approval of notice was 84% in circuits that follow *Lusardi* (Second Circuit—49 of 60 motions granted; Third—25 of 29 granted; Fourth—34 of 37; Eighth—11 of 12 granted; Tenth—17 of 19; and Eleventh—18 of 26). In the Ninth Circuit, which follows its own (slightly stricter) standard, the likelihood was lower: 71% (42 motions granted out of 59). But in the remaining circuits, which apply their own (varying) stricter standards, it was lower still: 67% (Fifth Circuit—8 of 12 motions granted; Sixth—11 of 19 granted; Seventh—20 of 29 granted). *See* Duane Morris LLP, CLASS ACTION REVIEW 2025, p. 468; CLASS ACTION REVIEW 2024, p. 248.¹⁶

3. And because the certification standard applied is “almost always crucial to the outcome” in collective actions, step one leniency presents an “opportunity for abuse of the collective-action device [because] plaintiffs may wield the collective-action format for settlement leverage[.]” *Bigger v. Facebook, Inc.*, 947 F.3d 1043, 1049-50 & n.5 (7th Cir. 2020). In FLSA collective actions, as in Rule 23 class actions, “expanding the litigation with additional plaintiffs increases pressure to settle, no matter the action’s merits.” *Id.* at 1049. “[L]eniency of the

16. The 2025 REVIEW is available on the internet at <https://online.flippingbook.com/view/1027553609/476/>. The 2024 REVIEW, at <https://online.flippingbook.com/view/954167557/>.

stage-one standard, while not so toothless as to render conditional certification automatic, exerts formidable settlement pressure.” *Swales*, 985 F.3d at 436. “[M]ost collective actions settle.” 7B Wright, FEDERAL PRACTICE § 1807.¹⁷ Again, the statistics bear this out. In the same 2023-24 period, while there were 321 step one conditional certification motions filed and decided across the circuits, only 33 step two decertification motions were filed and decided. CLASS ACTION REVIEW 2025, p. 468; CLASS ACTION REVIEW 2024, p. 248. Settlement accounts for most of the difference.

17. See also, e.g., *Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 524 (2018) (“[I]t’s also well known that [class actions] can unfairly ‘plac[e] pressure on the defendant to settle even unmeritorious claims’”) (quoting *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 445, n.3 [2010] [Ginsburg, J., dissenting]); *AT&T Mobility LLC v. Concepcion*, 563 US 333, 350 (2010) (“But when damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable. Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims. Other courts have noted the risk of ‘in terrorem’ settlements that class actions entail . . .”).

These settlement pressures even play out on this Court’s own docket. Five terms ago, following the Second Circuit’s adoption of *Lusardi* in *Scott*, the employer petitioned for *certiorari*. After the petition was fully briefed, including *amici* briefs supporting both sides, and the matter sent to conference more than once, the parties settled and stipulated to withdraw the petition, depriving this Court of an opportunity to settle the questions posed here. See *Chipotle Mexican Grill, Inc. v. Scott*, No. 20-257.

At that time, there was only a two-way split between *Lusardi*’s step-one leniency, and the Ninth Circuit’s step-one leniency ‘plus’ frameworks. Now, three more distinct approaches have emerged (in the Fifth, Sixth and Seventh Circuits).

3. This case is an ideal vehicle to resolve the circuit split and restore national uniformity to FLSA collective actions in agreement with this Court’s most recent interpretation of the Act. The Ninth Circuit was squarely presented with this issue and declined to apply this Court’s decision in *E.M.D. Sales* to the “similarly situated” standard. The Court should correct this error.

CONCLUSION

“The stage is set for the Supreme Court to finally prescribe a framework for district courts across the country to follow.” Tausch, *Defying Goldilocks*, 74 EMORY L.J. at 1528. And this is a rare case in which considerations of conflict resolution and error correction are served equally by *certiorari*.¹⁸ See SUP CT. R. 10(A) & (C). The petition for writ of certiorari should be granted.

18. Should this Court be disinclined to grant *certiorari* to undertake plenary review, it should consider in the alternative summary reversal following GVR, with a short *per curiam* opinion concluding that the Ninth Circuit’s affirmance of the district court’s preliminary approval order was error under *E.M.D. Sales*. Such an opinion could nudge the circuits to bring themselves into correct uniformity without the need for this Court (and the parties) to devote significant resources to briefing, argument and decision articulating the correct standard to replace the many approaches applied at present.

This Court has employed this procedure in the past in the face of doctrinal error. See, e.g., *Marmet Health Care Center, Inc. v. Brown*, 565 U.S. 530 (2012) (*per curiam* opinion reversing remand lower court decision at odds with Supreme Court precedent following GVR order). A *per curiam* opinion reversing and remanding would be a decision on the merits with precedential value. See, e.g., *Viking River Cruises, Inc. v. Moriana*, 596 U.S. 639, 658 (2022) (characterizing *Marmet Health*

Respectfully submitted,

JAMES M. COLEMAN
JASON D. FRIEDMAN
CONSTANGY, BROOKS, SMITH
& PROPHETE LLP
12500 Fair Lakes Circle,
Suite 300
Fairfax, VA 22033

STEVEN B. KATZ
Counsel of Record
CONSTANGY, BROOKS, SMITH
& PROPHETE LLP
2029 Century Park East,
Suite 1100
Los Angeles, CA 90067
(310) 909-7775
skatz@constangy.com

Counsel for Petitioner

November 5, 2025

as “our precedent[.]”); *Johnson v. Walmart Inc.*, 57 F.4th 677, 681 (9th Cir. 2023) (citing *Marmet Health* as precedent); *Noohi v. Toll Bros., Inc.*, 708 F.3d 599, 612 (4th Cir. 2013) (distinguishing *Marmet Health* on its facts, implying precedential value). *See also*, generally, *Lawrence on Behalf of Lawrence v. Chater*, 516 U.S. 163, 166-67 (1996) (discussing the Court’s “broad power to GVR”)

APPENDIX

TABLE OF APPENDICES

	<i>Page</i>
APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED JULY 1, 2025	1a
APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, SUBMITTED JULY 1, 2025...	17a
APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA, FILED JANUARY 30, 2024	20a
APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA, FILED MARCH 31, 2023	56a
APPENDIX E — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA, FILED JULY 22, 2022.....	99a
APPENDIX F — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA, FILED JANUARY 21, 2022	108a

Table of Appendices

	<i>Page</i>
APPENDIX G — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA, FILED NOVEMBER 12, 2021	115a
APPENDIX H — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED AUGUST 8, 2025...	130a
APPENDIX I — EXCERPT OF 29 U.S.C. § 216(b) ..	132a

1a

**APPENDIX A — OPINION OF THE UNITED
STATES COURT OF APPEALS FOR THE NINTH
CIRCUIT, FILED JULY 1, 2025**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 23-15650, 24-1979
D.C. No. 2:21-cv-00940-DJH

ANDREW HARRINGTON; KATIE LIAMMAYTRY;
JASON LENCHERT; DYLAN BASCH,

Plaintiffs-Appellees,

v.

CRACKER BARREL OLD COUNTRY STORE, INC.,

Defendant-Appellant.

Argued and Submitted February 7, 2025,
Phoenix, Arizona

Filed July 1, 2025

Before: Michael Daly Hawkins, Richard R. Clifton, and
Bridget S. Bade, Circuit Judges.

Opinion by Judge Hawkins.

OPINION

HAWKINS, Circuit Judge:

Appendix A

The Fair Labor Standards Act of 1938 (the “FLSA”) imposes certain minimum-wage and overtime-compensation requirements on employers and allows employees alleging violations of those requirements to litigate their claims collectively with other “similarly situated” plaintiffs. *See* 29 U.S.C. § 216(b). There is a “near-universal practice to evaluate the propriety of the collective mechanism—in particular, plaintiffs’ satisfaction of the ‘similarly situated’ requirement—by way of a two-step ‘certification’ process.” *Campbell v. City of Los Angeles*, 903 F.3d 1090, 1100 (9th Cir. 2018). In a typical case, “plaintiffs will, at some point around the pleading stage, move for ‘preliminary certification’ of the collective action, contending that they have at least facially satisfied the ‘similarly situated’ requirement.” *Id.* The “sole consequence” of preliminary certification “is the sending of court-approved written notice” to prospective-plaintiff employees, who may opt to join into the collective action by filing a written consent with the court. *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 75, 133 S. Ct. 1523, 185 L. Ed. 2d 636 (2013). Then, at a later stage in the proceedings “after the necessary discovery is complete,” defendants may “move for ‘decertification’ of the collective action on the theory that the plaintiffs’ status as ‘similarly situated’ was not borne out by the fully developed record.” *Campbell*, 903 F.3d at 1100.

Here, a group of current and former employees (“Plaintiffs”) of Cracker Barrel Old Country Store, Inc. (“Cracker Barrel”) filed the underlying lawsuit alleging that Cracker Barrel violated the FLSA in connection with its wages for tipped workers. Following the two-

Appendix A

step process just described, the district court granted Plaintiffs’ motion for preliminary certification and approved notice to a group of prospective opt-in plaintiffs. The group included employees that may have entered into arbitration agreements with Cracker Barrel as well as out-of-state employees with no apparent ties to Cracker Barrel’s operations in Arizona—the forum state.

We granted Cracker Barrel’s motion to permit this interlocutory appeal to answer three questions: (1) Did the district court follow the correct procedure in granting preliminary certification? (2) Was the district court required to determine the arbitrability of absent employees’ claims prior to authorizing notice? (3) Does *Bristol-Myers Squibb Company v. Superior Court of California (Bristol-Myers)*, 582 U.S. 255, 137 S. Ct. 1773, 198 L. Ed. 2d 395 (2017), apply in FLSA collective actions in federal court such that nationwide notice was inappropriate in this case?

We find no error in the district court’s order with regard to the first two questions. As to the third question, we join the majority of our sister circuits reaching the issue and hold that *Bristol-Myers* applies in FLSA collective actions in federal court. Consequently, where the basis for personal jurisdiction in the collective action is specific personal jurisdiction, the district court must assess whether each opt-in plaintiff’s claim bears a sufficient connection to the defendant’s activities in the forum state. Because the district court authorized nationwide notice on the mistaken assumption that it would not need to assess specific personal jurisdiction on a claim-by-claim basis,

Appendix A

we vacate and remand for further proceedings consistent with this opinion.

I. Background.

Plaintiffs are current and former employees of Cracker Barrel who are not subject to the arbitration agreement that Cracker Barrel routinely presents to its employees through an online training program.¹ They allege that Cracker Barrel violated the FLSA in connection with its use of tip credits and wages for tipped employees.

After several rounds of motions to dismiss and amendments to the operative complaint, Plaintiffs sought preliminary certification and authorization to send notice to a collective consisting of “all servers who worked for Cracker Barrel in states where it attempts to take a tip credit . . . over the last three years.” Cracker Barrel objected on the grounds that notice should not be sent to (1) employees who are subject to Cracker Barrel’s arbitration agreement, and (2) employees outside of Arizona to the extent the district court would not have personal jurisdiction over their claims.

The district court granted Plaintiffs’ motion and authorized notice over Cracker Barrel’s objections. Because questions of fact persisted as to which prospective plaintiffs were bound by Cracker Barrel’s arbitration agreement, the district court decided to reserve judgment

1. In a separate memorandum disposition, we affirm the district court’s denial of Cracker Barrel’s motion to compel arbitration of plaintiff Dylan Basch’s claims.

Appendix A

on that issue until the second stage of proceedings. The district court then concluded that nationwide notice was permissible because the participation of one Arizona-based plaintiff was all that was needed to secure personal jurisdiction over Cracker Barrel for the collective action. Given the novelty of the issues before it, the district court also granted, in part, Cracker Barrel's motion to certify issues for interlocutory appeal, and we granted Cracker Barrel's subsequent petition for permission to bring this appeal.

II. Jurisdiction and Standard of Review.

We have jurisdiction under 28 U.S.C. § 1292(b). We review a district court's management orders in a collective action for abuse of discretion. *Dominguez v. Better Mortg. Corp.*, 88 F.4th 782, 791 (9th Cir. 2023). We review questions of law de novo. *FTC v. Qualcomm Inc.*, 969 F.3d 974, 993 (9th Cir. 2020).

III. Discussion.

We first address Cracker Barrel's challenges of the district court's process for granting preliminary certification and then the scope of the notice.

A. The Preliminary Certification Process.

The first issue on appeal—whether the district court followed a permissible procedure—is easily resolved. Under the FLSA, “workers may litigate jointly if they (1) claim a violation of the FLSA, (2) are ‘similarly situated,’

Appendix A

and (3) affirmatively opt in to the joint litigation, in writing.” *Campbell*, 903 F.3d at 1100 (citing 29 U.S.C. § 216(b)). The FLSA leaves the rest of the collective mechanism procedure open. *See id.* at 1108. As mentioned at the outset of this opinion, there is a generally accepted practice of following a two-step “certification” procedure.² *Id.* at 1108-10. In *Campbell*, we discussed the two-step approach at length and approved of its use in this circuit. *Id.*

Relying on a recent decision of the Fifth Circuit, *Swales v. KLLM Transport Services, LLC*, 985 F.3d 430 (5th Cir. 2021), Cracker Barrel now asks us to abandon the two-step approach and instead adopt “a one-step mechanism that rigorously enforces at the outset of the litigation § 216(b)’s ‘similarly situated’ mandate.” But our court has already endorsed the two-step approach, and we are bound by that precedent.³ *See Miller v. Gammie*,

2. FLSA cases have borrowed the “certification” and “decertification” terminology from the Rule 23 class action context, but we have cautioned that use of those terms is not meant to “imply that there should be any particular procedural parallels between collective and class actions.” *Campbell v. City of Los Angeles*, 903 F.3d 1090, 1102 (9th Cir. 2018).

3. Contrary to Cracker Barrel’s contention, *E.M.D. Sales, Inc. v. Carrera*, 604 U.S. 45, 145 S. Ct. 34, 220 L. Ed. 2d 309 (2025), is not clearly irreconcilable with our decision in *Campbell*. *E.M.D. Sales* held that the preponderance-of-the-evidence standard, rather than the clear-and-convincing-evidence standard, “applies when an employer seeks to show that an employee is exempt from the minimum-wage and overtime-pay provisions” of the FLSA. *Id.* at 49, 54. It said nothing about how a district court should manage a collective action or the procedure it should follow when

Appendix A

335 F.3d 889, 899 (9th Cir. 2003) (en banc). Accordingly, we hold that the district court did not abuse its discretion by following the two-step approach outlined in *Campbell*.⁴

B. Proposed Notice Recipients.

We next turn to the scope of the notice and address whether the district court permissibly authorized notice to (1) employees that allegedly entered into arbitration agreements with the defendant, and (2) out-of-state employees with no apparent ties to the defendant's activities in the forum state.

1. Arbitration Agreements.

Whether a district court may authorize notice to employees that allegedly entered into arbitration agreements with the defendant is an issue of first impression in our circuit. The few circuits that have reached the issue have generally agreed that a district court may not do so if it is undisputed that the absent employees (prospective opt-in plaintiffs) are bound by valid arbitration agreements. *See Bigger v. Facebook, Inc.*, 947 F.3d 1043, 1050 (7th Cir. 2020); *In re JPMorgan Chase*

determining whether to exercise its discretion to facilitate notice to prospective opt-in plaintiffs. Cracker Barrel's motion for leave to file a supplemental brief is denied.

4. *Campbell* did not address the standard the district court should apply in evaluating a preliminary certification motion. 903 F.3d at 1117. We also do not reach that issue, as Cracker Barrel has challenged only the district court's use of the two-step procedural mechanism.

Appendix A

& Co., 916 F.3d 494, 503 (5th Cir. 2019); *see also Clark v. A&L Homecare & Training Ctr., LLC*, 68 F.4th 1003, 1012 (6th Cir. 2023). Where the issue remains in dispute, two circuits require district courts to permit discovery and hold an evidentiary hearing prior to preliminary certification. *Bigger*, 947 F.3d at 1050; *In re JPMorgan Chase & Co.*, 916 F.3d at 502-03. In those circuits, if an employer shows by a preponderance of the evidence that certain absent employees have agreed to arbitrate their claims, the district court may not authorize notice to those employees. *See Bigger*, 947 F.3d at 1050; *In re JPMorgan Chase & Co.*, 916 F.3d at 503. *But see Clark*, 68 F.4th at 1011 (disagreeing with the conclusion “that district courts can or should determine, ‘by a preponderance of the evidence,’ whether absent employees have agreed to arbitrate their claims”).

We agree with our sister circuits that it is an abuse of discretion to authorize notice to employees if it is undisputed that their claims are subject to arbitration. Beyond that, we decline to adopt any bright-line rule requiring district courts in all cases to make conclusive determinations regarding the arbitrability of prospective opt-in plaintiffs’ claims prior to the dissemination of notice.

As we have recognized, “the proper means of managing a collective action—the form and timing of notice, the timing of motions, the extent of discovery before decertification is addressed—is largely a question of case management and thus a subject of substantial judicial discretion.” *Campbell*, 903 F.3d at 1110 (quotation

Appendix A

marks and citation omitted). That is particularly true of “[p]reliminary certification, to the extent it relates to the approval and dissemination of notice.” *Id.* at 1110 n.10. Issues regarding the applicability and enforceability of arbitration agreements are often fact intensive and individualized. *See, e.g., Oberstein v. Live Nation Ent., Inc.*, 60 F.4th 505, 513-15 (9th Cir. 2023). It may not be feasible or even possible to make those determinations in the absence of the parties allegedly bound by the agreements. *See Clark*, 68 F.4th at 1011 (“[T]his type of contention—that ‘other employees’ have agreed to arbitrate their claims—illustrates the impracticability of conclusively determining, in absentia, whether other employees are similarly situated to the original plaintiffs.”). Thus, where the existence and validity of an arbitration agreement remains in dispute, a district court is not required to rule on the arbitrability of absent employees’ claims prior to authorizing notice. Instead, the district court may reserve that determination until after the prospective plaintiffs have, in fact, opted into the litigation.

Applying these rules to the case before us, there was no abuse of discretion. The district court found that multiple fact issues remained that would need to be resolved before the court could determine which prospective opt-in plaintiffs might be required to arbitrate their claims. And the notice that the district court approved cautions that only employees whose claims are not subject to arbitration may join the litigation. The district court appropriately treated arbitrability as one factor in its determination of whether and how to facilitate notice.

Appendix A

See Campbell, 903 F.3d at 1117 (discussing the “similarly situated” requirement); *see also Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, 174, 110 S. Ct. 482, 107 L. Ed. 2d 480 (1989) (explaining that district courts “must be scrupulous to respect judicial neutrality” and “take care to avoid even the appearance of judicial endorsement of the merits of the action” when facilitating notice).

2. Personal Jurisdiction.

Finally, we turn to the question of personal jurisdiction and the propriety of nationwide notice.⁵

There are two forms of personal jurisdiction: general and specific. *Daimler AG v. Bauman*, 571 U.S. 117, 126-27, 134 S. Ct. 746, 187 L. Ed. 2d 624 (2014). General “or all-purpose” jurisdiction is available in the forum in which the defendant is “fairly regarded as at home”; for corporate defendants like Cracker Barrel, that typically means the state in which the defendant is incorporated or has its principal place of business.⁶ *Id.* at 122, 137. Specific jurisdiction, on the other hand, “focuses on the relationship among the defendant, the forum, and the litigation,” *Walden v. Fiore*, 571 U.S. 277, 284, 134 S. Ct.

5. As a preliminary matter, Plaintiffs contend that Cracker Barrel waived any argument that the court lacks personal jurisdiction over it in connection with the claims of non-Arizona employees. The district court rejected Plaintiffs’ waiver argument, and we decline to revisit the argument here.

6. Cracker Barrel is incorporated and has its principal place of business in Tennessee, so it is undisputed that Cracker Barrel is not subject to general personal jurisdiction in Arizona.

Appendix A

1115, 188 L. Ed. 2d 12 (2014) (internal quotation marks and citation omitted), *i.e.*, whether the suit “arises out of or relates to the defendant’s contacts with the forum,” *Daimler*, 571 U.S. at 127 (quotation marks, alteration, and citation omitted).

Bristol-Myers involved the exercise of specific personal jurisdiction in a mass tort action filed in California state court. 582 U.S. at 258. There, hundreds of plaintiffs joined together in a mass action against a nonresident pharmaceutical company alleging injuries resulting from a medication manufactured and sold by the defendant. *Id.* at 258-59. Some of the plaintiffs were California residents, but most were not. *Id.* at 259. Although all plaintiffs claimed the same type of injury, the nonresident plaintiffs’ claims bore no connection to California. *Id.* In what it described as a “straightforward application . . . of settled principles of personal jurisdiction,” the Supreme Court held that the due process clause of the Fourteenth Amendment prohibited a California state court from exercising specific personal jurisdiction over the claims of the nonresident plaintiffs against the nonresident defendant. *Id.* at 268. “The mere fact that *other* plaintiffs were prescribed, obtained, and ingested [the drug] in California—and allegedly sustained the same injuries as did the nonresidents”—could not support the assertion of specific personal jurisdiction over the nonresidents’ claims. *Id.* at 265. “What [wa]s needed—and what [wa]s missing . . . —[wa]s a connection between the forum and the specific claims at issue.” *Id.*

A split among circuit and district courts has emerged regarding whether the *Bristol-Myers* claim-by-claim

Appendix A

analysis for specific personal jurisdiction applies in FLSA collective actions. The Third, Sixth, Seventh, and Eighth Circuits hold that it does. *Fischer v. Fed. Express Corp.*, 42 F.4th 366, 370 (3d Cir. 2022); *Canaday v. Anthem Cos., Inc.*, 9 F.4th 392, 397 (6th Cir. 2021); *Vanegas v. Signet Builders, Inc.*, 113 F.4th 718, 721, 723 (7th Cir. 2024); *Vallone v. CJS Sols. Grp., LLC*, 9 F.4th 861, 865-66 (8th Cir. 2021). The First Circuit holds that it does not. *Waters v. Day & Zimmermann NPS, Inc.*, 23 F.4th 84, 92 (1st Cir. 2022). We align ourselves with the majority.

Our personal jurisdiction analysis in a federal question case begins with two basic principles. First, there must be “an applicable rule or statute that potentially confers jurisdiction over the defendant.” *Cox v. CoinMarketCap OPCO, LLC*, 112 F.4th 822, 829 (9th Cir. 2024) (citation modified). Second, the exercise of jurisdiction must be “consonant with the constitutional principles of due process.” *Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co.*, 284 F.3d 1114, 1123 (9th Cir. 2002).

“Congress’ typical mode of providing for the exercise of personal jurisdiction has been to authorize service of process.” *BNSF Ry. Co. v. Tyrrell*, 581 U.S. 402, 409, 137 S. Ct. 1549, 198 L. Ed. 2d 36 (2017). Because the FLSA does not contain a service of process provision, Federal Rule of Civil Procedure 4(k)(1)(A) directs us to the law of the forum state—here Arizona. *See* Fed. R. Civ. P. 4(k)(1)(A); *Briskin v. Shopify, Inc.*, 135 F.4th 739, 750 (9th Cir. 2025) (en banc). The Arizona long-arm statute is “co-extensive with the limits of federal due process” under the Fourteenth Amendment. *Herbal Brands, Inc.*

Appendix A

v. Photoplaza, Inc., 72 F.4th 1085, 1089 (9th Cir. 2023) (internal citation omitted). In a case like this involving specific personal jurisdiction over a nonresident defendant, those limits include *Bristol-Myers*’s requirement that each claim bears a connection to the defendant’s forum contacts. *See Bristol-Myers*, 582 U.S. at 265-68; *see also Vanegas*, 113 F.4th at 729 (“[W]hen the court asserts its jurisdiction through Rule 4(k)(1)(A) service, all it gets is what a state court would have.”).

Plaintiffs argue that *Bristol-Myers* does not apply because FLSA collective actions, like class actions, are representative actions in which personal jurisdiction is analyzed at the level of the suit rather than on a claim-by-claim basis. Although we have not yet considered the application of *Bristol-Myers* in a class action, *see Moser v. Benefytt, Inc.*, 8 F.4th 872, 878-79 (9th Cir. 2021), we have made clear that a collective action under the FLSA “is not a comparable form of representative action,” *Campbell*, 903 F.3d at 1105. The FLSA collective mechanism “is more accurately described as a kind of mass action, in which aggrieved workers act as a collective of *individual* plaintiffs with *individual* cases.” *Campbell*, 903 F.3d at 1105; *see also Vanegas*, 113 F.4th at 725 (“[I]n practice courts treat FLSA collectives as agglomerations of individual claims.”). The maintenance of individual party status makes the FLSA collective mechanism analogous to the mass action at issue in *Bristol-Myers*. *See Canaday*, 9 F.4th at 397. And in a case made up of individual claims by individual parties, it logically follows that personal jurisdiction be analyzed on an individual basis rather than at the level of the suit.

Appendix A

Plaintiffs also argue that *Bristol-Myers* does not apply because it is the Fifth Amendment, rather than the Fourteenth Amendment, that constrains personal jurisdiction in federal courts. When analyzing whether the exercise of personal jurisdiction comports with the Fifth Amendment, they argue, the court need only determine that the defendant has sufficient contacts with the United States as a whole—a standard easily met in a case involving a domestic corporation like Cracker Barrel. But Plaintiffs’ argument rests on the faulty premise that the Fourteenth Amendment plays no role in the jurisdictional analysis in this case.⁷ See *Walden*, 571 U.S. at 283 (“Federal courts ordinarily follow state law in determining the bounds of their jurisdiction over persons.” (quoting *Daimler*, 571 U.S. at 125)). If the FLSA provided for nationwide service of process, we would undertake a national contacts analysis and concern ourselves only with the due process limits of the Fifth Amendment. See *Go-Video, Inc. v. Akai Elec. Co., Ltd.*, 885 F.2d 1406, 1416 (9th Cir. 1989) (suggesting that “a national service provision is a necessary prerequisite for a court even to consider a national contacts approach”). However, the FLSA contains no such provision, which means that we must look to state law and, in turn, the Fourteenth Amendment. See *Herbal Brands, Inc.*, 72 F.4th at 1089.

7. *Bristol-Myers* clarified that it “concern[ed] the due process limits on the exercise of specific jurisdiction by a State” and left “open the question whether the Fifth Amendment imposes the same restrictions on the exercise of personal jurisdiction by a federal court.” 582 U.S. at 268-69. Because our holding rests on the Fourteenth Amendment, we also do not answer that question.

Appendix A

In reaching its contrary holding, the First Circuit acknowledged that the Fourteenth Amendment constrains a federal court’s personal jurisdiction in FLSA collective actions by virtue of Rule 4(k)(1)(A). *Waters*, 23 F.4th at 94. The court reasoned, though, that the Fourteenth Amendment is relevant only to the service of a summons by the original plaintiff. *Id.* at 94-96. Then, once the original plaintiff effects service, “the Fifth Amendment’s constitutional limitations limit the authority of the court” as to all other plaintiffs and claims. *Id.* at 96. That approach is “‘hard to reconcile with *Bristol-Myers*,’ as it would create another ‘loose and spurious form of general jurisdiction’” that “would permit later-added claims of any kind—whether under the FLSA or plain old Rule 18 joinder—to sidestep the usual jurisdictional limits.” *Vanegas*, 113 F.4th at 729 (citations omitted) (first quoting *Canaday*, 9 F.4th at 401; and then quoting *Bristol-Myers*, 582 U.S. at 264). We have long held that “[p]ersonal jurisdiction must exist for each claim asserted against a defendant.” *Action Embroidery Corp. v. Atl. Embroidery, Inc.*, 368 F.3d 1174, 1180 (9th Cir. 2004) (citing *Data Disc, Inc. v. Sys. Tech. Assocs., Inc.*, 557 F.2d 1280, 1289 n.8 (9th Cir. 1977)). Nothing in the text of the FLSA or the nature of the collective action suggests that the framework for the court’s personal jurisdiction analysis changes between the original plaintiff’s claims and opt-in plaintiffs’ claims.

We, therefore, hold that the reasoning of *Bristol-Myers* applies in FLSA collective actions, and the district court erred in its assumption that the participation of a single plaintiff with a claim arising out of Cracker Barrel’s business in Arizona was sufficient to establish personal

Appendix A

jurisdiction over Cracker Barrel for all claims in the collective action.

IV. Conclusion.

Although we conclude that the district court employed a permissible process for evaluating these threshold questions, we vacate and remand for the district court to reassess its preliminary certification in light of our holding that *Bristol-Myers* applies to FLSA collective actions.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

Each party will bear its own costs on appeal.

**APPENDIX B — OPINION OF THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT,
SUBMITTED JULY 1, 2025**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 23-15650, 24-1979
D.C. No. 2:21-cv-00940-DJH

ANDREW HARRINGTON; KATIE LIAMMAYTRY;
JASON LENCHERT; DYLAN BASCH,

Plaintiffs-Appellees,

v.

CRACKER BARREL OLD COUNTRY STORE, INC.,

Defendant-Appellant.

Argued and Submitted February 7, 2025
Phoenix, Arizona

MEMORANDUM*

Appeal from the United States District Court
for the District of Arizona
Diane J. Humetewa, District Judge, Presiding

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Appendix B

Before: HAWKINS, CLIFTON, and BADE, Circuit Judges.

Cracker Barrel Old Country Store, Inc. (“Cracker Barrel”) appeals the denial of its motion to compel arbitration of the claims brought by plaintiff Dylan Basch in this action under the Fair Labor Standards Act. We have jurisdiction under 9 U.S.C. § 16(a). Reviewing de novo the denial of a motion to compel arbitration and the underlying findings of fact for clear error, *Bielski v. Coinbase, Inc.*, 87 F.4th 1003, 1008 (9th Cir. 2023), we affirm.

The basic facts are undisputed. Basch encountered the arbitration agreement in question as part of his “Cracker Barrel University” online training. He checked the “Mark Complete” box at the end of the dispute resolution module of the training program. At that time, Basch was a minor. In connection with this litigation, Basch submitted a declaration explaining his lack of knowledge of the agreement and purporting to repudiate the agreement. Basch signed that declaration when he was 19 years old—18 months after he reached the age of majority to be precise.

The parties agree that Arizona law governs the arbitration agreement and its enforceability. Under Arizona law, “a contract entered into with a minor is voidable.” *St. Paul Fire & Marine Ins. Co. v. Muniz*, 504 P.2d 546, 548 (Ariz. Ct. App. 1972). The contract remains in effect until renounced, *id.*, and a minor must renounce the agreement “within a reasonable time after reaching his majority,” *Almada v. Ruelas*, 393 P.2d 254, 256 (Ariz.

Appendix B

1964) (internal quotation marks and citation omitted). Under the circumstances, the district court did not err in concluding Basch renounced the agreement “within a reasonable time after reaching his majority.”

In a separate opinion, we vacate, in part, the district court’s preliminary certification order appealed in case number 23-15650 and remand for further proceedings.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

Each party will bear its own costs on appeal.

20a

**APPENDIX C — ORDER OF THE UNITED
STATES DISTRICT COURT FOR THE DISTRICT
OF ARIZONA, FILED JANUARY 30, 2024**

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CV-21-00940-PHX-DJH

ANDREW HARRINGTON, *et al.*,

Plaintiffs,

v.

CRACKER BARREL OLD COUNTRY STORE
INCORPORATED,

Defendant.

Filed January 30, 2024

ORDER

Diane J. Humetewa, United States District Judge.

On March 31, 2023, the Court conditionally certified this matter as a collective action under the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.* (“FLSA”) (the “Collective Certification Order”) (Doc. 82). Pending before the Court are five motions filed by Defendant Cracker Barrel Old Country Store Incorporated (“Cracker Barrel”), each of which concern rulings that stem from the Collective Certification Order:

Appendix C

(1) Cracker Barrel’s “Motion for Clarification, or, in the Alternative, Reconsideration” (Doc. 83)¹ (“Motion for Reconsideration”) regarding the putative collective definition that was established in the Collective Certification Order;

(2) Cracker Barrel’s “Motion to Certify Interlocutory Appeal” (Doc. 84)² of four questions arising out of the Collective Certification Order;

(3) Cracker Barrel’s “Motion to Strike Plaintiffs’ Request for Equitable Tolling” (Doc. 93)³, where the contended request appeared in Plaintiffs’ Response to Cracker Barrel’s Motion for Reconsideration (Doc. 90);

(4) Cracker Barrel’s Motion to Stay Proceedings Pending Appeal (Doc. 96)⁴ of the Collective

1. The matter is fully briefed. Plaintiffs filed a Response (Doc. 90) in accordance with the Court’s April 17, 2023, Order (Doc. 88).

2. The matter is fully briefed. Plaintiffs did not file a Response, and the time to do so has passed. *See* LRCiv 7.2(c) (opposing party has 14 days after service within which to serve and file a responsive memorandum).

3. The matter is fully briefed. Plaintiffs filed a Response (Doc. 94). Cracker Barrel did not file a reply brief and the time to do so has passed. *See* LRCiv. 7.2(c).

4. The matter is fully briefed. Plaintiffs filed a Response (Doc. 97) and Cracker Barrel filed a Reply (Doc. 98).

Appendix C

Certification Order to the Ninth Circuit (Doc. 91);

(5) Cracker Barrel’s Motion to Strike Plaintiffs’ Notice of Supplemental Authority (Doc. 101)⁵ regarding *Coinbase, Inc. v. Bielski*, 599 U.S. 736, 143 S.Ct. 1915, 216 L.Ed.2d 671 (2023).

For the following reasons, the Court will modify the putative collective definition, certify for interlocutory appeal questions regarding arbitration and personal jurisdiction in FLSA collective actions, and stay the matter pending the Ninth Circuit’s review.

I. Procedural History⁶

Cracker Barrel filed most of the pending motions within the span of twenty-one days, creating a complex procedural history. Below is a brief overview of the relevant rulings, motions, and arguments:

In August 2022, Cracker Barrel filed its “Motion to Compel Arbitration and Dismiss Second Amended

5. The matter is fully briefed. Plaintiffs filed a Response (Doc. 102). Cracker Barrel did not file a reply brief and the time to do so has passed. *See* LRCiv. 7.2(c).

6. The Court incorporates by reference the Background Section of its Collective Certification Order (Doc. 82 at 2-4), which contains a comprehensive history of Plaintiffs’ prior amended complaints (Does. 1; 57; 74) and prior motions for certification (Docs. 8; 58; 76).

Appendix C

Complaint with Prejudice” (Doc. 77). Plaintiffs Andrew Harrington, Katie Liammaytry, Jason Lenchert, and Dylan Basch (collectively “Plaintiffs”) also filed their “Second Amended Motion For Conditional Certification” (Doc. 76). In March 2023, the Court issued its Collective Certification Order, which denied Cracker Barrel’s Motion but granted Plaintiffs’ Motion. (*See generally* Doc. 82). In so doing, the Court conditionally certified the present action as a collective under Section 216(b) of the FLSA. (*Id.*) The Court defined the following putative collective for notice purposes: “all current and former Cracker Barrel servers who worked for Cracker Barrel from May 28, 2018, to the present in states where Cracker Barrel pays its employees under the 29 U.S.C. § 203(m) tip credit scheme.” (*Id.* at 28).⁷ The Court also authorized Plaintiffs’ Notice and Consent to Join forms (Docs. 76-13; 76-14) (the “Notice Forms”) to be disseminated in compliance with the Court’s directives. (Doc. 82 at 19-28).

On April 14, 2023, Cracker Barrel filed its Motion for Reconsideration on the bounds of the putative collective for notice purposes. (Doc. 83). Cracker Barrel concurrently filed a Motion to Certify Interlocutory Appeal (Doc. 84) and a “Motion to Stay Deadlines for Answer and Production of Employee Data” (Doc. 85).

In its April 17, 2023, Order, the Court noted some merit in Cracker Barrel’s position on the defined putative collective, and thus ordered the parties to meet and confer

7. The Court used the proposed putative collective definition as stated in Plaintiffs’ Motion to Certify Class (*see* Doc. 76 at 2). (Doc. 82 at 11 n.8).

Appendix C

on possible stipulated language for the terms of notice. (Doc. 88 at 1). If no agreement could be reached, the Court ordered Plaintiffs to respond to Cracker Barrel's Motion for Reconsideration. (*Id.*) Consequently, the Court stayed the notice deadlines established in the Collective Certification Order pending a ruling on Cracker Barrel's Motion for Reconsideration. (*Id.* at 2).

On April 28, 2023, Plaintiffs filed their Response to Cracker Barrel's Motion for Reconsideration (Doc. 90) agreeing to a "slight modification" of the Collective Certification Order. (*Id.* at 1).

On April 30, 2023, instead of waiting for the Court to review the parties' arguments on the Collective Certification Order and rule on the related Motion for Reconsideration, Cracker Barrel appealed the Collective Certification Order to the Ninth Circuit. (Doc. 91). Thereafter, Cracker Barrel moved to strike Plaintiffs' request for equitable tolling as set forth in Plaintiffs' Response to Cracker Barrel's Motion for Reconsideration. (Doc. 93). Cracker Barrel also moved to stay the case pending the appeal of the Collective Certification Order. (Doc. 96).

On June 25, 2023, Plaintiffs file a notice of new United States Supreme Court authority that relates to issues in the present matter. (Doc. 99). Cracker Barrel moved to strike Plaintiffs' notice. (Doc. 99).

On October 4, 2023, Cracker Barrel's then-counsel moved to withdraw as counsel of record. (Doc. 103). Cracker Barrel has since retained new counsel. (Doc. 105).

*Appendix C***II. Discussion**

The Court will address together Cracker Barrel's Motion for Reconsideration and Motion to Strike Plaintiffs' Request for Equitable Tolling because both relate to the bounds of the putative collective. The Court will then turn to Cracker Barrel's Motion to Certify Interlocutory Appeal. The Court will conclude with Cracker Barrel's Motion to Stay Proceedings Pending Appeal and Motion to Strike Plaintiffs' Notice of Supplemental Authority because both relate to whether a stay in this case is proper.

A. Cracker Barrel's Motion for Reconsideration (Doc. 83) and Motion to Strike Plaintiffs' Request for Equitable Tolling (Doc. 93)

Cracker Barrel seeks reconsideration of the putative collective definition due to concerns regarding the scope of data it must produce on the individuals who will be sent notice. Cracker Barrel represents the putative collective currently encompasses 159,934 individuals. (Doc. 83 at 3). Cracker Barrel seeks clarification of the definition "to make sure FLSA conditional certification notice is not sent to individuals whose FLSA claims are already time-barred or who this Court has previously determined cannot join this court action." (*Id.* at 2). First, Cracker Barrel argues the Court should reconsider the time frame of the putative collective in light of the opt-in standard for FLSA collective actions. (*Id.* at 4-6). Cracker Barrel seeks to strike Plaintiffs' request that the statute of limitations be equitably tolled. (*See generally* Doc. 93). Second, Cracker Barrel argues the Court should

Appendix C

reconsider the scope of the putative collective so that it expressly excludes servers who signed Cracker Barrel's Arbitration Agreement after turning 18 years old. (Doc. 83 at 10, 6-9).

The Court will set forth the applicable legal standard for motions for reconsideration before turning to Cracker Barrel's arguments.

1. Legal Standards

Motions for reconsideration should be granted only in rare circumstances. *Carroll v. Nakatani*, 342 F.3d 934, 945 (9th Cir. 2003). "Reconsideration is appropriate if the district court (1) is presented with newly discovered evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3) if there is an intervening change in controlling law." *Sch. Dist. No. 1J, Multnomah Cnty., Or. v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993). Similarly, Arizona Local Rule of Civil Procedure 7.2 provides "[t]he Court will ordinarily deny a motion for reconsideration of an Order absent a showing of manifest error or a showing of new facts or legal authority that could not have been brought to its attention earlier with reasonable diligence." LRCiv 7.2(g)(1). The movant must specify "[a]ny new matters being brought to the Court's attention for the first time and the reasons they were not presented earlier." *Id.* Whether to grant a motion for reconsideration is left to the "sound discretion" of the district court. *Navajo Nation v. Norris*, 331 F.3d 1041, 1046 (9th Cir. 2003). Such motions should not be used for the purpose of asking a court "to rethink what the

Appendix C

court had already thought through—rightly or wrongly.” *Defenders of Wildlife v. Browner*, 909 F. Supp. 1342, 1351 (D. Ariz. 1995) (quoting *Above the Belt, Inc. v. Mel Bohannon Roofing, Inc.*, 99 F.R.D. 99, 101 (E.D. Va. 1983)). A mere disagreement with a previous order is an insufficient basis for reconsideration. *See Leong v. Hilton Hotels Corp.*, 689 F. Supp. 1572, 1573 (D. Haw. 1988).

2. The Time Frame of the Putative Collective

Cracker Barrel first argues the Court should reconsider the time frame of the putative collective because it does not accurately reflect the opt-in standard for FLSA collective actions. The Collective Certification Order defined the putative collective for notice purposes as follows: “all current and former Cracker Barrel servers who worked for Cracker Barrel *from May 28, 2018, to the present* in states where Cracker Barrel pays its employees under the 29 U.S.C. § 203(m) tip credit scheme.” (Doc. 82 at 28) (emphasis added). In so defining, the Court settled that Plaintiffs may use the three-year statutory time period for Cracker Barrel’s allegedly willful violations of the FLSA. (*Id.* at 25) (citing 29 U.S.C. § 225(a)). Cracker Barrel does not take issue with the Court’s decision to do so. The Court further explained that because the original complaint in this matter was filed on May 28, 2021, the putative collective time frame is three years before the filing of the complaint on May 18, 2018. (*Id.*) Cracker Barrel argues this decision was error.

Cracker Barrel posits the time frame should start on March 31, 2020—or, three years before the Court certified

Appendix C

this matter as a collective action. (Doc. 83 at 6). Cracker Barrel maintains that collective actions under the FLSA differ from other class actions under Federal Rule of Civil Procedure 23 in that an FLSA opt-in plaintiff's action is considered commenced from the date their opt-in form is filed with the district court. (*Id.* at 4). Cracker Barrel asserts the Court's error resulted in a defined collective that includes an extra 64,216 individuals whose claims would otherwise be time-barred. (*Id.* at 5). In response, Plaintiffs admit that "a three-year statute of limitations from the date a plaintiff opts-in is generally the rule" in FLSA cases. (Doc. 90 at 2). However, Plaintiffs argue the statute of limitations should be equitably tolled due to Cracker Barrel's efforts to prolong case proceedings. (*Id.* at 5-8). Cracker Barrel moves to strike Plaintiffs' request on the basis that it is improper to raise new claims or grounds for relief in a response brief (Doc. 93 at 2).

The Courts agrees with Cracker Barrel that the Collective Certification Order erred when setting the time frame of the putative collective as three years prior to the filing of the complaint. The Court also finds that Plaintiffs' request for equitable tolling—although procedurally improper—is meritorious. The time frame of the putative collective will be modified accordingly.

a. The Putative Collective Should Reflect the FLSA's Opt-in Standard

Section 255(a) of the FLSA states that "a cause of action arising out of a willful violation may be *commenced* within three years after the cause of action accrued." 29

Appendix C

U.S.C. § 255(a) (emphasis added). Section 256 further defines when a cause of action has been “commenced” for statute of limitation purposes:

In determining when an action is commenced for the purposes of section 255 of [the FLSA], an action commenced on or after May 14, 1947 [under the FLSA] shall be considered to be commenced on the date when the complaint is filed; *except that in the case of a collective or class action instituted under the [FLSA]*, it shall be considered to be commenced in the case of any individual claimant—

(a) on the date when the complaint is filed, if he is specifically named as a party plaintiff in the complaint and his written consent to become a party plaintiff is filed on such date in the court in which the action is brought; or

(b) if such written consent was not so filed or if his name did not so appear—*on the subsequent date on which such written consent is filed in the court in which the action was commenced.*

Id. § 256 (emphasis added). In other words, in an FLSA collective action such as here, an opt-in plaintiff’s action is deemed “commenced” from the date her opt-in form is filed, not from the date the complaint was filed. *Campbell v. City of L.A.*, 903 F.3d 1090, 1104 (9th Cir. 2018) (citing

Appendix C

29 U.S.C. § 256). The Northern District of California has highlighted the FLSA's distinct opt-in standard in *Coppernoll v. Hamcor, Inc.*:

For purposes of calculating the timeliness of a FLSA claim, the statute of limitations is tolled for each putative class member individually upon filing a written consent to become a party plaintiff. This opt-in standard differs from the opt-out standard in a Rule 23 class action, where the statute of limitations is tolled for all putative class members when the complaint is filed. Thus, without equitable tolling, the statute of limitations on a putative class member's FLSA claim continues to run in the time between the filing of the collective action complaint and the filing of their written consent opting-in.

2017 WL 1508853, at *1 (N.D. Cal. Apr. 27, 2017).

Because this is an FLSA collective suit, the Court should not have applied the opt-out standard; rather, the putative collective should be framed based on the opt-in standard under Section 256. The Collective Certification Order erred when it set the time frame of the putative collective as May 28, 2018, on the basis that an FLSA opt-in plaintiff's action is commenced on the date the complaint is filed. (Doc. 82 at 25). Section 256 of the FLSA rather establishes that an FLSA opt-in plaintiff's action is "commenced" from the date her opt-in form is filed. 29 U.S.C. § 256. Plaintiffs certainly concede to this general rule. (Doc. 90 at 2). Therefore, the Court agrees

Appendix C

with Cracker Barrel that it is more appropriate to set the time frame of the putative collective as three years before the Court certified this matter as a collective action. The remaining issue, however, is Plaintiffs' request to equitably toll the applicable statute of limitations.

b. Plaintiffs' Request for Equitable Tolling

Plaintiffs request that the Court toll the statute of limitations on the putative collective's FLSA claims due to (1) Cracker Barrel's efforts to prolong case proceedings and (2) other delays in this case. (Doc. 90 at 5-8). Cracker Barrel moves to strike Plaintiffs' request as procedurally deficient, arguing it is "inappropriate [] to imbed in a response brief." (Doc. 93 at 2). Even so, Cracker Barrel submitted a proposed "Response in Opposition" regarding Plaintiffs' equitable tolling arguments in the event the Court construes Plaintiffs' request as a new motion. (Doc. 93-2). Plaintiffs have no objection to the Court considering Cracker Barrel's Response in Opposition and have submitted a reply brief thereto. (*See* Doc. 94). The Court will address Cracker Barrel's procedural arguments before turning to the merits of Plaintiffs' request for tolling.

i. Plaintiffs' Request for Tolling is Construed as a Motion

At the outset, to request a new claim for relief for the first time in a response brief is not the appropriate procedure. *See Allen v. Beard*, 2019 WL 2501925, *2

Appendix C

n.3 (S.D. Cal. June 17, 2019) (explaining “a defendant must have ‘fair notice’ of the claims and the grounds for relief” and so a plaintiff “may not raise new claims or new grounds for relief in opposition to [a] motion”) (citing *Pickern v. Pier I Imports (U.S.), Inc.*, 457 F.3d 963, 968 (9th Cir. 2006)); *Griego v. Cnty. of Maui*, 2017 WL 2882695, at *5 (D. Haw. July 6, 2017) (“The regular briefing protocol for a motion would be undermined if a new motion (other than a mirror-image motion such as a cross- or counter-motion) were countenanced if mentioned in an opposition memorandum.”). Plaintiffs indeed recognize they have failed to file a motion for equitable tolling. (Doc. 90 at 8 n.3). Nonetheless, because Cracker Barrel preemptively submitted a Response in Opposition to Plaintiffs’ tolling arguments, to which Plaintiffs have replied, any notice concerns are remedied. In the interest of judicial economy, the Court will proceed by construing Plaintiffs’ request for equitable tolling as a fully briefed motion.⁸ Plaintiffs, however, are admonished for this unconventional procedure.

**ii. Plaintiffs’ Request for Tolling
has Merit**

As to the merits of Plaintiffs’ request, “[e]quitable tolling is a rare remedy to be applied in unusual circumstances, not as a cure-all for an entirely common state of affairs.” *Wallace v. Kato*, 549 U.S. 384, 396, 127 S.Ct. 1091, 166 L.Ed.2d 973 (2007). The Ninth Circuit

8. (Doc. 90 at 5-8 (Plaintiffs’ Request for Equitable Tolling)); (Doc. 93-1 (Cracker Barrel’s Response)); (Doc. 94 (Plaintiffs’ Reply)).

Appendix C

has stated that courts have discretion to apply equitable tolling on a case-by-case basis, but that such relief is to be applied “sparingly” and in “extreme” scenarios. *Scholar v. Pac. Bell*, 963 F.2d 264, 267 (9th Cir. 1992); *see also Partlow v. Jewish Orphans’ Home of Southern Cal., Inc.*, 645 F.2d 757, 760-61 (9th Cir. 1981), *abrogated on other grounds by Hoffman-LaRoche Inc. v. Sperling*, 493 U.S. 165, 110 S.Ct. 482, 107 L.Ed.2d 480 (1989) (stating the statute of limitations under Section 255 of the FLSA may be tolled “when equity warrants”). For example, “[e]quitable tolling applies when the plaintiff is prevented from asserting a claim by wrongful conduct on the part of the defendant, or when extraordinary circumstances beyond the plaintiff’s control made it impossible to file a claim on time.” *Stoll v. Runyon*, 165 F.3d 1238, 1242 (9th Cir. 1999), *as amended* (Mar. 22, 1999). The Court finds the latter warrants tolling here.

Plaintiffs argue equitable tolling should apply from either September 3, 2021—the date Plaintiffs’ initial Motion to Certify Class (Doc. 8) was fully briefed—or October 4, 2021—the date the Court granted Cracker Barrel’s Motion to Stay Discovery (Docs. 41; 45). (Doc. 90 at 7-8). Plaintiffs point to (1) Cracker Barrel’s efforts to prolong the case and (2) the Court’s discretionary case management decisions as circumstances beyond their control that give rise to equitable tolling. (*Id.* at 8). Cracker Barrel contends Plaintiffs cannot rely on their previously failed litigation attempts to seek tolling, as the Court ultimately denied Plaintiffs’ initial Motion to Certify Class and dismissed the complaint that was connected to the Court’s stay of discovery. (Doc. 93-2 at 4).

Appendix C

The Court agrees with Cracker Barrel that failed litigation efforts are hardly the type of extreme circumstances that justify equitable tolling. However, the Court is persuaded by Plaintiffs' line of authorities that have applied equitable tolling "where the court's discretionary case management decisions have led to procedural delay beyond the control of the putative collective action members." *Koval v. Pac. Bell Tel. Co.*, 2012 WL 3283428, *7 (N.D. Cal. Aug. 10, 2012); (see Doc. 90 at 7-8). Those authorities have found delays beyond a plaintiff's control include the time a court requires to rule on a motion to certify a collective action under the FLSA. See *Winningham v. Rafeal's Gourmet Diner, LLC*, 2022 WL 18359485, at *2 (D. Or. Dec. 19, 2022), *report and recommendation adopted*, 2023 WL 197005 (D. Or. Jan. 17, 2023); *Small v. Univ. Med. Ctr. of S. Nevada*, 2013 WL 3043454, at *3 (D. Nev. June 14, 2013); *Helton v. Factor 5, Inc.*, 2011 WL 5925078, *2 (N.D. Cal. Nov. 28, 2011). Here, the Court took under advisement Plaintiffs' Second Motion to Certify Class for six months before conditionally certifying this action as a collective. The Court required an additional ten months to resolve Cracker Barrels' five pending motion, all of which has been delaying the dissemination of notice to the putative collective despite this action being conditionally certified under the FLSA. Given that these delays are outside of Plaintiffs' control, the Court will equitably toll the statute of limitations from September 6, 2022—the date Plaintiffs' meritorious certification motion became ripe for review—until the date on which notice is sent to the putative collective. See *Winningham*, 2022 WL 18359485, at *2; *Koval v. Pac. Bell Tel. Co.*, 2012 WL 3283428, at *7.

Appendix C

In sum, to account for (1) the applicable three-year statute of limitations under the FLSA, (2) the opt-in standard under the FLSA, (3) the equitable tolling period that will run from September 6, 2022, until the date that notice is disseminated to the putative class, and (4) the policy that the broadest notice possible be approved on conditional certification of FLSA collective actions,⁹ the time frame of the putative collective class for notice purposes shall include: all current and former Cracker Barrel servers who worked for Cracker Barrel from *September 6, 2019, to the present* in states where Cracker Barrel pays its employees under the 29 U.S.C. § 203(m) tip credit scheme.

3. The Scope of the Putative Collective

Cracker Barrel next argues the Court erred when it included individuals who are subject to arbitration in the putative collective. (Doc. 83 at 6-10). The Court directly addressed this issue in the Collective Certification Order. (Doc. 82 at 20-21). In denying Cracker Barrel's Motion to Compel Arbitration and Dismiss Second Amended Complaint with Prejudice, the Court further examined Cracker Barrel's Arbitration Agreement and clarified which employees are subject to arbitration versus those who are not:

Employees who have signed the Agreement,
including through Cracker Barrel's online

9. (See Doc. 82 at 24) (citing *Vega v. All My Sons Bus. Dev. LLC*, 2022 WL 684380, at *3 (D. Ariz. Mar. 8, 2022)).

Appendix C

training program, while the majority age are subject to the Agreement. By contrast, employees are not subject to the Agreement if they: (1) did not sign the Agreement; (2) signed the Agreement when they were a minor and are still a minor; or (3) signed the Agreement when they were a minor and voided the Agreement after turning the majority age.

(*Id.* at 20). Due to these nuanced circumstances, the Court found it best to address whether certain opt-in plaintiffs were subject to arbitration at the second stage of the certification process. (*Id.* at 21 (noting other courts in the Ninth Circuit that have found the same)). The Court concluded that—even though some of the notified members of the putative collective may be subject to arbitration—it was improper to reference the Arbitration Agreement in the putative collective definition because “[o]nly after the FLSA plaintiffs join this action, may the court entertain [a] defendants’ arbitration-related motions seeking to compel opt-in plaintiffs to arbitrate or to prohibit plaintiffs from proceeding collectively.” (*Id.* at 21) (quoting *Campanelli v. Image First Healthcare Laundry Specialists, Inc.*, 2018 WL 6727825, at *9 (N.D. Cal. Dec. 21, 2018)). The Court further acknowledged that other areas of the Notice Forms would sufficiently alert potential opt-in plaintiffs that they can only join the action if they are not subject to arbitration. (*Id.* at 20 (citing Doc. 76-13 at 1, 2)).

Cracker Barrel contends the Court contradicted its prior orders when it did not account for a potential opt-

Appendix C

in plaintiff's "arbitration signing status" in the putative collective for notice purposes. (Doc. 83 at 7). In Cracker Barrel's opinion, by determining which employees are subject to arbitration and which are not, the Court fully resolved the issue of enforceability in this matter and failed to tailor the putative collective definition accordingly. (*Id.*) Cracker Barrel complains that "while 53, 750 individuals either have not signed the Agreement or [were] minors at the time of signing, a staggering 108,184 individuals have signed the Agreement as adults and, per the Court's previous Orders, cannot bring their claims in Court and are ineligible to participate." (*Id.*) Cracker Barrel cites to *Droesch v. Wells Fargo Bank* for the proposition that it should be allowed to present evidence on which employees are bound to arbitrate their claims. (*Id.*) (citing 2021 WL 2805604 (N.D. Cal. July 6, 2021)). Cracker Barrel further argues the Court should revise the putative collective to expressly exclude individuals "who signed the [Arbitration] Agreement after turning 18 years old." (*Id.* at 10). This is because any inclusion in the putative collective of individuals who are potentially subject to arbitration "greatly offends" the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.* ("FAA"). (*Id.* at 9-10).

In opposition, Plaintiffs contend that the Court did not misapply any of its prior orders because the Collective Certification Order is the first time the Court had addressed the issue of which potential plaintiffs should get notice. (Doc. 90 at 9). They argue that all other prior orders had discussed the enforceability of the Arbitration Agreements as to specific named plaintiffs only. (*Id.*) Plaintiffs further maintain that sorting through which

Appendix C

potential opt-in plaintiffs are subject to arbitration is more appropriate for the second stage of the FLSA certification process due to out-standing factual and legal disputes. (*Id.* at 9-10). The Court agrees with Plaintiffs in all regards.

As noted in Cracker Barrel’s primary authority, the Ninth Circuit has not yet considered whether FLSA notice should be provided to individuals who signed arbitration agreements. *See Droesch*, 2021 WL 2805604, *2. So, district courts have taken varying approaches when handling arbitration issues in FLSA collective actions. In concluding that remaining disputes over which potential opt-in plaintiffs are subject to arbitration are better addressed at the second stage of the certification process, the Court pointed to other courts in this circuit in accord. (Doc. 82 at 21 citing *Monplaisir v. Integrated Tech Grp.*, LLC, 2019 WL 3577162, at *3 (N.D. Cal. Aug. 6, 2019) (“[T]o avoid putting the cart before the horse, this inquiry [of arbitration] is best left for step two”); *Mejia v. Bimbo Bakeries USA Inc.*, 2018 WL 11352489, at *4 n.7 (D. Ariz. May 7, 2018); *Campanelli*, 2018 WL 6727825, at *8-9; *Delara v. Diamond Resorts Int’l Mktg., Inc.*, 2020 WL 2085957, at *5-6 (D. Nev. Apr. 30, 2020)). Although Cracker Barrel invokes a number of out-of-circuit authorities¹⁰ and persuasive, in-circuit authorities¹¹

10. For example, Cracker Barrel relies on *Bigger v. Facebook, Inc.*, 947 F.3d 1043, 1050 (7th Cir. 2020) and *In re JPMorgan Chase & Co.*, 916 F.3d 494, 502 (5th Cir. 2019). (Doc. 83 at 9-10).

11. For example, Cracker Barrel relies on *Droesch v. Wells Fargo Bank, N.A.*, 2021 WL 2805604 (N.D. Cal. July 6, 2021) and *Sandbergen v. Ace Am. Ins. Co.*, 2019 WL 13203944 (N.D. Cal. June 17, 2019). (Doc. 83 at 8-9).

Appendix C

to argue a contrary approach, Cracker Barrel has not pointed to any binding authority that precludes the Court from addressing arbitrability issues at the second stage of certification. Nor is the Court aware of any. Therefore, the Court did not commit clear error. That Cracker Barrel merely disagrees with the Court's decision to follow suit with other courts in this circuit is an insufficient basis for reconsideration. *See Leong*, 689 F. Supp. at 1573.

Moreover, Plaintiffs' list of remaining factual issues illustrates why the enforceability of Cracker Barrel's Arbitration Agreement must be determined on a case-by-case basis. Plaintiffs identify the following disputes among the parties: (1) whether an employee signed the Agreement when they were a minor depends on the state in which the Agreement was signed; (2) there may be adult employees who signed the Agreement as minors who still need to be given the opportunity to void the Agreement; and (3) employees who signed the Agreement, ended their employment with Cracker Barrel, and then were later rehired by Cracker Barrel may not be subject to arbitration. (Doc. 90 at 9-10). Indeed, the Court had to perform fact-intensive analysis to determine that Plaintiff Dylan Basch is not subject to arbitration because he had voided the Agreement within a reasonable time¹² after turning the majority age. (Doc. 82 at 6-10). The Court cannot possibly define which opt-in plaintiffs are certainly subject to arbitration at this juncture. Separate analyses

12. Based on Plaintiff Dylan Basch's circumstances, the Court found that eighteen months was a reasonable time for him to disaffirm Cracker Barrel's Arbitration Agreement. (Doc. 82 at 8-9).

Appendix C

will need to be performed on each putative collective member based on the facts of their employment with Cracker Barrel.

Cracker Barrel is reminded that we are still at the first preliminary certification stage of the Ninth Circuit’s two-step approach to FLSA collective actions, which is called “preliminary” for a reason. *Campbell*, 903 F.3d at 1100. It is not the court’s role to resolve factual disputes, decide substantive issues relating to the merits of the claims, or make credibility determinations at this first stage of certification—yet, that is exactly what Cracker Barrel asks this Court to do. *See Lee v. Asurion Ins. Servs. Inc.*, 2016 WL 9525665, at *2 (D. Ariz. Dec. 2, 2016) (citing *Colson v. Avnet, Inc.*, 687 F. Supp. 2d 914, 926 (D. Ariz. 2010)); *see also Thornsburry v. Pet Club LLC*, 2016 WL 11602764, at *2 (D. Ariz. Nov. 22, 2016). Although the Court has identified nuanced circumstances in which a Cracker Barrel employee *may* not be subject to arbitration, a final determination requires further fact inquiries that are better resolved at the second stage of certification. *See Davis v. Westgate Planet Hollywood Las Vegas, LLC*, 2009 WL 102735, at *10 (D. Nev. Jan. 12, 2009) (stating that “disparities in the factual employment situations of any plaintiffs who choose to opt in should be considered during the court’s second tier analysis”). Furthermore, the putative collective does not run afoul of the FAA because the Notice Forms adequately alerts potential opt-in plaintiffs that they can only join the action if they are not subject to arbitration. (*See* Doc. 76-13 at 1, 2).¹³ And, “[a]t this stage, all putative collective

13. For example, the Notice is addressed to “All Cracker Barrel servers, *not subject to arbitration*, who were paid on a

Appendix C

members remain potential plaintiffs.” *Monplaisir*, 2019 WL 3577162, at *3 (emphasis added).

4. Conclusion

In sum, Cracker Barrel’s Motion for Reconsideration is granted to the extent it relates to the time frame of the putative collective, but denied to the extent it relates to the scope of the putative collective. Plaintiffs’ request for equitable tolling is granted in part, and the Court will toll the statute of limitations on the putative collective’s FLSA claims from September 6, 2022—the date Plaintiffs’ meritorious certification motion became ripe for review—until the date on which notice is sent to the putative collective. Cracker Barrel’s Motion to Strike Plaintiffs’ Request for Equitable Tolling will therefore be denied. To reflect these findings, the putative collective for notice purposes shall be modified to the following definition: all current and former Cracker Barrel servers who worked for Cracker Barrel from *September 6, 2019, to the present* in states where Cracker Barrel pays its employees under the 29 U.S.C. § 203(m) tip credit scheme. Final determinations as whether certain opt-in plaintiffs are subject to arbitration will be reserved for the second stage of certification.

“tip credit” basis or less than minimum wage by Cracker Barrel at any time in the last three (3) years, or worked off-the-clock.” (Doc. 76-13 at 1) (emphasis added). The Notice further states in the lawsuit description that “only servers *who are not subject to arbitration* may join this lawsuit.” (*Id.* at 2) (emphasis added).

*Appendix C***B. Cracker Barrel’s Motion to Certify Interlocutory Appeal (Doc. 84)**

Cracker Barrel next requests the Court to certify the Collective Certification Order for interlocutory appeal to the Ninth Circuit under 28 U.S.C. § 1292(b). (Doc. 84 at 8-15). Cracker Barrel argues the Collective Certification Order gives rise to the following four questions that are appropriate for appeal:

1. Whether a District Court may allow sending a notice under Section 216(b) of the FLSA to individuals whom the Court has determined to be bound by an enforceable arbitration agreement.
2. Whether a District Court may allow sending a notice under Section 216(b) of the FLSA to individuals whose claims would be time-barred by the FLSA’s most-inclusive three year statute of limitations period.
3. Whether *Bristol-Myers Squibb Co. v. Superior Ct. of California, San Francisco Cnty.*, 582 U.S. 255, 265, 137 S.Ct. 1773, 198 L.Ed.2d 395 (2017), prevents a District Court from sending notice under Section 216(b) of the FLSA to individuals over whom the Court lacks specific personal jurisdiction.
4. Whether a District Court, in determining whether putative plaintiffs are “similarly

Appendix C

situated” to named plaintiffs under Section 216(b) of the FLSA, must follow the two-step certification process detailed in *Lusardi v. Xerox Corp.*, 118 F.R.D. 351, 352 (D.N.J. 1987), or instead should “rigorously enforce the similarly situated requirement” through a period of preliminary discovery as held in *Swales v. KLLM Transport Services, L.L.C.*, 985 F.3d 430, 443 (5th Cir. 2021).

(*Id.* at 7). Plaintiffs did not file a response in opposition to Cracker Barrel’s Motion. Under Rule 7.2 of the Local Rules of Civil Procedure, if a party “does not serve and file the required answering memoranda, . . . such non-compliance may be deemed a consent to the denial or granting of the motion and the Court may dispose of the motion summarily.” LRCiv. 7.2(i); *see also Brydges v. Lewis*, 18 F.3d 651, 652 (9th Cir. 1994). However, because requests for interlocutory appeals are to be granted “only in exceptional circumstances,” the Court will nonetheless proceed to evaluate the merits of Cracker Barrel’s Motion. *City of Glendale v. Nat’l Union Fire Ins. Co. of Pittsburgh, PA*, 2013 WL 12250532, at *2 (D. Ariz. June 5, 2013) (citing *U.S. v. Woodbury*, 263 F.2d 784, 799 n.11 (9th Cir. 1959)).

1. Legal Standards

Generally, “parties may appeal only from orders which end the litigation on the merits and leave nothing for the court to do but execute the judgment.” *Couch v. Telescope Inc.*, 611 F.3d 629, 632 (9th Cir. 2010) (internal citations omitted). A “narrow exception” to the final judgment rule allows a non-final order to be certified

Appendix C

for interlocutory appeal provided that three statutory requirements are met: the non-final order “(1) involves a controlling question of law” as to which “(2) there is substantial ground for difference of opinion” and where “(3) an immediate appeal from the order may materially advance the ultimate termination of the litigation.” 28 U.S.C. § 1292(b). Cracker Barrel, as “[t]he party seeking certification[,] has the burden of showing that exceptional circumstances justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment.” *Villarreal v. Caremark LLC*, 85 F. Supp. 3d 1063, 1067 (D. Ariz. 2015) (internal citations omitted).

The first statutory requirement is that an order must involve a controlling question of law. “While Congress did not specifically define what it meant by ‘controlling,’ the legislative history of [28 U.S.C. §] 1292(b) indicates that this section was to be used only in exceptional situations in which allowing an interlocutory appeal would avoid protracted and expensive litigation.” *In re Cement Antitrust Litig.*, 673 F.2d 1020, 1026 (9th Cir. 1981). “Examples of controlling questions of law include fundamental issues such as the determination of who are necessary and proper parties, whether a court to which a case has been transferred has jurisdiction, or whether state or federal law should be applied.” *Villarreal*, 85 F. Supp. 3d at 1068 (internal citations omitted).

As to the second statutory requirement to determine if a “substantial ground for difference of opinion” exists under 28 U.S.C. § 1292(b),¹⁴ courts must examine to what

14. Unless where otherwise noted, all Section references are to Title 28 of the United States Code.

Appendix C

extent the controlling law is unclear. Courts traditionally will find this requirement is satisfied where “the circuits are in dispute on the question and the court of appeals of the circuit has not spoken on the point, if complicated questions arise under foreign law, or if novel and difficult questions of first impression are presented.” *Couch*, 611 F.3d at 633. However, “just because a court is the first to rule on a particular question or just because counsel contends that one precedent rather than another is controlling does not mean there is such a substantial difference of opinion as will support an interlocutory appeal.” *Id.*

Last, the third statutory requirement “that the appeal must be likely to materially speed the termination of the litigation [] is closely linked to the question of whether an issue of law is ‘controlling,’ because the district court should consider the effect of a reversal on the management of the case.” *L.H. Meeker v. Belridge Water Storage District*, 2007 WL 781889, at *6 (E.D. Cal. March 13, 2007) (citing *In re Cement*, 673 F.2d at 1026). Where “a substantial amount of litigation remains in th[e] case regardless of the correctness of the Court’s ruling . . . arguments that interlocutory appeal would advance the resolution of th[e] litigation are unpersuasive.” *Lillehagen v. Alorica, Inc.*, 2014 WL 2009031, at *7 (C.D. Cal. May 15, 2014).

28 U.S.C. § 1292(b) “is to be applied sparingly” and is not intended “merely to provide review of difficult rulings in hard cases.” *City of Glendale*, 2013 WL 12250532, at *2 (citing *Woodbury*, 263 F. 2d at 799 n.11). “Even when all

Appendix C

three statutory requirements are satisfied, district court judges have ‘unfettered discretion’ to deny certification.” *Id.* (internal citations omitted). Therefore, “a district court’s denial of a motion to certify a decision for immediate appeal under section 1292(b) is not reviewable by the appellate court.” *Environmental Protection Information Center v. Pacific Lumber Co.*, 2004 WL 838160, at *2, n. 6 (N.D. Cal. April 19, 2004) (citing *Executive Software v. U.S. Dist. Court*, 24 F.3d 1545, 1550 (9th Cir. 1994)). By the same token, “[e]ven where the district court makes such a certification, the court of appeals nevertheless has discretion to reject the interlocutory appeal, and does so quite frequently.” *Villarreal*, 85 F. Supp. 3d at 1068.

2. Question Regarding Arbitration

Cracker Barrel’s first proposed question for interlocutory appeal is: “Whether a District Court may allow sending a notice under Section 216(b) of the FLSA to individuals whom the Court has determined to be bound by an enforceable arbitration agreement.” (Doc. 84 at 7). The Court agrees with Cracker Barrel that the statutory requirement is met because this question would “dramatically affect the number of persons who will be invited to file consents to join as plaintiffs.” (Doc. 84 at 9). Thus, this issue goes to the fundamental determination of who the necessary and proper parties are in this matter. *See Villarreal*, 85 F. Supp. 3d at 1068. The Court further agrees the second statutory requirement is met because the Ninth Circuit has not yet opined on the issue, and there are cases displaying that “other courts both within and outside the Ninth Circuit are hostile to such an approach.”

Appendix C

(Doc. 84 at 11); (*see also* Doc. 82 at 20-21); *see also supra* Section II.A(3).

Lastly, the Court finds the third statutory requirement is met because resolution of the issue would materially affect the manner and speed in which litigation is terminated against those individuals who are subject to arbitration. Although courts across the nation have found that FLSA conditional class certification orders are not generally proper for interlocutory appeal due to their preliminary nature, *see Villarreal*, 85 F. Supp. 3d at 1069-70 (collecting cases), the Court finds the split decisions among circuit courts and inner-circuit district courts on how to approach arbitration issues in FLSA collective actions present the type of exceptional circumstances that warrant interlocutory appeal. *See Couch*, 611 F.3d at 633.

Therefore, the Court will certify Cracker Barrel's proposed question regarding arbitration in FLSA collective actions for interlocutory appeal under 28 U.S.C. § 1292(b).

3. Question Regarding FLSA Statute of Limitations

Cracker Barrel's second proposed question for interlocutory appeal is: "Whether a District Court may allow sending a notice under Section 216(b) of the FLSA to individuals whose claims would be time-barred by the FLSA's most-inclusive three year statute of limitations period." (Doc. 84 at 7). Because the Court will grant Cracker Barrel's request to modify the time frame of the

Appendix C

putative collective so that it reflects the opt-in standard under Section 256 of the FLSA, this issue is moot. *See supra* Section II.A(2).

4. Question Regarding Specific Personal Jurisdiction

Cracker Barrel’s third proposed question for interlocutory appeal is: “Whether *Bristol-Myers Squibb Co. v. Superior Ct. of California, San Francisco Cnty.*, 582 U.S. 255, 265, 137 S.Ct. 1773, 198 L.Ed.2d 395 (2017), prevents a District Court from sending notice under Section 216(b) of the FLSA to individuals over whom the Court lacks specific personal jurisdiction.” (Doc. 84 at 7). The Court agrees with Cracker Barrel that this question meets all three statutory requirements. This is a controlling question of law that would materially speed the termination of litigation because it concerns a jurisdictional issue that would fundamentally “change the nature of this action from a nationwide action to one focused only on claims with connection to the State of Arizona.” (*Id.* at 9). An outcome narrowing this matter as such would indeed avoid protracted and expensive litigation. *See Villarreal*, 85 F. Supp. 3d at 1068. Furthermore, there is clearly a substantial ground for difference of opinion as the circuit courts are split on the issue. And, because the Ninth Circuit has yet to weigh in on this issue, inner-circuit courts have consequently applied varying approaches. (Doc. 84 at 12). The Court has certainly noted these issues in its Certification Order. (Doc. 82 at 21-23).

Appendix C

Therefore, the Court will certify Cracker Barrel's proposed question on specific personal jurisdiction in FLSA collective actions for interlocutory appeal under 28 U.S.C. § 1292(b).

5. Question Regarding Certification Process for FLSA Collective Actions

Cracker Barrel's fourth and last proposed question for interlocutory appeal is: "Whether a District Court, in determining whether putative plaintiffs are 'similarly situated' to named plaintiffs under Section 216(b) of the FLSA, must follow the two-step certification process detailed in *Lusardi v. Xerox Corp.*, 118 F.R.D. 351, 352 (D.N.J. 1987), or instead should 'rigorously enforce the similarly situated requirement' through a period of preliminary discovery as held in *Swales v. KLLM Transport Services, L.L.C.*, 985 F.3d 430, 443 (5th Cir. 2021)." (Doc. 84 at 7). The Court agrees with Cracker Barrel that the first statutory requirement is met because this question would replace the certification framework as followed in the Ninth Circuit. (*Id.* at 10). However, the Court disagrees that the second statutory requirement is met. Cracker Barrel argues a substantial ground for difference of opinion exists because "[t]he Ninth Circuit has used the two-step *Lusardi* approach but has never decided whether the approach follows the FLSA, or whether *Swales* reflects the proper approach." (*Id.* at 12). But, as stated in the Collective Certification Order, the Ninth Circuit has explicitly established the two-step approach to FLSA collective action certification in *Campbell*, 903 F.3d at 1108-09, which addresses "preliminary certification"

Appendix C

at step one and “decertification” at step two. (Doc. 82 at 11-13). *Swales* has no binding effect on the Ninth Circuit. Therefore, Cracker Barrel’s fourth proposed question is not proper for interlocutory appeal. *See Couch*, 611 F.3d at 633 (holding that “just because a court is the first to rule on a particular question or just because counsel contends that one precedent rather than another is controlling does not mean there is such a substantial difference of opinion as will support an interlocutory appeal”).

6. Conclusion

In sum, Cracker Barrel’s Motion to Certify Interlocutory Appeal is denied as to proposed questions two and four, but granted as to questions one and three. The Court will permit Cracker Barrel to seek appeal of the Collective Certification Order under 28 U.S.C. 1292(b) regarding arbitration and specific personal jurisdiction in FLSA collective actions.

C. Cracker Barrel’s Motion to Stay Proceedings Pending Appeal (Doc. 96) and Motion to Strike Plaintiffs’ Notice of Supplemental Authority (Doc. 101)

The final issue is whether the Court should stay all proceedings in this matter pending Cracker Barrel’s various appeals of the Collective Certification Order. Cracker Barrel argues that, under the United States Supreme Court’s June 23, 2023, decision in *Coinbase, Inc. v. Bielski*, 599 U.S. 736, 143 S.Ct. 1915, 216 L.Ed.2d 671

Appendix C

(2023),¹⁵ an automatic stay is required because Cracker Barrel appealed the Collective Certification Order under Section 16 of the FAA.¹⁶ (Doc. 96 at 5-7). Alternatively, Cracker Barrel argues the Court should exercise its discretion to issue a stay under either test set forth in *Nken v. Holder*, 556 U.S. 418, 433-34, 129 S.Ct. 1749, 173 L.Ed.2d 550 (2009)¹⁷ and *Landis v. N. Am. Co.*, 299

15. At the time Cracker Barrel filed its Motion to Stay Proceedings Pending Appeal, *Coinbase* was not yet issued. On June 25, 2023, Plaintiffs file a Notice of New Authority (Doc. 99) alerting the Court that *Coinbase* had published. Cracker Barrel moved to strike Plaintiffs' Notice on the basis that it contained improper, additional legal arguments. (Doc. 101). The Court agrees, and will strike Plaintiffs' Notice from the record. In any event, Plaintiffs' Notice of New Authority is not necessary for the Court to consider the implications of *Coinbase* on this matter.

16. Section 16 of the FAA provides that "[a]n appeal may be taken from an order denying an application under section 206 of this title to compel arbitration." 9 U.S.C. § 16(a)(1)(C). The Collective Certification Order denied Cracker Barrel's "Motion to Compel Arbitration and Dismiss Second Amended Complaint with Prejudice." (Doc. 96 at 5-7), and Cracker Barrel indeed filed its Notice of Appeal (Doc. 91).

17. Under the *Nken* test, a court should consider the following four-factors when deciding whether to stay proceedings: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." 556 U.S. at 434, 129 S.Ct. 1749 (quoting *Hilton v. Braunskill*, 481 U.S. 770, 107 S.Ct. 2113, 95 L.Ed.2d 724 (1987)).

Appendix C

U.S. 248, 254, 57 S.Ct. 163, 81 L.Ed. 153 (1936).¹⁸ (*Id.* at 7-14). In opposition, Plaintiffs argue that *Coinbase* has no bearing on this matter because it applies to non-frivolous appeals, whereas Cracker Barrel’s appeal is frivolous. (Doc. 97 at 4-7). Plaintiffs further contend *Coinbase* is distinguishable because the decision concerns a Federal Rule of Civil Procedure 23 class action while this matter concerns an FLSA collective action. (*Id.* at 7-9). Last, Plaintiffs argue both the *Nken* and *Landis* tests favor litigation to proceed. (*Id.* at 9-17).

The Court need not weave through the parties’ tangled, technical arguments to conclude a stay of proceedings in this matter is warranted. In holding that district courts are required to stay its proceedings when a party appeals the denial of its motion to compel arbitration, *Coinbase* emphasized the long-standing principle that “[a]n appeal, including an interlocutory appeal, ‘divests the district court of its control over those aspects of the case involved in the appeal.’” 599 U.S. at 740, 143 S.Ct. 1915 (quoting *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58, 103 S.Ct. 400, 74 L.Ed.2d 225 (1982)). Accordingly, a stay is required pending Cracker Barrel’s appeal of the

18. Under the *Landis* test, a court should consider the following three-factors when deciding whether to stay proceedings: “[1] the possible damage which may result from the granting of a stay, [2] the hardship or inequity which a party may suffer in being required to go forward, and [3] the orderly course of justice measured in terms of the simplifying or complicating of issues, proof, and question of law which could be expected to result from a stay.” *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1110 (9th Cir. 2005) (quoting *CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9th Cir. 1962)).

Appendix C

Collective Certification Order under Section 16 of the FAA because (a) Cracker Barrel's appeal is non-frivolous, *see supra* Section II.B; and (b) whether this litigation may move forward in this Court is precisely what the Ninth Circuit must decide. *See Coinbase*, at 599 U.S. at 741, 143 S.Ct. 1915. Likewise, at this juncture, the Court's control over dissemination of notice to the putative collective is divested because fundamental questions regarding arbitration and personal jurisdiction in FLSA collective actions stand to be resolved on interlocutory appeal. *See supra* Section II.B.

Turning to the parties' individual interests, it is evident that Cracker Barrel would face irreparable harm absent a stay. Cracker Barrel represents that of the 159,934 individuals in the putative collective, 106,184 are potentially subject to arbitration. (Doc. 96 at 10). So, Cracker Barrel would incur significant discovery expenses should the certification process proceed. Indeed, the size of the putative collective makes it likely that *both* parties would suffer irreparable harm in spending substantial time and resources on litigation that might otherwise be narrowed on appeal. *See Salhotra v. Simpson Strong-Tie Co., Inc.*, 2022 WL 1091799, at *2 (N.D. Cal. Apr. 12, 2022) (collecting cases). By comparison, the issuance of a stay would not pose injury to Plaintiffs—or the putative collective as potential opt-in plaintiffs—because the applicable statute of limitations will be equitably tolled from September 6, 2022, until the date on which notice is sent to the putative collective. *See supra* Section II.A(2)(b). This tolling period would necessarily include any duration the proceedings are stayed pending appeal.

Appendix C

“[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the cases on its docket with economy of time and effort for itself, for counsel, and for litigants.” *Landis*, 299 U.S. at 254, 57 S.Ct. 163. In light of *Coinbase* and the *Nken* and the *Landis* tests, the Court finds it appropriate to stay all proceedings in this matter pending Cracker Barrel’s appeals to the Ninth Circuit.

Accordingly,

IT IS ORDERED that Cracker Barrel’s “Motion for Clarification, or, in the Alternative, Reconsideration” (Doc. 83) is granted in part and denied in part as stated herein. Lines 8-12 on page 28 of the March 31, 2023, Order (Doc. 82 at 28) is stricken and amended as follows:

IT IS FURTHER ORDERED the collective class of potential plaintiffs is conditionally certified under 29 U.S.C. § 216(b) and shall consist of all current and former Cracker Barrel servers who (a) worked for Cracker Barrel from September 6, 2019, to the present in states where Cracker Barrel pays its employees under the 29 U.S.C. § 203(m) tip credit scheme.

The remainder of the March 31, 2023, Order (Doc. 82) is otherwise affirmed.

IT IS FURTHER ORDERED that Plaintiffs’ request for equitable tolling (Doc. 90 at 5-8) is construed as a motion and is granted. The three-year statute of limitations on the putative collective’s FLSA claims shall

Appendix C

be tolled from September 6, 2022—the date Plaintiffs’ meritorious certification motion became ripe for review—until the date on which notice is sent to disseminated to the putative collective. Cracker Barrel’s “Motion to Strike Plaintiffs’ Request for Equitable Tolling” (Doc. 93) is therefore denied.

IT IS FURTHER ORDERED that Cracker Barrel’s “Motion to Certify Interlocutory Appeal” (Doc. 84) is granted in part and denied in part as stated herein. Cracker Barrel may seek appeal under 28 U.S.C. § 1292(b) of the March 31, 2023, Order (Doc. 82) regarding arbitration and specific personal jurisdiction in FLSA collective actions.

IT IS FURTHER ORDERED that Cracker Barrel’s Motion to Strike Plaintiffs’ Notice of Supplemental Authority (Doc. 101) is GRANTED. The Notice of Supplemental Authority at Doc. 99 shall be stricken and disregarded.

IT IS FINALLY ORDERED that Cracker Barrel’s Motion to Stay Proceedings Pending Appeal (Doc. 96) is granted. As set forth herein, the proceedings in this matter are stayed until the Ninth Circuit resolves Cracker Barrel’s appeals of the March 31, 2023, Order (Doc. 82).

**APPENDIX D — ORDER OF THE UNITED
STATES DISTRICT COURT FOR THE DISTRICT
OF ARIZONA, FILED MARCH 31, 2023**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CV-21-00940-PHX-DJH

ASHLEY GILLESPIE, *et al.*,

Plaintiffs,

v.

CRACKER BARREL OLD COUNTRY STORE
INCORPORATED,

Defendant.

ORDER

This action arises out of the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.* (“FLSA”). Plaintiffs Andrew Harrington (“Harrington”), Katie Liammaytry (“Liammaytry”), Jason Lencerht (“Lencerht”), and Dylan Basch (“Basch”) (collectively “Plaintiffs”) have filed a Second Amended Motion for Conditional Certification (“Second Motion to Certify”) (Doc. 76).¹ Defendant Cracker Barrel Old Country Store Incorporated

1. The matter is fully briefed. (*See* Response at Doc. 78 and Reply at Doc. 79).

Appendix D

(“Cracker Barrel”) has filed a Motion to Compel Individual Arbitration and Dismiss Second Amended Complaint with Prejudice (“Motion to Dismiss and Compel Arbitration”) (Doc. 77).² The Court must decide whether the matter should be conditionally certified as a collective action under the FLSA notwithstanding Cracker Barrel’s Arbitration Agreement. For the following reasons, the Court grants in part Plaintiffs’ Second Motion to Certify and denies Cracker Barrel’s Motion to Dismiss and Compel Arbitration.

I. Background

This matter concerns Plaintiffs’ ongoing collective efforts against Cracker Barrel for allegedly violating provisions of the FLSA that govern wages for tipped-employees. Plaintiffs have filed three complaints: the “Original Complaint” (Doc. 1), the First Amended Complaint (“FAC”) (Doc. 57), and the Second Amended Complaint (“SAC”) (Doc. 74). Plaintiffs previously attempted to certify this matter as a collective action under the FLSA, but were unsuccessful due to Cracker Barrel’s Arbitration Agreement (the “Agreement”) (Doc. 77-3 at 2-6). (*See generally* Doc. 47). For context, the Court provides a brief overview of each complaint.

2. The matter is also fully briefed (*See* Response at Doc. 80 and Reply at Doc. 81).

*Appendix D***A. The Original Complaint (Doc. 1) and the Court's 2021 Order (Doc. 47)**

The named plaintiffs in the Original Complaint were Ashley (Jade) Gillespie (“Gillespie”), a former Arizona Cracker Barrel employee; Tonya Miller, a current South Carolina Cracker Barrel employee; Tami Brown, a current North Carolina Cracker Barrel employee; and Sarah Mangano, a current Pennsylvania Cracker Barrel employee (collectively the “Original Plaintiffs”). (Doc. 1 at ¶¶ 6-9). In its November 12, 2021, Order (the “2021 Order”), the Court found Cracker Barrel’s Arbitration Agreement was valid and enforceable and that the Original Plaintiffs were subject to the Agreement. (Doc. 47 at 9). Accordingly, the Court granted Cracker Barrel’s First Motion to Dismiss and Compel Arbitration (Doc. 21) and denied the Original Plaintiffs’ First Motion for Conditional Certification (Doc. 8) without prejudice. (Doc. 47). The Original Plaintiffs were dismissed so that they may pursue their claims in arbitration. (*Id.* at 10). However, the Court permitted them leave to file a first amended complaint because some opt-in plaintiffs were capable of voiding the Agreement due to their status as minors. (*Id.*)

B. The First Amended Complaint (Doc. 57) and the Court's 2022 Order (Doc. 73)

The named Plaintiffs in the FAC were Harrington, a former Ohio Cracker Barrel employee; Liammaytry, a former North Carolina Cracker Barrel employee; and Lencerht, a current Florida Cracker Barrel employee

Appendix D

(collectively the “FAC Plaintiffs”). (Doc. 57 at ¶¶ 6-8). All of the FAC Plaintiffs were alleged to be minors when they signed the Agreement, but neither of them worked in any of the fourteen Cracker Barrel stores in Arizona. (Doc. 73 at 2, 5). Accordingly, in its July 22, 2022, Order (the “2022 Order”), the Court granted Cracker Barrel’s Motion to Dismiss (Doc. 62) for lack of personal jurisdiction. (Doc. 73). It also denied as moot the FAC Plaintiffs’ Amended Motion for Conditional Certification (Doc. 58) and Motion for Partial Dismissal (Doc. 60). (*Id.*)

C. The Operative Second Amended Complaint (Doc. 74)

In their SAC—presumably to address the personal jurisdiction concerns and deficiencies of the FAC—Plaintiffs added Basch as a fourth plaintiff with Harrington, Liammaytry, and Lencerht. (Doc. 74 at ¶¶ 6-9). Basch has worked in the Goodyear and Chandler Cracker Barrel restaurants located in Arizona since March 26, 2019, and continues to do so. (Doc. 74-2 at ¶ 2; Doc. 77 at 6). Cracker Barrel records indicate that Basch was born in January 2003 (Doc. 77-1 at ¶ 9), thus he was sixteen-years-old when he joined Cracker Barrel. (Doc. 74-2 at ¶ 4).

Basch was onboarded through Cracker Barrel’s routine online employee training program, during which he was presented with Cracker Barrel’s Arbitration Agreement through the “ADR³ Sign-Off” module. (Doc.

3. ADR stands for “Alternative Dispute Resolution.”

Appendix D

77-1 at ¶¶ 3, 6). Cracker Barrel’s Human Resources Director explained that “[o]nce an employee is presented with the Arbitration Agreement to read and review, he or she is instructed to ‘Please close this document and mark “complete” to signify you have read, understood and will comply with the agreement.[’] If the employee closes the [] Agreement, the employee is presented with a screen that allows the employee to click ‘Mark Complete.’ Once the employee clicks ‘Mark Complete,’ [Cracker Barrel] makes a record of the date and time at which he or she agreed to comply with the [] Agreement.” (*Id.* at ¶ 7).

Cracker Barrel’s records reflect that Basch electronically completed the Agreement on October 19, 2019, seven months after he started employment. (Doc. 77-2). On August 10, 2022, Basch submitted the SAC to this Court with an attached declaration stating: “I have still not seen any such agreement forcing me to arbitrate claims against Cracker Barrel (rather than pursuing in court), but to any extent such an agreement exists, I am canceling or voiding it.” (Doc. 74-2) Basch purports to void the Agreement with Cracker Barrel on the basis that he was a minor when he allegedly entered into the Agreement.

Plaintiffs are all current or former tipped-employees and bring the following four counts against Crack Barrel in the SAC:

Count I for failure to pay tipped-employees minimum wages for work performed on non-tipped duties that exceed 20% of their work time under 29 U.S.C. §§ § 203(m), 206;

Appendix D

Count II for failure to timely inform tipped employees of the tip credit requirements under 29 U.S.C. § 203(m);

Count III for failure to pay tipped-employees minimum wages for “off-the-clock” work under 29 U.S.C. §§ 206, 207; and

Count IV for lack of good faith and willfully violating the FLSA under 29 U.S.C. § 255(a).

(Doc. 74 at ¶¶ 85-105). Plaintiffs bring these Counts on behalf of themselves and other similarly situated employees as a collective action under 29 U.S.C. §§ 206 216(b). (*Id.* at ¶¶ 76-77).

II. Discussion

The Court must determine whether Plaintiffs’ SAC should be conditionally certified as a collective action under the FLSA notwithstanding Cracker Barrel’s Arbitration Agreement. Because it is dispositive, the Court will first consider Cracker Barrel’s Motion to Dismiss and Compel Arbitration. Cracker Barrel moves to dismiss the SAC for either lack of personal jurisdiction or failure to state a claim for which relief can be granted. The Court will then turn to Plaintiffs’ Second Motion to Certify.

A. Cracker Barrel’s Motion to Dismiss and Compel Arbitration (Doc. 77)

Cracker Barrel once again moves to dismiss the SAC and seeks to compel the Plaintiffs to arbitrate their claims.

Appendix D

Cracker Barrel argues newly-added plaintiff Basch fails to state a claim for relief because he is subject to the Arbitration Agreement. (Doc. 77 at 6-10). Cracker Barrel further reasons that if Basch is subject to the Agreement, then the Court again lacks personal jurisdiction over Harrington, Liammaytry, and Lencerht's claims because they do not arise out of Arizona. (*Id.* at 5 (citing the Court's 2022 Order (Doc. 73) dismissing the FAC for lack of personal jurisdiction over Harrington, Liammaytry, and Lencerht)). The Court will consider each of Cracker Barrel's arguments in turn.

1. Whether the Second Amended Complaint Confers Specific Personal Jurisdiction over Cracker Barrel

First, Cracker Barrel argues the Court lacks personal jurisdiction over Harrington, Liammaytry, and Lencerht's claims because they were not employed in Arizona. (Docs. 77 at 5; 81 at 9-10). This Court has already settled various issues pertaining to personal jurisdiction in its 2022 Order. It confirmed it does not have general personal jurisdiction over Cracker Barrel. (Doc. 73 at 5). It also explained it has specific personal jurisdiction over claims against Cracker Barrel when there are allegations by a named plaintiff who worked in an Arizona restaurant. (*Id.* at 3).

For example, the Court explained "the defense of lack of personal jurisdiction was not available to Cracker Barrel when it filed its [F]irst Motion to Dismiss" because "the original complaint included allegations of a Plaintiff

Appendix D

who worked in Arizona restaurant” through Gillespie. (*Id.*) The Court indeed found, as Cracker Barrel argues, that “there [were] insufficient connections between [Harrington, Liammaytry, Lencerht], Cracker Barrel, and this forum to justify the exercise of specific personal jurisdiction.” (*Id.*) This is because although “Cracker Barrel purposefully directs some activities to Arizona because it operates restaurants here[,]” the claims set forth by Harrington, Liammaytry, and Lencerht “do not arise out of Cracker Barrel’s operation of restaurants in Arizona” to establish specific personal jurisdiction. (*Id.* at 5).

In light of the 2022 Order, the addition of Basch—a current Arizona Cracker Barrel employee—as a plaintiff cures the personal jurisdiction deficiencies as to Harrington, Liammaytry, and Lencerht. (*Id.* at 3). The SAC therefore establishes the Court’s personal jurisdiction over Cracker Barrel by virtue of Cracker Barrel and Basch’s contacts with the forum state.

2. Whether the Second Amended Complaint States a Claim for Which Relief can be Granted

Second, Cracker Barrel argues that Basch should be dismissed for failure to state a claim for which relief can be granted because his claims are subject to arbitration. The Court will first confirm the validity of Cracker Barrel’s Arbitration Agreement before examining Basch’s efforts to void the agreement.

*Appendix D***a. 12(b)(6) Standards**

Though not explicitly stated, the Court construes Cracker Barrel’s Motion to Dismiss and Compel Arbitration as a Federal Rules of Civil Procedure 12(b)(6) motion for failure to state a claim because Basch’s claim is barred by the Arbitration Agreement. *See e.g., Leal v. Chapman Chevrolet, L.L.C.*, 2007 U.S. Dist. LEXIS 39840, 2007 WL 1576001, at *1-2 (D. Ariz. May 30, 2007). If Basch’s claim is arbitrable, the district court “will never reach the merits of the parties’ controversy. Rather, [the district court’s] jurisdiction is limited to compelling arbitration, *see* 9 U.S.C. § 4, and reviewing any future arbitration award, *see* 9 U.S.C. §§ 9-12.” 2007 U.S. Dist. LEXIS 39840, [WL] at *2 (citations in original).

A motion to dismiss pursuant to Rule 12(b)(6) challenges the legal sufficiency of a complaint. *Cook v. Brewer*, 637 F.3d 1002, 1004 (9th Cir. 2011). Complaints must contain a “short and plain statement showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a). This requires “more than an unadorned, the-defendant-unlawfully-harmed-me accusation.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). Dismissal of a complaint for failure to state a claim can be based on either the “lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory.” *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990). In reviewing a motion to dismiss, courts will “accept factual allegations in the complaint as true and

Appendix D

construe the pleadings in the light most favorable to the nonmoving party.” *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008). But courts are not required “to accept as true a legal conclusion couched as a factual allegation.” *Twombly*, 550 U.S. at 555 (quoting *Papasan v. Allain*, 478 U.S. 265, 286, 106 S. Ct. 2932, 92 L. Ed. 2d 209 (1986)).

b. Cracker Barrel’s Arbitration Agreement is Valid and Enforceable

This Court has already settled three issues pertaining to Cracker Barrel’s Arbitration Agreement in its 2021 Order. First, the Court found that Cracker Barrel’s Agreement is valid and enforceable against those employees who are subject to the Agreement. (Doc. 47 at 9). Cracker Barrel employees routinely sign the Agreement as part of an online employee training program.⁴ (*Id.* at 8). The Court confirmed that this method of executing the Agreement with employees is procedurally conscionable. (*Id.*) Second, a Cracker Barrel employee who signed the Agreement through this online method cannot void the Agreement “by simply saying ‘I forgot.’” (*Id.*) Last, the

4. “As part of this training, employees log on to an online program using their ‘personal email address or individual access number along with their confidential password.’ The program guides them through several modules, including one that covers the Agreement. ‘Once the employee is presented with the arbitration agreement to read and review, he or she is instructed to ‘Please close this document and mark ‘complete’ to signify that you have read, understood and will comply with the agreement.’” (Doc. 47 at 8) (internal citations omitted).

Appendix D

Court clarified that the Arbitration Agreements that Cracker Barrel executed “with minors can be voided.” (*Id.* at 3; *see also id.* at 9 (“Plaintiffs [who] alleged to have been minors during their employment with Cracker Barrel [] are not subject to the [Arbitration] Agreement.”)).

According to the first two findings in the 2021 Order, Basch entered into a valid and enforceable Arbitration Agreement with Cracker Barrel. Basch electronically signed the Agreement on October 19, 2019, through the same online method affirmed by the Court as procedurally conscionable. (*Compare* Docs. 77-1 at ¶¶ 4-10; 77-2 at 2 *with* Doc. 47 at 8-9). And although Basch states he does “not recall signing an agreement to arbitrate” (Doc. 74-2 at ¶ 3), this is an insufficient basis to void the Agreement under the 2021 Order. (Doc. 47 at 8).

c. Minor Employees Can Void Cracker Barrel’s Arbitration Agreement Within a Reasonable Time After Adulthood

The remaining issue concerns Basch’s efforts to void the Agreement after he turned eighteen-years-old. (*Id.* at 3 (finding that “some opt-in plaintiffs were capable of voiding the Agreement due to their status as minors”)). It is undisputed that Bash was a sixteen-year-old minor when he signed Cracker Barrel’s Arbitration Agreement in 2019. (Docs. 74-2 at ¶ 4; 77-2). It is also undisputed that any efforts Basch took to void the Agreement took place in August 2022, which is eighteen months after he turned the majority age. (*See* Doc. 74-2). However, the parties

Appendix D

disagree on whether eighteen months is a reasonable time for a minor to effectively disaffirm the Agreement. (Docs. 77 at 10; 80 at 3-5).

Arizona state law allows a person to void a contract that they entered into while a minor, provided they do so within a reasonable time of reaching the majority age. *Almada v. Ruelas*, 96 Ariz. 155, 158, 393 P.2d 254 (1964). However, Arizona courts have not explicitly defined what a “reasonable time” means for a minor to effectively disaffirm a contract. What constitutes a “reasonable time” is “answered in view of the peculiar circumstances of each case.” *Sims v. Everhardt*, 102 U.S. 300, 309, 26 L. Ed. 87 (1880); see *Hurley v. Southern Cal. Edison Co.*, 183 F.2d 125, 132 (9th Cir. 1950).

At the outset, the Court has already identified two opt-in Plaintiffs that were not subject to arbitration because they entered into Cracker Barrel’s Arbitration Agreement as minors. (Doc. 47 at 3 (citing 29-2)). Those opt-in Plaintiffs had voided their Agreements 2-4 years after turning the majority age, which is well over eighteen months. (See Doc. 29-2). Accordingly, as a matter of consistency and fairness, the Court finds Basch’s eighteen months delay in voiding his Agreement is reasonable. Furthermore, the circumstances particular to Basch do not raise any concerns regarding the length of time that passed before his disaffirmance. In Basch’s declaration voiding the Agreement, he states the following:

At no time during my employment at Cracker Barrel did any manager or [human resources]

Appendix D

representative tell me that I was agreeing to arbitrate disputes or waiving any rights to pursue claims in court. Nobody has ever explained to me the terms of any alleged agreement to arbitrate.

(Doc. 74-2).

A minor's lack of understanding as to the significance of a contract was an important factor in *Hurley*, 183 F.2d at 132. There, the Ninth Circuit considered the general issue of what constitutes a "reasonable time" for a minor to void a contract under state law.⁵ The court held that an individual who disaffirmed a contract fifteen years after reaching the age of majority had done so within a reasonable time because "[he] had no opportunity to exercise any judgment upon the matter until [he] learned he had some interest in [the contract]" *Id.*

Here, considering Basch's averment, eighteen months is a reasonable time for him to disaffirm the Arbitration Agreement. Basch states that no one explained to him that he was waiving his rights to pursue claims in court by signing the Agreement. Therefore, he had "no opportunity to exercise any judgment upon the matter" until learning the significance of the Agreement. *Hurley*, 183 F.2d at 132.

5. In *Hurley*, the Ninth Circuit noted that both California and Missouri state law recognized the general principle that contracts "were voidable at the election of the minor manifested within a reasonable time after reaching his majority." 183 F.2d at 131. Thus, in issuing its ruling, the circuit court found it "unnecessary to determine which law governs, as the rule with respect to disaffirmance of infant's contracts is the same in either state. *Id.* at 132.

Appendix D

When viewing Basch's statements in light most favorable to Plaintiffs, as the Court must upon a motion to dismiss, the Court finds Basch voided his Agreement within a reasonable time.⁶ (Doc. 80 at 5) (citing *Hurley*, 183 F.2d at 125). Basch is therefore not subject to arbitration.

Last, the Court rejects Cracker Barrel's policy argument that it would be inequitable to allow Basch to void the Agreement on the grounds that he has continued to take the benefits of continued employment with Cracker Barrel after turning the majority age. (Doc. 77 at 8-10). Although Cracker Barrel cites several out-of-state cases⁷ to support this argument, it has not identified any law in

6. The Court finds the out-of-state authorities Cracker Barrel relies on to argue eighteen months is not a reasonable amount of time are distinguishable and, in any event, not binding on this issue of Arizona law. (See Doc. 77 at 10 (citing *Norred v. Cotton Patch Café, LLC*, 2019 U.S. Dist. LEXIS 183290, 2019 WL 5425479, at *7 (N.D. Tex. Oct. 22, 2019); *Bobby Floars Toyota, Inc. v. Smith*, 48 N.C. App. 580, 269 S.E.2d 320, 323 (N.C. 1980); and *Kelly v. Furlong*, 194 Minn. 465, 467, 261 N.W. 460, 462 (Minn. 1935)).

7. (See Doc. 77 at 9 citing *Paster v. Putney Student Travel, Inc.*, 1999 U.S. Dist. LEXIS 9194, 1999 WL 1074120, at *2 (C.D. Cal. June 9, 1999) (rejecting the argument that plaintiff could disaffirm a forum selection clause in a travel contract under California law that she and her mother had signed when she was a minor because she had already gone on the trip and thus experienced the benefits offered); *Bobby Floars Toyota, Inc. v. Smith*, 48 N.C. App. 580, 269 S.E.2d 320, 323 (N.C. 1980) (rejecting disaffirmance where minor plaintiff had continued to use a car he had purchased in a sale of goods contract when he was seventeen after ten months after turning eighteen under North Carolina's state infancy defense); *E.K.D. ex rel. Dawes v. Facebook, Inc.*, 885 F. Supp. 2d 894 (S.D. Ill. 2012) (rejecting disaffirmance of forum selection clause in a contract for a social media account under California's state infancy defense)).

Appendix D

Arizona recognizing this exception to the general rule that a minor may void a contract within a reasonable time. Moreover, the Court is unpersuaded that such an exception would apply in the context of an employment and/or arbitration agreement where the “benefits” differ in kind from those in the agreements at issue in the cases cited by Cracker Barrel—e.g., purchase of a trip, car, and social media account.

In sum, Basch has stated a claim for which relief can be granted and the Court therefore has personal jurisdiction over Cracker Barrel. The addition of Basch as plaintiff cures the personal jurisdiction deficiencies as to Harrington, Liammaytry, and Lencerht. The Court will accordingly deny Cracker Barrel’s Motion to Dismiss and Compel Arbitration.

B. Plaintiffs’ Second Motion to Certify

The Court will now consider Plaintiffs’ Second Amended Motion for Conditional Certification. Plaintiffs apply the Ninth Circuit’s lenient two-step approach for collective action certification. (Doc. 76 at 10-11). As mentioned, they seek to bring the following counts against Cracker Barrel as an FLSA collective action:

Count I for failure to pay tipped-employees minimum wages for work performed on non-tipped duties that exceed 20% of their work time under 29 U.S.C. §§ 203(m), 206;

Appendix D

Count II for failure to timely inform tipped employees of the tip credit requirements under 29 U.S.C. § 203(m);

Count III for failure to pay tipped-employees minimum wages for “off-the-clock” work under 29 U.S.C. § 206; and

Count IV for lack of good faith and willfully violating the FLSA under 29 U.S.C. § 255(a).

(Doc. 74 at ¶¶ 85-105). They propose the following putative class should be certified: “all servers who worked for Cracker Barrel in states where it attempts to take a tip credit, under 29 U.S.C. § 203(m), over the last three years, which is the maximum time-period allowed under . . . 29 U.S.C. § 255(a).” (Doc. 76 at 3).⁸ Plaintiffs also request the Court to approve their proposed method of notice to the defined collective. (*Id.* at 12-17).

At the outset, Cracker Barrel urges this Court to follow the Fifth Circuit’s more stringent standard for collective action certification. (Doc. 78 at 3). It argues Plaintiffs and the defined collective are not similarly

8. The Court notes the proposed putative class in Plaintiffs’ Motion to Certify varies from the proposed putative class in their Complaint. *Compare* (Doc. 76 at 3) *with* (Doc. 74 at ¶ 11). For the purpose of this Order, the Court will consider the proposed putative class in Plaintiffs’ Motion to Certify as it is most consistent with its Proposed Notice and Consent to Join Forms. *Compare* (Doc. 76 at 3) *with* (Doc. 76-13 at 3).

Appendix D

situated because Plaintiffs cannot show Cracker Barrel maintains policies that violated the FLSA. (*Id.* at 4-6). As to Plaintiffs' proposed notice, Cracker Barrel contests it will be sent to employees who are subject to arbitration and the Court will not have personal jurisdiction over the claims of opt-in plaintiffs outside of Arizona. (*Id.* at 6-16). Last, Cracker Barrel asks to submit an additional brief to address Plaintiffs' proposed notice procedures as overbroad. (*Id.* at 16).

The Court will first set forth the applicable standard for collective certification under the FLSA. The Court will then determine whether conditional certification of the present matter as a collective action is proper. Finding that it is, the Court will last consider Plaintiffs' proposed form of notice.

1. Legal Standard for Conditional Certification Under the Fair Labor Standards Act

Plaintiffs filed their SAC "on behalf of themselves and other similarly situated employees as a collective action pursuant to the FLSA, 29 U.S.C. §§ 206 and 216(b)." (Doc. 74 at ¶ 76-77). Section 216(b)⁹ establishes a mechanism for bringing collective actions under the FLSA. *Campbell v. City of Los Angeles*, 903 F.3d 1090, 1108-09 (9th Cir. 2018) (citing 29 U.S.C. § 216(b)). Section 216(b) provides:

9. Except where otherwise noted, all section references are to the Fair Labor Standards Act, Title 29 of the United States Code.

Appendix D

An action to recover the liability prescribed [this subsection] may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees *similarly situated*. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.

29 U.S.C. § 216(b) (emphasis added). “The FLSA does not define the term ‘similarly situated’ or describe the process for evaluating the propriety of a collective action.” *Sandbergen v. Ace Am. Ins. Co.*, 2019 U.S. Dist. LEXIS 243862, 2019 WL 13203944, at *2 (N.D. Cal. June 17, 2019) (citation omitted). Thus, the Ninth Circuit employs a two-step approach to collective action certification that addresses “preliminary certification” and “decertification.” *Campbell*, 903 F.3d at 1100 (citing 1 McLaughlin on Class Actions § 2:16 (14th ed. 2017)) (applying the certification process in the context of the FLSA). These terms have been adopted from Federal Rule of Civil Procedure 23, which governs class actions in federal court. *Id.*

At the first preliminary certification stage, the main focus is for the Court to determine whether the defined collective is “similarly situated,” as required by Section 216(b). *Id.* at 1109. The standard is “loosely akin to a plausibility standard, commensurate with the stage of the proceedings.” *Id.* Courts continuously describe this

Appendix D

stage as “lenient.” See *Juvera v. Salcido*, 294 F.R.D. 516, 519-20 (D. Ariz. 2013); *Benedict v. Hewlett-Packard Co.*, 2014 U.S. Dist. LEXIS 18594, 2014 WL 587135 at *6 (N.D. Cal. Feb. 13, 2014); *Schiller v. Rite of Passage, Inc.*, 2014 U.S. Dist. LEXIS 20508, 2014 WL 644565, at *3 (D. Ariz. Feb. 19, 2014). If granted, “preliminary certification results in the dissemination of a court-approved notice to the putative collective action members, advising them that they must affirmatively opt in to participate in the litigation.” *Campbell*, 903 F.3d at 1109. Then, the second stage occurs after discovery and allows the employer to move for “decertification” of the collective action if it can show that the Plaintiffs do not satisfy the “similarly situated” requirement in light of further evidence. *Id.* This prompts the court to “take a more exacting look at the plaintiffs’ allegations and the record.” *Id.*

Cracker Barrel posits this Court should reject the Ninth Circuit approach and instead employ the Fifth Circuit’s more stringent standard set forth in *Swales v. KLLM Transp. Servs. LLC*, 985 F.3d 430 (5th Cir. 2021). (Doc. 78 at 3). However, Cracker Barrel provides no argument for this proposition and does not cite to any court within this circuit that has done so. *Cf. Droesch v. Wells Fargo Bank, N.A.*, 2021 U.S. Dist. LEXIS 87123, 2021 WL 1817058, at *4 (N.D. Cal. May 6, 2021) (rejecting *Swales* and following *Campbell*). The Court remains unpersuaded and will adhere to the binding Ninth Circuit approach for collective certification under the FLSA as recently clarified in *Campbell*, 903 F.3d at 1108-09.

*Appendix D***2. Conditional Certification of the Present Matter**

This matter falls within the first step of the Ninth Circuit’s approach to collective actions as Plaintiffs request this Court to conditionally certify this action under the FLSA. The preliminary certification stage entails three requirements: “[i]t is evident from the [FLSA] that workers may litigate jointly if they (1) claim a violation of the FLSA, (2) are ‘similarly situated,’ and (3) affirmatively opt into the joint litigation, in writing.” *Campbell* 903 F.3d at 1100.

Plaintiffs argue the Court should grant conditional certification because they and the proposed putative class are similarly situated “victims” of Cracker Barrel’s nationwide uniform policies and practices that violate the FLSA. (*See* Doc. 76 at 12). Plaintiffs also request the Court to approve their method of notice to the defined collective. (Docs. 76 at 12-17; 76-13 (Proposed Notice Form); 76-14 (Proposed Consent to Join Form)). The Court will address each of the three conditional certification requirements in turn.

a. Plaintiffs’ Fair Labor Standard Act Claims

For preliminary certification purposes, Plaintiffs’ FLSA allegations neither need to be strong nor conclusive. *Colson v. Avnet, Inc.*, 687 F. Supp. 2d 914, 926 (D. Ariz. 2010). A court’s determination to “conditionally certify a

Appendix D

proposed class for notification purposes only,” and “courts do not review the underlying merits of the action.” *Id.*

Plaintiffs are all current or former “tipped employees”¹⁰ for Cracker Barrel who are not subject to Cracker Barrel’s Arbitration Agreement. (Doc. 74 at ¶¶ 6-9). Plaintiffs represent that Cracker Barrel pays its tipped employees less than minimum wage under the FLSA’s tip credit scheme in most of the states in which it operates. (*Id.* at ¶¶ 22-23). Within the last three years, they claim: (1) they were paid less than minimum wage while spending more than 20% of their work time on non-tipped duties; (2) they did not receive a timely tip credit notice; and (3) they were not compensated for working off-the-clock. (Docs. 76 at 4-7; 74 at ¶¶ 85-105). Thus, Plaintiffs allege (4) Cracker Barrel willfully violated the FLSA under Sections 203(m), 206, 207, and 255(a). (Docs. 76 at 7, 9; 74 at ¶¶ 103-06).

i. Minimum Wages for Non-tipped Work

Under Count I, Plaintiffs claim Cracker Barrel violated the FLSA by failing to pay tipped-employees minimum wages for excessive work performed on non-tipped duties. (Doc. 74 at ¶¶ 85-91). “An employer may fulfill part of its [Section 206] minimum wage obligation to a tipped employee with the employee’s tips.” *Or. Rest. & Lodging Ass’n v. Perez*, 816 F.3d 1080, 1082 (9th Cir. 2016) (citing 29 U.S.C. § 203(m)). This practice is known as

10. The FLSA defines a “tipped employee” as “any employee engaged in an occupation in which he customarily and regularly receives more than \$30 a month in tips.” 29 U.S.C. § 203(t).

Appendix D

taking a “tip credit” under Section 203(m). *Id.* However, tip credits are subject to the Department of Labor’s 80/20 rule¹¹ for dual jobs. *Marsh v. J. Alexander’s LLC*, 905 F.3d 610, 630 (9th Cir. 2018) (citing FOH § 30d00(f) (2016) with approval) (finding the Department of Labor’s guidance on dual jobs is entitled to *Auer* deference). Therefore, a tipped employee sufficiently states a claim under the FLSA when she alleges her employer failed to pay her the full hourly minimum wage for time spent on non-tipped duties in excess of 20% of the workweek. *Id.* at 615-616, 633.

Plaintiffs state that tipped employees at Cracker Barrel are all assigned various “side-work,” none of which are tipped duties or related to the employee’s occupation. (Doc. 74 at ¶¶ 28-29). Plaintiffs claim Cracker Barrel has violated the 80/20 rule over the last five years by increasing the amount of non-tipped work that its tipped employees are required to perform. (Doc. 74 at ¶¶ 47-60; *see also* Docs. 76 at 5; 76-6 (copy of Cracker Barrel’s policy assigning stocking and cleaning duties to tipped servers)). Plaintiffs have submitted declarations by eight current or former tipped employees stating they have consistently spent more than 20% of their working hours on non-tipped work and have witnessed their coworkers do the same. (*See* Docs. 76-2; 76-3; 76-4; 76-5; 76-9; 76;10; 76-11; 76-12).

11. The 80/20 rule provides that “[a]n employee who engages in untipped ‘work that is not related to the tipped occupation’ or spends more than 20% of her workweek on related duties that are not themselves directed toward producing tips must be treated as working in an untipped occupation and paid the full hourly minimum wage.” *Marsh v. J. Alexander’s LLC*, 905 F.3d 610, 630 (9th Cir. 2018) (citing FOH § 30d00(f) (2016) with approval).

Appendix D

Plaintiffs argue this excess time should be compensated at minimum wage. (Doc. 76 at 6).

ii. Notification of Tip Credit

Under Count II, Plaintiffs claim Cracker Barrel violated the FLSA by failing to inform tipped employees of its use of the tip credit scheme. (Doc. 74 at ¶¶ 92-95). Section 203(m) prohibits an employer from taking a tip credit unless it (1) gives employees prior notice of their intent to use a tip credit and (2) allow its employees to retain all the tips they receive. *Or. Rest. & Lodging Ass'n*, 816 F.3d at 1082, 1084; *see* 29 U.S.C. § 203(m)(2)(A).

Plaintiffs represent that Cracker Barrel does not timely inform its servers of its tip credit requirements. (Doc. 76 at 2; 74 at ¶¶ 61-66). Plaintiffs allege that Cracker Barrel only notifies tipped employees of this information on the employee's first paystub, which is two weeks after Cracker Barrel has already taken tip credits. (Doc. 76 at 6). To support this, Plaintiffs include copies of paystubs and declarations from current and former tipped employees of Cracker Barrel. (*See* Docs. 76-1; 76-7).

iii. Minimum Wages for Off-the-Clock Work

Under Count III, Plaintiffs claim Cracker Barrel violated the FLSA by failing to pay tipped-employees minimum wages for "off-the-clock" work. (Doc. 74 at ¶¶ 96-102). Sections 206 and 207 require an employer to pay its employees for all hours worked and at least one and

Appendix D

one-half times their “regular rate” for all hours worked in excess of a forty hour workweek. 29 U.S.C. §§ 206(a)(1), 207(a)(1).

Plaintiffs allege that Cracker Barrel requires or allows employees to work off-the-clock without compensation. (Docs. 76 at 7; 74 at ¶¶ 96-102). For example, Plaintiffs state employees are often required to clock-out before they are done performing various non-tipped duties and before they receive their tips. (Doc. 74 at ¶ 69). They also allege employees are often required to help with non-tipped duties before clocking-in. (*Id.*) Plaintiffs support these allegations with declarations from current and former tipped employees and a former Store Operations Supervisor. (*See* Docs. 76-1; 76-2; 76-3; 76-4; 76-5).

iv. Lack of Good Faith and Willful Violation

Under Count IV, Plaintiffs claim Counts I—III show Cracker Barrel lacked good faith and willfully violated the FLSA. (Doc. 74 at ¶¶ 103-105). Section 255(a) allows a plaintiff to bring an FLSA “cause of action arising out of a willful violation . . . within three years after the cause of action accrued.” 29 U.S.C. § 255 (a).

Plaintiffs claim that Cracker Barrel’s alleged violations were willful and that Cracker Barrel did not act in good faith when attempting to comply with the FLSA. (Doc. 74 at ¶¶ 103-105). It represents Cracker Barrel’s corporate management has been aware of these ongoing FLSA violations. (Doc. 76 at 5). For example, Plaintiffs

Appendix D

include a declaration by a former Store Operations Supervisor from Cracker Barrel's corporate office stating potential pay-related violations were discussed with no remedial efforts. (Docs. 76 at 7-8; 76-1). Plaintiffs further claim Cracker Barrel "purposely limits the labor budget for each store" and "chooses not to track the amount of time servers spend on tipped duties versus non-tipped duties." (Doc. 74 at ¶ 105).

To summarize, Plaintiffs' allegations are sufficient to sustain a collective action under the FLSA.

b. Whether Plaintiffs and the Proposed Putative Class are Similarly Situated

The second FLSA certification requirement requires Plaintiffs to show they are "similarly situated" with the defined collective under Section 216(b). *See Campbell*, 903 F.3d at 1109. According to the Ninth Circuit, plaintiffs are similarly situated "to the extent they share a similar issue of law or fact material to the disposition of their FLSA claims." *Id.* at 1117. A plaintiff "need . . . only show that there is some 'factual nexus which binds the named plaintiffs and the potential class members together[.]'" *Shoults*, 2020 U.S. Dist. LEXIS 136147, 2020 WL 8674000, at *2 (quoting *Stickle v. SCI W. Mkt. Support Ctr., L.P.*, 2009 U.S. Dist. LEXIS 97735, 2009 WL 3241790, at *3 (D. Ariz. Sept. 30, 2009)). The standard is "lenient" and can be satisfied by "substantial allegations that the putative class members were together the victims of a single decision, policy, or plan." 2020 U.S. Dist. LEXIS 136147, [WL] at *1 (citations omitted). This can be achieved through

Appendix D

similarities “with respect to their job requirements and with regard to their pay provisions.” *Wood v. TriVita, Inc.*, 2009 U.S. Dist. LEXIS 64585, 2009 WL 2046048, at *4 (D. Ariz. Jan. 22, 2009).

The burden rests on the plaintiff to establish they are similarly situated to the rest of the proposed class. *Shoults*, 2020 U.S. Dist. LEXIS 136147, 2020 WL 8674000, at *1. The court’s determination is “based primarily on the pleadings and any affidavits submitted by the parties.” *Kesley v. Ent. U.S.A. Inc.*, 67 F. Supp. 3d 1061, 1065 (D. Ariz. 2014) (internal citation omitted); *see also Campbell*, 903 F.3d at 1109. It is not the court’s role to resolve factual disputes, decide substantive issues relating the merits of the claims, or make credibility determinations at this first stage of certification. *See Lee v. Asurion Ins. Servs. Inc.*, 2016 U.S. Dist. LEXIS 192848, 2016 WL 9525665, at *2 (D. Ariz. Dec. 2, 2016) (citing *Colson*, 687 F. Supp. 2d at 926)); *see also Thornsbury v. Pet Club LLC*, 2016 U.S. Dist. LEXIS 194765, 2016 WL 11602764, at *2 (D. Ariz. Nov. 22, 2016). Any “disparities in the factual employment situations of any plaintiffs who choose to opt in should be considered during the court’s second tier analysis[.]” *Davis v. Westgate Planet Hollywood Las Vegas, LLC*, 2009 U.S. Dist. LEXIS 5941, 2009 WL 102735, at *10 (D. Nev. Jan. 12, 2009). Thus, the plaintiff’s burden is low and “the initial determination to certify . . . typically results in conditional certification of a representative class.” *Curphey v. F&S Mgmt. I LLC*, 2021 U.S. Dist. LEXIS 25829, 2021 WL 487882, at *2 (D. Ariz. Feb. 10, 2021) (internal quotation and citation omitted).

Appendix D

Here, Plaintiffs propose certification of the following putative class: “all servers who worked for Cracker Barrel in states where it attempts to take a tip credit, under 29 U.S.C. § 203(m), over the last three years, which is the maximum time-period allowed under . . . 29 U.S.C. § 255(a).” (Doc. 76 at 3). Plaintiffs argue they are similarly situated with the proposed class because they are all “victims” of Cracker Barrel’s uniform policies and practices that violate the FLSA. (*Id.* at 12). For support, they provide declarations of other potential class members “confirming Cracker Barrel’s nationwide FLSA violations” and “witness[ing] other servers at their locations being treated the same.” (*Id.* at 12).

The Court finds Plaintiffs have met their burden. First, all party plaintiffs are current or former tipped employees for Cracker Barrel that are paid under the tip credit scheme. Thus, they are similarly situated with regard to their pay provisions. *Wood*, 2009 U.S. Dist. LEXIS 64585, 2009 WL 2046048, at *4. Second, all party plaintiffs are “servers” and have the same job duties. Plaintiffs have submitted a declaration by a former Store Operations Supervisor stating Cracker Barrel stores use a “side-work chart created by corporate” that assigns non-tipped duties to all servers. (Doc. 76-1 at ¶ 5). Plaintiffs have also provided a copy of the purported “side-work chart.” (*see also* Doc. 76-6). Thus, all party plaintiffs are similarly situated with regard to their job requirements. *Wood*, 2009 U.S. Dist. LEXIS 64585, 2009 WL 2046048, at *4.

Appendix D

Cracker Barrel contends Plaintiffs have not met their burden for preliminary certification because they failed to show Cracker Barrel maintains any unlawful common policy or plan. (Doc. 78 at 3-6). It submits its own affidavits and declarations to justify its current policies as compliant under the FLSA. (*Id.*) But, as explained, it is not the court's role to resolve factual disputes, decide substantive issues relating the merits of the claims, or make credibility determinations at this first stage of certification. *See Lee*, 2016 U.S. Dist. LEXIS 192848, 2016 WL 9525665, at *2. The declarations and affidavits provided by Plaintiffs and potential class members contain substantial allegations that they were "victims" of Cracker Barrel's uniform, nationwide policies. *Shoults*, 2020 U.S. Dist. LEXIS 136147, 2020 WL 8674000, at *2; (*see* Doc. 79 at 4). Plaintiffs have therefore shown sufficient factual nexuses that bind them with the proposed putative class. *Shoults*, 2020 U.S. Dist. LEXIS 136147, 2020 WL 8674000, at *2; *see e.g., Campbell*, 903 F.3d at 1102 ("[A]llegations of a Department-wide policy should suffice to make the [employees] similarly situated[.]").

In sum, Plaintiffs have met their burden in showing they and the defined collective are similarly situated under the lenient standard applicable at the first step of the certification process. All party plaintiffs are current or former tipped serves at Cracker Barrel who are paid under the tip credit scheme and allege the same FLSA violations. Therefore, the Court will conditionally certify the present matter as a collective action under the FLSA for notice purposes.

*Appendix D***3. Approval of Notice**

The third FLSA certification requirement is “the dissemination of a court-approved notice to the putative collective action members, advising them that they must affirmatively opt in to participate in the litigation.” *Campbell*, 903 F.3d at 1109. To effectuate notice to the defined collective, Plaintiffs ask this Court to approve their Proposed Notice and Consent to Join forms (Docs. 76-13; 76-14); authorize Plaintiffs to mail, email, text, and post notices to potential collective members; and require Cracker Barrel to produce information of all current and former servers who worked at the company within the relevant opt-in period. (Doc. 76 at 1-2, 10-11).

Cracker Barrel argues that Plaintiffs’ proposed notice is improper because: (1) notice will be sent to employees who are subject to Cracker Barrel’s Arbitration Agreement; and (2) the Court does not have personal jurisdiction over Cracker Barrel for collective action members outside of Arizona. (Doc. 78 at 6-16). Cracker Barrel also asks to submit an additional brief to address Plaintiffs’ proposed notice method and procedures as overbroad. (*Id.* at 16). The Court will first address Cracker Barrel’s jurisdictional arguments before turning to Plaintiffs’ proposed notice procedures.

*Appendix D***a. Cracker Barrel's Jurisdictional Arguments****i. Employees Subject to Arbitration**

First, Cracker Barrel argues that Plaintiffs cannot send notice to servers who are bound by its Arbitration Agreement and Plaintiffs have otherwise failed to identify any servers who are not subject to the Agreement. (Doc. 78 at 6-7). Plaintiffs represent its Proposed Notice and Consent to Join Forms comply with the Court's Prior Orders regarding the enforceability of the Agreement because it "inform[s] potential opt-in plaintiffs that they can only join if they are not subject to arbitration." (Doc. 76 at 2 n.1; *see also* Doc. 76-13 at 1, 2).

At the outset, the Court has clarified which of Cracker Barrel's employees are subject to the Agreement versus those employees who are not. Employees who have signed the Agreement, including through Cracker Barrel's online training program, while the majority age are subject to the Agreement. (Doc. 47 at 8-9). By contrast, employees are not subject to the Agreement if they: (1) did not sign the Agreement; (2) signed the Agreement when they were a minor and are still a minor; or (3) signed the Agreement when they were a minor and voided the Agreement after turning the majority age.¹² *Id.*; *see supra* Section II.A(2) (b)-(c).

12. For example, "at least two of the opt-in Plaintiffs are not subject to arbitration" having disaffirmed their Agreements 2-4 years after turning the majority age (Doc. 47 at 3 (citing 29-2)). Additionally, Basch is not subject to arbitration having disaffirmed his Agreement eighteen months after turning the majority age. *See supra* Section II.A(2).

Appendix D

Cracker Barrel cites to *Sandbergend v. Ace American Ins.* for the proposition that notice cannot be sent to servers who are bound by the Agreement. (Doc. 78 at 6-7 citing 2019 U.S. Dist. LEXIS 243862, 2019 WL 13203944)). In that case, the California district court held that plaintiffs could not send notice to any potential class members who had signed an arbitration agreement. 2019 U.S. Dist. LEXIS 243862, [WL] at *4. The plaintiffs had stipulated that any class member who signed the arbitration agreement would proceed with arbitration as the agreement's enforceability was not at issue. 2019 U.S. Dist. LEXIS 243862, [WL] at *2.

This matter is distinct from *Sandbergend* because the enforceability of Cracker Barrel's Arbitration Agreement *is* at issue. As stated, some Cracker Barrel employees are not bound by the Arbitration Agreement despite having signed it. Thus, "[a]t this stage, all putative collective members remain *potential* plaintiffs." *Monplaisir v. Integrated Tech Grp., LLC*, 2019 U.S. Dist. LEXIS 132887, 2019 WL 3577162, at *3 (N.D. Cal. Aug. 6, 2019) (emphasis added). Courts in this circuit have continuously held that disputes over which putative class members are subject to arbitration are better addressed at the second stage of the certification process. *See e.g., id.* ("[T]o avoid putting the cart before the horse, this inquiry [of arbitration] is best left for step two"); *Mejia v. Bimbo Bakeries USA Inc.*, 2018 U.S. Dist. LEXIS 244459, 2018 WL 11352489, at *4 n.7 (D. Ariz. May 7, 2018); *Campanelli v. Image First Healthcare Laundry Specialists, Inc.*, 2018 U.S. Dist. LEXIS 215287, 2018 WL 6727825, at *8-9 (N.D. Cal. Dec. 21, 2018); *Delara v. Diamond Resorts Int'l Mktg. Inc.*,

Appendix D

2020 U.S. Dist. LEXIS 75803, 2020 WL 2085957, at *5-6 (D. Nev. Apr. 30, 2020).

In sum, Plaintiffs have met their burden for conditional certification under the similarly situated standard. Even though some notified members of the putative class may be “subject to an enforceable arbitration agreement, [the] court may not preemptively deny FLSA certification or narrow the scope of the proposed collective. . . . Only after the FLSA plaintiffs join this action, may the court entertain [a] defendants’ arbitration-related motions seeking to compel opt-in plaintiffs to arbitrate or to prohibit plaintiffs from proceeding collectively.” *Campanelli*, 2018 U.S. Dist. LEXIS 215287, 2018 WL 6727825, at *9. Therefore, conditional certification and notice to the collective are appropriate here despite some notified servers being subject to arbitration.

ii. Personal Jurisdiction in Federal Collective Actions

Second, Cracker Barrel argues that Plaintiffs cannot send notice to non-Arizona servers because “the Court does not have jurisdiction over opt-in and putative collective members whose claims stem from non-Arizona activities, i.e., servers who did not work for Cracker Barrel in Arizona.” (Doc. 78 at 8). Cracker Barrel cites to *Bristol-Myers Squibb Co. v. Superior Court of California* for support, which involved a mass tort action under California state law. 582 U.S. 255, 137 S. Ct. 1773, 198 L. Ed. 2d 395 (2017). There, the Supreme Court required every class member to establish personal jurisdiction

Appendix D

over the nonresident defendant by showing a sufficient connection between their individual claims and the forum state. *Id.* at 1781-1783. It held that, absent general personal jurisdiction over the defendant, a court does not have personal jurisdiction over state claims by nonresident plaintiffs that do not arise out of the forum. *Id.*

However, the Supreme Court declined to rule on whether this rule applies to a federal court's ability to exercise personal jurisdiction in cases arising out of federal law. *Id.* at 1783-1784. Thus far, four circuits have resolved whether *Bristol-Myers* applies to FLSA collective actions. The Third, Sixth, and Eighth Circuits hold it does. *See Fischer v. Fed. Express Corp.*, 42 F.4th 366, 370-71 (3d Cir. 2022); *Canaday v. Anthem Companies, Inc.*, 9 F.4th 392, 397 (6th Cir. 2021); *Vallone v. CJS Sols. Grp., LLC*, 9 F.4th 861 (8th Cir. 2021). The First Circuit holds it does not. *See Waters v. Day & Zimmermann NPS, Inc.*, 23 F.4th 84 (1st Cir. 2022).

The Ninth Circuit has yet to address this issue, and district courts within this circuit have “come to varying conclusions.” *Wilkerson v. Walgreens Specialty Pharm. LLC*, 2022 U.S. Dist. LEXIS 195903, 2022 WL 15520004, at *4 (D. Ariz. Oct. 27, 2022).¹³ Majority of the Ninth Circuit

13. Including *Wilkerson*, four Ninth Circuit district courts have applied *Bristol-Meyers* to FLSA collective actions while “at least seven have held the opposite.” 2022 U.S. Dist. LEXIS 195903, 2022 WL 15520004, at *4. Compare *Kurtz v. RegionalCare Hosp. Partners, Inc.*, 2021 U.S. Dist. LEXIS 171373, 2021 WL 6246619, at *5-6 (E.D. Wash. Sept. 9, 2021); *Carlson v. United Nat. Foods, Inc.*, 2021 U.S. Dist. LEXIS 154079, 2021 WL 3616786, at *4 (W.D. Wash.

Appendix D

district courts have rejected applying *Bristol-Myers* to collection actions arising under the FLSA. *Id.* These cases reason that nothing in the FLSA limits remedies to in-state plaintiffs and so applying *Bristol-Myers* to FLSA claims would be contrary to congressional intent. *See e.g., Swamy*, 2017 U.S. Dist. LEXIS 186535, 2017 WL 51967 at *2. The Court agrees as Section 216(b) allows collective actions to proceed under the FLSA so long as employees are “similarly situated.” 29 U.S.C. § 216(b).

Moreover, it is well-settled that the Court has specific personal jurisdiction in this matter over claims against Cracker Barrel because there are allegations by a named plaintiff who worked in an Arizona restaurant. *See supra* Section II.A(1) (citing Doc. 73 at 3) (“The addition of Basch as plaintiff cures the personal jurisdiction deficiencies as to Harrington, Liammaytry, and Lencerht.”). Therefore, following the majority of district courts within this circuit, the Court declines to apply *Bristol-Myers* to the present

Aug. 14, 2021); *McNutt v. Swift Transp. Co. of Ariz.*, 2020 U.S. Dist. LEXIS 119909, 2020 WL 3819239, at *7-9 (W.D. Wash. July 7, 2020) with *Arends v. Select Med. Corp.*, 2021 U.S. Dist. LEXIS 190231, 2021 WL 4452275, at *1 (C.D. Cal. July 7, 2021); *Pavloff v. Cardinal Logistics Mgmt. Corp.*, 2020 U.S. Dist. LEXIS 222893, 2020 WL 6828902, at *4 n.2 (C.D. Cal. Oct. 2, 2020); *Cooley v. Air Methods Corp.*, 2020 U.S. Dist. LEXIS 177139, 2020 WL 9311858, at *3 (D. Ariz. Sept. 25, 2020); *Chavez v. Stellar Mgmt. Grp.*, 2020 U.S. Dist. LEXIS 140210, 2020 WL 4505482, at *5-7 (N.D. Cal. Aug. 5, 2020); *Seiffert v. Qwest Corp.*, 2018 U.S. Dist. LEXIS 211287, 2018 WL 6590836, at *1-4 (D. Mont. Dec. 14, 2018); *Swamy v. Title Source, Inc.*, 2017 U.S. Dist. LEXIS 186535, 2017 WL 5196780, at *2 (N.D. Cal. Nov. 10, 2017); *Thomas v. Kellogg Co.*, 2017 U.S. Dist. LEXIS 171734, 2017 WL 5256634, at *1 (W.D. Wash. Oct. 17, 2017).

Appendix D

FLSA action and will allow Plaintiffs to notify opt-in plaintiffs from outside Arizona. To hold otherwise would be inconsistent with the Court's previous findings.

b. Plaintiffs' Method of Notice

Last, the Court will review Plaintiffs proposed notice method and procedures. Cracker Barrel seeks to submit an additional brief to address Plaintiffs' procedures as overbroad. (Doc. 78 at 16). The Court construes this as a request to file a surresponse. But neither the Federal Rules of Civil Procedure nor the District's Local Rules entitle a party to a surresponse as a matter of right as they are "highly disfavored and permitted only in extraordinary circumstances." *Finley v. Maricopa Cnty. Sheriff's Office*, 2016 U.S. Dist. LEXIS 24456, 2016 WL 777700 at *1 n. 1 (D. Ariz. Feb. 29, 2016); *see also* See LRCiv 7.2. Here, there are no extraordinary circumstances that would give rise to allowing Cracker Barrel a surresponse. *Cf. Fitzhugh v. Miller*, 2020 U.S. Dist. LEXIS 57926, 2020 WL 1640495 at *9 (D. Ariz. Apr. 2, 2020) (explaining valid reasons are where the movant raises new arguments in its reply brief). The Court accordingly rejects Cracker Barrel's request and will consider Plaintiffs' proposed method of notice.

Unlike a class action under Rule 23, to participate in a collective action, an employee is required to give her consent in writing to become a party. 29 U.S.C. § 216(b); *see Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, 170, 110 S. Ct. 482, 107 L. Ed. 2d 480 (1989) (rights in a collective action under the FLSA are dependent on the

Appendix D

employee receiving accurate and timely notice about the pendency of the collective action, so that the employee can make informed decisions about whether to participate). “If an employee does not file a written consent, then that employee is not bound by the outcome of the collective action.” *Edwards v. City of Long Beach*, 467 F. Supp. 2d 986, 989 (C.D. Cal. 2006). In an FLSA action, “the court must provide potential plaintiffs ‘accurate and timely notice concerning the pendency of the collective action, so that they can make informed decisions about whether or not to participate.’” *Adams v. Inter-Con Sec. Sys.*, 242 F.R.D. 530, 539 (N.D. Cal. 2007) (quoting *Hoffmann-La Roche*, 493 U.S. at 170). Thus, “[t]he court may authorize the named FLSA plaintiffs to send notice to all potential plaintiffs and may set a deadline for those potential plaintiffs to join the suit.” *Id.* at 535 (citing *Hoffmann—La Roche Inc.*, 493 U.S. at 169). It is within the district court’s discretion to “approve the broadest notice possible on conditional certification.” *Vega v. All My Sons Bus. Dev. LLC*, 2022 U.S. Dist. LEXIS 40874, 2022 WL 684380, at *3 (D. Ariz. Mar. 8, 2022).

Here, Plaintiffs have submitted their Proposed Notice and Consent to Join forms for approval. (Docs. 76-13; 76-14). They intend to mail, email, and text notices to potential class members as well as have Cracker Barrel post the notice on its employee bulletins. (Doc. 76 at 14-15). Plaintiffs also seeks information from Cracker Barrel regarding the potential class members. (*Id.* at 18).

*Appendix D***i. Plaintiffs' Proposed Notice and Consent to Join forms**

First, the Court approves Plaintiffs' Notice and Consent to Joint forms with limited modifications. Plaintiffs' notice allows for an opt-in period of ninety days, which the Court finds appropriate. (Doc. 76 at 16). Plaintiffs say this period is necessary given the high number¹⁴ of potential class members. (Doc. 76 at 16) (citing *Saleh v. Valbin Corp.*, 297 F. Supp. 3d 1025, 1036-37 (N.D. Cal. 2017); *Delara*, 2020 U.S. Dist. LEXIS 75803, 2020 WL 2085957, *12; *Ziglar V. Express Messenger Sys. Inc.*, 2017 U.S. Dist. LEXIS 220460, 2017 WL 6539020, at *6 (D. Ariz. Aug. 31, 2017)). Moreover, the Notice form properly contains an explicit judicial disclaimer stating, "[t]he Court has not ruled which party will prevail in this lawsuit, but has ordered that this notice be sent to you to inform you of your legal rights and ability to make a claim for unpaid wages." (Doc. 76-13 at 2). *See Stanfield v. Lasalle Corr. W. LLC*, 2022 U.S. Dist. LEXIS 132717, 2022 WL 2967711, at *5 (D. Ariz. July 26, 2022) (finding the notice form contained an adequate judicial disclaimer).

Plaintiffs seek to use the three year statutory time period for Cracker Barrel allegedly willful violations of the FLSA. 29 U.S.C. § 255(a). Thus, the class period is three years before the filing of the complaint. *See Delara*, 2020 U.S. Dist. LEXIS 75803, 2020 WL 2085957, at *4 (allowing references to the three-year limitation on willful

14. Plaintiffs estimate the potential class, covering a three year time period, is comprised of 100,000-200,000 current and former Cracker Barrel servers among 650 stores nationwide. (Doc. 76 at 14).

Appendix D

violations because whether the defendant acted willfully “is a merits question not suitable to resolution at this stage”). The Original Complaint was filed on May 28, 2021. (*See* Doc. 1). Thus, Plaintiffs shall include language in their notice stating the class period starts on May 28, 2018. (*See* Doc. 76-13 at 2).

Last, the Court directs Plaintiffs to delete sections of the notice form, email, and text that advise potential plaintiffs they may contact Plaintiffs’ counsel regarding questions about the collective action or their legal rights. (Doc. 76-13 at 4, 5). This is because potential plaintiffs could construe those sections as suggestions to call Plaintiffs’ counsel. *See Stanfield*, 2022 U.S. Dist. LEXIS 132717, 2022 WL 2967711, at *5 (citing *Barrera v. US Airways Grp., Inc.*, 2013 U.S. Dist. LEXIS 124624, 2013 WL 4654567, at *9 (D. Ariz. Aug. 30, 2013) (directing plaintiff to omit the “further information” section because it could be construed as encouragement for potential plaintiffs to call plaintiff’s counsel); *see also Wertheim v. Arizona*, 1993 U.S. Dist. LEXIS 21292, 1993 WL 603552, at *6 (D. Ariz. Sept. 30, 1993).

ii. Plaintiffs’ Proposed Method of Notice

Second, the Court finds Plaintiffs’ proposed methods of mailing, emailing, and texting the notices to potential class members are reasonable. *See Phelps v. MC Communs., Inc.*, 2011 U.S. Dist. LEXIS 84428, 2011 WL 3298414, at *6 (D. Nev. Aug. 1, 2011) (finding notice by mail is sufficient, especially when email notice is also

Appendix D

provided); *see e.g., Anthony v. Rise Servs. Inc.*, 2022 U.S. Dist. LEXIS 137233, 2022 WL 3042854, at *3 (D. Ariz. Aug. 2, 2022) (allowing notice by mail, email, and text). However, the Court declines to require Cracker Barrel to post the notice on its employee bulletins. *See Delara*, 2020 U.S. Dist. LEXIS 75803, 2020 WL 2085957, at *7 (finding there is no basis for requiring the defendant to post the notice in the workplace). Apart from citing cases from out of circuit (Doc. 76 at 15-16), Plaintiffs have not identified “a need for a third-party administrator” to effectuate notice and “there is no reason to suspect [Plaintiffs] counsel is incapable of properly handling notice” themselves. *Delara*, 2020 U.S. Dist. LEXIS 75803, 2020 WL 2085957, at *7.

Plaintiffs also propose notice be sent twice during the opt-in period: once on day one of the notice period and another on day forty five. (Doc. 76 at 16). The Court finds a reminder notice halfway through the opt-in period is reasonable. *See Curphey v. F&S Mgmt. I LLC*, 2021 U.S. Dist. LEXIS 25829, 2021 WL 487882, at *5 (D. Ariz. Feb. 10, 2021) (ordering a sixty day opt-in period and a reminder notice halfway through the opt-in period); *see e.g., Delara*, 2020 U.S. Dist. LEXIS 75803, 2020 WL 2085957, at *6 (ordering a ninety day opt-in period and a reminder notice halfway through the opt-in period).

iii. Plaintiffs’ Request for Information

Last, Plaintiffs requests Cracker Barrel to, within twenty-one days of the Court’s Order, produce the names, mailing addresses, email addresses, cell phone numbers,

Appendix D

last four digits of social security numbers, and dates of employment of all current and former servers who have worked for Cracker Barrel during the class period. (Doc. 76 at 17). They explain this information is necessary to locate those current or former servers who may have moved. (*Id.*)

Discovery of the contact information for current and former Cracker Barrel servers is necessary for Plaintiffs to provide those potential class members with notice of the collective action. *See Hoffmann-La Roche*, 493 U.S. at 170 (names and addresses of discharged employees were “relevant to the subject matter of the action and that there were no grounds to limit the discovery under the facts and circumstances of this case.”). However, Plaintiffs do not explain why a social security number is necessary to communicate with clients. *Delara*, 2020 U.S. Dist. LEXIS 75803, 2020 WL 2085957, at *4 (“If counsel later needs that information, it can request it of the opt-in plaintiffs and justify the request to them.”). Cracker Barrel shall not provide Plaintiffs with servers’ social security numbers. Moreover, the Courts finds twenty-one days is a reasonable time for Cracker Barrel to provide this discovery as courts in this district have allowed as little as fourteen days for production. *See Barrera*, 2013 U.S. Dist. LEXIS 124624, 2013 WL 4654567, at *10 (finding a five day request to produce an electronic list of potential opt-ins burdensome and permitting fourteen days instead).

In sum, the Court approves Plaintiffs’ proposed Notice and Consent to Join forms with the following modifications:

Appendix D

(1) Plaintiffs shall include language stating the class period starts on May 28, 2018.

(2) Plaintiffs shall delete sections of the notice form, email, and text that advise potential plaintiffs they may contact Plaintiffs' counsel regarding questions about the collective action or their legal rights.

The Court also approves Plaintiffs' proposed methods of mailing, emailing, and texting the notices to potential class members, and Plaintiffs are permitted to send one reminder halfway through the opt-in period. Cracker Barrel shall, within twenty-one days of this Order, provide Plaintiffs the names, mailing addresses, email addresses, cell phone numbers, and dates of employment of all current and former servers who have worked for Cracker Barrel from May 28, 2018, to the present. Although Defendant raises issues regarding collective members who are subject to arbitration, such issues may be addressed at the second decertification stage.

IV. Conclusion

It is proper to conditionally certify this collective action under the FLSA for notice purposes. The Court denies Cracker Barrel's Motion to Dismiss and Compel Arbitration because Basch effectively voided Cracker Barrel's Arbitration Agreement and has thus stated a claim for which relief can be granted. Furthermore, the addition of Basch—a current Arizona Cracker Barrel employee—as a plaintiff establishes the Court's personal

Appendix D

jurisdiction over Cracker Barrel and cures the personal jurisdiction deficiencies as to Harrington, Lammaytry, and Lencerht.

The Court also grants Plaintiffs' Second Motion to Certify. Plaintiffs have met their low burden for preliminary certification of this matter as a collective action because they allege violations under the FLSA and have sufficiently shown they are similarly situated with the defined collective. Last, Plaintiffs' Proposed Notice and Consent to Join forms, with limited modifications, are a proper means of providing notice to the defined collective.

Accordingly,

IT IS HEREBY ORDERED that Plaintiffs' Second Amended Motion for Conditional Certification (Doc. 76) is **GRANTED in part**.

IT IS FURTHER ORDERED that Cracker Barrel's Motion to Compel Individual Arbitration and Dismiss Second Amended Complaint with Prejudice (Doc. 77) is **DENIED**.

IT IS FURTHER ORDERED the collective class of potential plaintiffs is conditionally certified under 29 U.S.C. § 216(b) and shall consist of all current and former Cracker Barrel servers who worked for Cracker Barrel from May 28, 2018, to the present in states where Cracker Barrel pays its employees under the 29 U.S.C. § 203(m) tip credit scheme.

Appendix D

IT IS FURTHER ORDERED that Plaintiffs' Notice and Consent to Join forms (Docs. 76-13; 76-14) shall be written and sent in compliance with the directives in this Order.

IT IS FINALLY ORDERED that within **twenty-one (21)** days of this Order, Cracker Barrel shall provide Plaintiffs the names, mailing addresses, email addresses, cell phone numbers, and dates of employment of all current and former servers who have worked for Cracker Barrel from May 28, 2018, to the present. Cracker Barrel shall provide this discovery in electronic and importable format.

Dated this 31st day of March, 2023.

/s/ Diane J. Humetewa
Honorable Diane J. Humetewa
United States District Judge

**APPENDIX E — ORDER OF THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF
ARIZONA, FILED JULY 22, 2022**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CV-21-00940-PHX-DJH

ASHLEY GILLESPIE, *et al.*,

Plaintiffs,

v.

CRACKER BARREL OLD COUNTRY STORE
INCORPORATED,

Defendant.

ORDER

Pending before the Court in this collective action are Plaintiffs' Amended Motion for Conditional Certification (Doc. 58), Plaintiffs' Motion for Partial Dismissal (Doc. 60), and Defendant's Motion to Dismiss for Lack of Jurisdiction (Doc. 62). For the following reasons, the Court grants Defendant's Motion to Dismiss and denies the remaining motions as moot.

*Appendix E***I. Background**

As alleged in the First Amended Complaint (“FAC”), Plaintiffs are current and former employees of Defendant Cracker Barrel Old Country Store Inc. (“Cracker Barrel”). (Doc. 57 at ¶¶ 6-8). They allege that Cracker Barrel violated the Fair Labor Standards Act (“FLSA”). (*Id.* at ¶ 1).

By previous Order, the Court granted Cracker Barrel’s Motion to Compel Arbitration. (Doc. 47). That Order permitted Plaintiffs to file an amended complaint that named Plaintiffs who were not subject to their employment arbitration agreement. (*Id.* at 9).

In Plaintiffs’ original Complaint, the lead named Plaintiff was alleged to be employed at one of Cracker Barrel’s restaurants in Arizona. (Doc. 1 at ¶ 6). The FAC alleges that Cracker Barrel has about fourteen stores in Arizona, but none of the named Plaintiffs are alleged to have worked in them. (Doc. 57 at ¶ 12). Cracker Barrel now raises the defense that the Court lacks personal jurisdiction over it. As it must, the Court addresses jurisdictional issues first. Because the Court finds no personal jurisdiction over Defendant, it dismisses the other motions as moot.

II. Personal Jurisdiction Standard

“Where a defendant moves to dismiss a complaint for lack of personal jurisdiction, the plaintiff bears the burden of demonstrating that jurisdiction is appropriate.” *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d

Appendix E

797, 800 (9th Cir. 2004). Federal courts have personal jurisdiction over a defendant “who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located.” Fed. R. Civ. P. 4(k)(1)(A). Arizona courts may exercise personal jurisdiction “to the maximum extent permitted by the Arizona Constitution and the United States Constitution.” Ariz. R. Civ. P. 4.2. Due process requires “certain minimum contacts” such that the lawsuit “does not offend traditional notions of fair play and substantial justice.” *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95 (1945). Since *International Shoe*, courts separate personal jurisdiction into “general” and “specific” jurisdiction. See *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919, 131 S. Ct. 2846, 180 L. Ed. 2d 796 (2011). A defendant is subject to a court’s general jurisdiction where its activities in the forum state are “so continuous and systematic as to render [it] essentially at home in the forum State.” *Id.* Specific jurisdiction, on the other hand, exists when the lawsuit “aris[es] out of or [is] related to the defendant’s contacts with the forum.” *Helicopteros Nacionales de Colom., S.A. v. Hall*, 466 U.S. 408, 414 n.8, 104 S. Ct. 1868, 80 L. Ed. 2d 404 (1984).

III. Discussion

a. Cracker Barrel May Raise Personal Jurisdiction as a Defense

Plaintiffs raise many arguments as to why the Court may not now consider whether it has personal jurisdiction over Cracker Barrel. The Court rejects them all.

Appendix E

To begin, the Court rejects Plaintiffs' argument that Cracker Barrel has waived the personal jurisdiction argument because it did not raise it in its earlier Motion to Dismiss. A party that files a motion under Federal Rule of Civil Procedure 12 "must not make another motion . . . raising a defense or objection that was available to the party but omitted from its earlier motion." Fed. R. Civ. P. 12(g)(2); *see also* Fed. R. Civ. P. 12(h)(1)(A) (stating that a party waives the personal jurisdiction defense by "omitting it from a motion in the circumstances described in Rule 12(g)(2)). "A fundamental tenet of the Federal Rules of Civil Procedure is that certain defenses under Fed. R. Civ. P. 12 must be raised at the *first available* opportunity or, if they are not, they are forever waived." *Am. Ass'n of Naturopathic Physicians v. Hayhurst*, 227 F.3d 1104, 1106 (9th Cir. 2000) (emphasis added). Here, because the original complaint included allegations of a Plaintiff who worked in an Arizona restaurant, the defense of lack of personal jurisdiction was not available to Cracker Barrel when it filed its first Motion to Dismiss. Now that the FAC contains no allegations about how Cracker Barrel's activities in Arizona gave rise to the named Plaintiffs' claims, the defense is available and has not been waived.

Plaintiffs also argue that under Arizona law, once jurisdiction has been established, it may not be revoked. They cite *Fry v. Garcia* for the proposition that generally, "a court that has acquired jurisdiction of a case cannot be deprived of jurisdiction by subsequent events in the course of its proceedings, even if those subsequent events would have prevented jurisdiction from attaching in the

Appendix E

first place.” 213 Ariz. 70, 138 P.3d 1197, 1200 (Ariz. Ct. App. 2006) (quoting 20 Am.Jur.2d Courts § 111 (1995)). Plaintiffs misconstrue the *Fry* court’s discussion, which was about subject matter jurisdiction, not personal jurisdiction. *See id.* And it is well-established that a court’s subject matter jurisdiction is established at the time an action is filed. *See Grupo Dataflux v. Atlas Glob. Grp., L.P.*, 541 U.S. 567, 571, 124 S. Ct. 1920, 158 L. Ed. 2d 866 (2004). But personal jurisdiction is different because it is not determined by a specific point in time but, rather, by the plaintiff’s pleadings. *See Dole Food Co. v. Watts*, 303 F.3d 1104, 1108 (9th Cir. 2002) (describing how a plaintiff’s prima facie showing of personal jurisdiction may be determined by the pleadings, unless there is a factual dispute). Here, Plaintiffs may not rely on their original pleadings because once an amended complaint is filed, it supersedes the original, which is then considered “non-existent.” *Rhodes v. Robinson*, 621 F.3d 1002, 1005 (9th Cir. 2010) (quoting *Loux v. Rhay*, 375 F.2d 55, 57 (9th Cir. 1967)). This conclusion, that personal jurisdiction may be lost upon the filing of an amended complaint, is also supported by Federal Rule of Civil Procedure 12’s permitting of the personal jurisdictional defense once it becomes available, which necessarily includes availability caused by an amended complaint.

Plaintiff makes other smaller arguments, which the Court will address briefly. Plaintiffs argue that because the Court previously granted Cracker Barrel’s first Motion to Dismiss, Cracker Barrel has availed itself of the Court’s jurisdiction and now has consented to the Court’s personal jurisdiction. The Court may have had personal

Appendix E

jurisdiction over this matter’s original Complaint. But for reasons further explained below, the Court no longer has personal jurisdiction over Cracker Barrel.

Plaintiffs also argue that because Cracker Barrel was properly served, it is subject to the Court’s personal jurisdiction. This argument lacks merit. Plaintiffs’ reliance on *Waters v. Day & Zimmermann NPS, Inc.*, 23 F.4th 84, 86 (1st Cir. 2022), *cert. denied*, 142 S. Ct. 2777, 213 L. Ed. 2d 1016 (2022), is erroneous. The Court need not delve into the nuance of *Waters* and only points out that it is not binding and distinguishable because the named plaintiff was employed by the defendant in the judicial district where the claim was brought. *Id.* at 87. That is no longer the case here.

Plaintiffs argue Cracker Barrel has consented to the Court’s personal jurisdiction because it’s Motion is untimely. Cracker Barrel’s Motion asserting the subject jurisdiction defense was filed less than a month after it became available by virtue of the FAC. This is not untimely.

Finally, Plaintiffs argue that to find that the Court lacks personal jurisdiction would be prejudicial to them. The decision to exercise of personal jurisdiction looks to “the quality and nature of the activity in relation to the fair and orderly administration of the laws . . .” *Int’l Shoe Co.*, 326 U.S. at 319. Although Plaintiffs argue that they would be prejudiced if the Court were to find it lacked personal jurisdiction over Cracker Barrel, such “prejudice” is the result of defects in their own pleadings. It would be more

Appendix E

prejudicial to require Cracker Barrel to defend an action where there is no general or specific personal jurisdiction.

b. General & Specific Personal Jurisdiction

Cracker Barrel cannot be said to be at home in this state. As alleged, it is incorporated and headquartered in Tennessee. (Doc. 57 at ¶ 5). Although the FAC alleges that Cracker Barrel has restaurants in Arizona, the Court finds these restaurants do not create the kind of affiliation that would permit Cracker Barrel “to be haled into” this District “to answer for any of its activities anywhere in the world.” *Schwarzenegger*, 374, F.3d at 801; *see also Goodyear*, 564 U.S. at 924 (identifying place of incorporation and principal place of business as the “paradigm” bases for general personal jurisdiction). Plaintiffs make no argument to the contrary. The Court, therefore, lacks general personal jurisdiction over Cracker Barrel.

Next, there are insufficient connections between Plaintiffs, Cracker Barrel, and this forum to justify the exercise of specific personal jurisdiction. The Court uses a three-pronged test to determine if specific personal jurisdiction exists:

- (1) The non-resident defendant must purposefully direct his activities or consummate some transaction with the forum or resident thereof; or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the

Appendix E

benefits and protections of its laws; (2) the claim must be one which arises out of or relates to the defendant's forum-related activities; and (3) the exercise of jurisdiction must comport with fair play and substantial justice, i.e. it must be reasonable.

Schwarzenegger, 374 F.3d at 802 (quoting *Lake v. Lake*, 817 F.2d 1416, 1421 (9th Cir. 1987)). First, Cracker Barrel purposefully directs some activities to Arizona because it operates restaurants here. However, the Plaintiffs' claims do not arise out of Cracker Barrel's operation of restaurants in Arizona. Plaintiffs, therefore, fail the second prong of the specific personal jurisdiction test, and the Court has already found that it would be unfair to subject Cracker Barrel to the Court's jurisdiction. Consequently, the Court lacks specific personal jurisdiction over Cracker Barrel.

IV. Conclusion

Having found that the Court lacks personal jurisdiction, it will grant Cracker Barrel's Motion to Dismiss.

Accordingly,

IT IS HEREBY ORDERED that Cracker Barrel's Motion to Dismiss (Doc. 62) is **granted**. Plaintiffs' may file a second amended complaint within thirty (30) days of this Order.

IT IS FURTHER ORDERED that if Plaintiffs fail to file a second amended complaint within thirty (30) days,

107a

Appendix E

the Clerk of Court shall terminate this action without prejudice and without further order of the Court.

IT IS FURTHER ORDERED that Plaintiffs' Amended Motion for Conditional Certification (Doc. 58) and Plaintiffs' Motion for Partial Dismissal (Doc. 60) are **denied** as moot.

Dated this 22nd day of July, 2022.

/s/ Diane J. Humetewa
Honorable Diane J. Humetewa
United States District Judge

**APPENDIX F — ORDER OF THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF
ARIZONA, FILED JANUARY 21, 2022**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CV-21-00940-PHX-DJH

ASHLEY GILLESPIE, *et al.*,

Plaintiffs,

v.

CRACKER BARREL OLD COUNTRY STORE
INCORPORATED,

Defendant.

ORDER

Pending before the Court is Plaintiffs' Motion for Clarification or Partial Motion for Reconsideration (Doc. 48). Defendant Cracker Barrel Old Country Store, Inc. ("Cracker Barrel") filed a Response (Doc. 52), and Plaintiffs filed a Reply¹ (Doc. 54). The Motion is unconventional. It presents several questions to the Court and requests the Court send notice to all Cracker Barrel servers explaining the Court's prior Order. For

1. Pages three through five of the Reply contain a mock dialogue. Further pleadings of this style will be summarily stricken as they are not based in law or fact.

Appendix F

the following reasons, the Motion is granted in part and denied in part.

I. Background & the Court’s Prior Order (Doc. 47)

Plaintiffs are current and former Cracker Barrel employees who filed a collective action alleging that Cracker Barrel violated the Fair Labor Standards Act. (Doc. 1 at ¶ 1). After initiating this action, Plaintiffs filed a Motion for Conditional Certification. (Doc. 8). If that Motion had been granted, it would have resulted in the publication of a court-approved written notice to any other Cracker Barrel employees who might wish to join this action. *See Campbell v. City of Los Angeles*, 903 F.3d 1090, 1101 (9th Cir. 2018). Cracker Barrel subsequently filed a Motion to Compel Arbitration, seeking to enforce an arbitration agreement (the “Agreement”) against the named Plaintiffs. (Doc. 21).

The Court’s prior Order denied Plaintiffs’ Motion for Conditional Certification without prejudice, and it granted Cracker Barrel’s Motion to Compel Arbitration. (Doc. 47 at 10). The Court dismissed all of the named Plaintiffs so that they may pursue their claims in arbitration. (*Id.*) However, because some opt-in Plaintiffs were capable of voiding the Agreement due to their status as minors, the Court gave Plaintiffs leave to file a first amended complaint. (*Id.*) The Court also denied Plaintiffs’ Motion for Conditional Certification without prejudice to refile if and when a class were proposed that did not fall subject to the Agreement. (*Id.*)

*Appendix F***II. Plaintiffs' Motion (Doc. 48)**

Plaintiffs' Motion presents several questions that toe the line between requesting clarification, reconsideration, advice from the Court, and entirely new rulings on matters not properly before the Court. Plaintiffs also request the Court "order that notices be provided to all Cracker Barrel servers (current and those employed within the last three years) that explain the Court's interpretation and clarification of the . . . Agreement." (Doc. 48 at 8).

The Court will proceed by addressing Plaintiffs' questions, most of which are easily answered by a careful and earnest reading of the Court's prior Order. To the extent Plaintiffs seek reconsideration, courts ordinarily deny such request "absent a showing of manifest error or a showing of new facts or legal authority that could not have been brought to its attention earlier with reasonable diligence." LRCiv 7.2(g)(1). To the extent they seek advice on how they should proceed, the Court is unable to provide counsel. *United Pub. Workers of Am. (C.I.O.) v. Mitchell*, 330 U.S. 75, 89, 67 S. Ct. 556, 91 L. Ed. 754 (1947) ("As is well known the federal courts established pursuant to Article III of the Constitution do not render advisory opinions.").

a. Confidentiality

Plaintiffs first ask whether the Agreement's confidentiality requirement is enforceable. (Doc. 48 at 4). It is. (*See* Doc. 47 at 6-7).

*Appendix F***b. Conciliation & Selective Enforceability**

Plaintiffs ask whether the Agreement’s conciliation requirement is enforceable and whether any party may selectively enforce portions of the Agreement. (*Id.*) The conciliation requirement is enforceable. (*See* Doc. 47 at 8). In its prior Order, the Court noted that Cracker Barrel has represented that it will not seek to enforce that requirement. (*Id.* (citing Doc. 39 at 9 n.2)). The Court included Cracker Barrel’s statement solely to show that to the extent the parties agree to waive the conciliation requirement, it may be possible to do so. Nothing in the Court’s prior Order stands for the proposition that a party may unilaterally choose to selectively enforce the Agreement.

c. Reporting to a Government Agency

Plaintiffs ask whether they may recover monetary compensation through a complaint to a government agency. (Doc. 48 at 6). This question relates to Plaintiffs’ prior argument that the Agreement was void because it violated an Arizona statute. (Doc. 29 at 14). Specifically, they argued the Agreement curtailed an employee’s right to file a claim with Arizona’s Department of Labor under A.R.S. § 23-356, a right which Plaintiffs argued could not be waived under A.R.S. § 23-364. (*Id.*) The Court found that the Agreement’s plain language provided an exception for “disputes which by statute are not arbitrable” and so Plaintiffs’ rights under § 23-356 were preserved. (Doc. 47 at 7 (quoting Doc. 21-3 at 2)).

Appendix F

Plaintiffs do not elaborate on what they mean by whether they may receive monetary compensation via a complaint to a government agency. The question is so vague as to render any answer from the Court an advisory opinion. *Aetna Life Ins. Co. of Hartford, Conn. v. Haworth*, 300 U.S. 227, 241, 57 S. Ct. 461, 81 L. Ed. 617 (1937) (noting that advisory opinions state “what the law would be upon a hypothetical state of facts”). Therefore, the Court declines to answer Plaintiffs’ request for “clarification” on this issue.

d. Determining Plaintiffs’ Attorney’s Fees

Plaintiffs next ask how an arbitrator should determine a prevailing plaintiffs’ attorney fees. (Doc. 48 at 6). The Court noted in its prior Order that, under the Agreement, an “Arbitrator may award relief to either party to which Cracker Barrel or [the employee] may be entitled by law.” (Doc. 47 at 5 (quoting Doc. 21-3 at 4)). Plaintiffs assume an arbitrator will follow the lodestar method, but they would like “direction from the Court . . . confirming the standard.” (Doc. 48 at 6-9). Here, again, the Court declines to respond to Plaintiffs’ question by advising the parties of the correct legal standard.

e. Defendant’s Attorneys’ Fees & Costs

Plaintiffs next state that the Agreement indicates that a party who sought to compel arbitration under the Agreement’s terms shall be awarded attorney fees and costs if successful. (Doc. 48 at 7). Plaintiffs concede that Cracker Barrel was successful in its Motion to Compel.

Appendix F

(*Id.*) They then ask whether they are obliged to pay Cracker Barrel's attorney fees and costs. (*Id.*) The Court declines to advise Plaintiffs on contractual duties they may or may not have.

f. Dismissal Requirement

Plaintiffs request to file a list of opt-in Plaintiffs to the Court who are subject to the Agreement so that the Court may dismiss them and proceed with an appeal to the Ninth Circuit. (Doc. 48 at 7). The Court will grant this request in part. The parties shall jointly submit a list of opt-in Plaintiffs who are subject to the Agreement by no later than March 14, 2022.

g. Request for Notice

Having addressed Plaintiffs' questions, the Court turns to Plaintiffs' request for an order that notice be provided to all Cracker Barrel employees to explain the Court's ruling and interpretation of the Agreement. (Doc. 48 at 8). Plaintiffs have cited no authority by which the Court may issue such notice, but they also argue no law prevents it. (Doc. 54 at 2). Essentially, their argument is that without such notice, potential Plaintiffs would be hesitant to seek relief under the Agreement. Cracker Barrel argues this request must be denied because it seeks the same relief as the Motion for Conditional Certification that was already denied. (Doc. 52).

The Court denied Plaintiffs' previous request to send out notice without prejudice. (Doc. 47 at 3). Plaintiffs will

Appendix F

have the opportunity to file another motion for conditional certification if and when they propose a class that is not subject to the Agreement. Therefore, Plaintiffs' request, to the extent it requests notice be sent to minors, is premature. As to those employees who are subject to the Agreement, to issue such notice now would functionally serve as a reconsideration of the Court's prior Order denying the Motion for Conditional Certification. Because there is no legal basis for sending notice now, and because Plaintiffs have not made a showing of manifest error, new facts, or legal authority, the Court declines to issue the requested notice. *See* LRCiv 7.2(g)(1).

Accordingly,

IT IS HEREBY ORDERED that Plaintiffs' Motion for Clarification or Partial Motion for Reconsideration (Doc. 48) is **granted** in part and **denied** in part as set forth in this Order.

IT IS FURTHER ORDERED that the parties shall file a list of opt-in Plaintiffs who are subject to the Agreement by no later than March 14, 2022.

Dated this 21st day of January, 2022.

/s/ Diane J. Humetewa
Honorable Diane J. Humetewa
United States District Judge

115a

**APPENDIX G — ORDER OF THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF ARIZONA,
FILED NOVEMBER 12, 2021**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CV-21-00940-PHX-DJH

ASHLEY GILLESPIE, et al.,

Plaintiffs,

v.

CRACKER BARREL OLD
COUNTRY STORE INCORPORATED,

Defendant.

Filed November 12, 2021

ORDER

Pending before the Court are Plaintiffs' Motion for Conditional Certification (Doc. 8) and Defendant's Motion to Compel Arbitration (Doc. 21).¹ In addition, Plaintiffs have filed a Motion to Strike an attachment to Defendant's Motion to Compel Arbitration (Doc. 30). Defendant has

1. Defendant filed a Response in opposition to Plaintiffs' Motion for Conditional Certification (Doc. 32), and Plaintiffs filed their Reply (Doc. 36). Likewise, Plaintiffs filed a Response opposing Defendant's Motion to Compel Arbitration (Doc. 29), and Defendant filed a Reply (Doc. 39).

Appendix G

filed a Response (Doc. 37), but Plaintiffs have not filed a Reply. The Court will now issue its decisions.

I. Background

Plaintiffs are current and former employees of Defendant Cracker Barrel Old Country Store Incorporated (“Cracker Barrel”). They allege Cracker Barrel violated provisions of the Fair Labor Standards Act (“FLSA”) that govern wages for tipped employees, such as servers. (Doc. 1 at ¶ 1). Plaintiffs now seek to conditionally certify this matter as a collective action under the FLSA. (Doc. 8 at 2). If granted, this certification would result in “the sending of court-approved written notice’ to workers who may wish to join the litigation as individuals.” *Campbell v. City of Los Angeles*, 903 F.3d 1090, 1101 (9th Cir. 2018) (quoting *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 75, 133 S. Ct. 1523, 185 L. Ed. 2d 636 (2013)). Cracker Barrel argues the named Plaintiffs are obligated to arbitrate their claims under an arbitration agreement (the “Agreement”) that Plaintiffs signed during their employee training. (Doc. 21 at 2). Cracker Barrel seeks to compel arbitration before any notice is sent. (*Id.*)

II. Whether the Motion to Compel Arbitration is Premature

The parties dispute whether the Court may address the Motion to Compel before the Motion for Conditional Certification. This posture is one in which many courts have previously found themselves. Some courts in the Northern District of California have decided to consider

Appendix G

motions to compel arbitration after a class has been conditionally certified. *See Saravia v. Dynamex, Inc.*, 310 F.R.D. 412, 424 (N.D. Cal. 2015) (“The decisions that have addressed that issue have all found that the issue of the enforceability of arbitration clauses related to the merits of the case and therefore should be dealt with in phase two.”); *Shaia v. Harvest Mgmt. Sub LLC*, 306 F.R.D. 268, 276 (N.D. Cal. 2015) (“The question whether certain employees are precluded from participating as members of the collective action by virtue of the arbitration/settlement agreements is not properly before the court at this first stage of the certification.”).

Courts in the District of Arizona have, primarily for reasons of judicial economy, routinely considered motions to compel arbitration before motions for conditional certification. “Despite the lenient first-step inquiry when deciding to certify a collective action, Courts in this District have not permitted collective certification to proceed, and will dismiss the action, where ‘the Plaintiff and opt-in Plaintiffs are not capable of representing the class because the claims are wholly subject to arbitration.’” *Cabanillas v. 4716 Inc.*, 2021 U.S. Dist. LEXIS 160934, 2021 WL 3773765, at *6 (D. Ariz. Aug. 25, 2021) (citing *Bufford v. VXi Glob. Sols. LLC*, 2021 U.S. Dist. LEXIS 12003, 2021 WL 229240, at *8 (D. Ariz. Jan. 22, 2021)).

Ultimately, “district courts have the inherent authority to manage their dockets and courtrooms with a view toward the efficient and expedient resolution of cases.” *Dietz v. Bouldin*, 579 U.S. 40, 136 S. Ct. 1885, 1892, 195 L. Ed. 2d 161 (2016). Using their discretion,

Appendix G

it seems the various district courts in this posture have proceeded by weighing the liberal standards for granting conditional certification against the judicial resources that may be needlessly expended if an arbitration agreement is enforceable.

Here, as will be further explained below, the named Plaintiffs in this action are bound by the Agreement. However, at least a few of the opt-in Plaintiffs are not subject to the Agreement. For example, Plaintiff has produced affidavits from two opt-in Plaintiffs who were minors when they worked for Cracker Barrel and claim their minor status voids any arbitration agreement. (Doc. 29-2). Cracker Barrel does not dispute that arbitration agreements with minors can be voided. Therefore, at least two of the opt-in Plaintiffs are not subject to arbitration. Although Plaintiffs should be afforded an opportunity to conditionally certify a class that is not subject to the Agreement, the Court will enforce the Agreement as it pertains to those Plaintiffs who are. Therefore, the Court will deny the Motion for Conditional Certification without prejudice with leave to refile for Plaintiffs to propose a class that is not bound by the Agreement.

The Court will now address Cracker Barrel's Motion to Compel Arbitration.

III. Enforceability of Arbitration Agreements

The Federal Arbitration Act ("FAA") codified "the liberal federal policy favoring arbitration" *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339, 131 S.

Appendix G

Ct. 1740, 179 L. Ed. 2d 742 (2011) (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983)). It states “[a] written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2. When presented with a motion to compel arbitration, a court’s review is limited to determining (1) whether the agreement is valid and (2) whether the agreement encompasses the dispute. *Samson v. NAMA Holdings, LLC*, 637 F.3d 915, 923 (9th Cir. 2011). In addressing these issues, courts are required to adopt a rule of contract construction favoring arbitration. *Kuehner v. Dickinson & Co.*, 84 F.3d 316, 319 (9th Cir. 1996), *as amended* (July 5, 1996). In addition, “the party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration.” *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 91, 121 S. Ct. 513, 148 L. Ed. 2d 373 (2000). If a valid agreement exists encompassing the dispute, then courts are called to “rigorously enforce” the arbitration agreement. *Id.* (quoting *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221, 105 S. Ct. 1238, 84 L. Ed. 2d 158 (1985)). In addition, if a court enforces an arbitration agreement, the court “may either stay the action or dismiss it outright when . . . the court determines that all of the claims raised in the action are subject to arbitration.” *Johnmohammadi v. Bloomingdale’s, Inc.*, 755 F.3d 1072, 1074 (9th Cir. 2014).

Cracker Barrel argues the four named Plaintiffs are subject to the Agreement because it is valid and

Appendix G

encompasses the claims at issue. (Doc. 21 at 2–5). Plaintiffs do not dispute that the Agreement, if valid, would encompass their claims. However, Plaintiffs challenge the Agreement’s validity on the grounds that it is substantively and procedurally unconscionable. First, Plaintiffs argue that the Agreement is invalid under the effective vindication doctrine. (Doc. 29 at 5). Second, Plaintiffs argue the Agreement’s confidentiality requirement is unenforceable. (*Id.* at 13). Third, Plaintiffs argue the Agreement violates Arizona law. (*Id.*) Finally, Plaintiffs argue the Agreement is procedurally unconscionable. (*Id.* at 17). The Court addresses each argument in turn.

a. Whether the Effective Vindication Doctrine Invalidates the Agreement

Plaintiffs argue the Court should invalidate the Agreement because it does not guarantee that the prevailing party will be entitled to an award of attorney fees and costs. Normally, prevailing plaintiffs in an FLSA action are entitled to such an award. 29 U.S.C. § 216(b). Plaintiffs argue certain provisions of the Agreement grant the arbitrator discretion to award fees, which presents the possibility that their right to attorney fees and costs might not be vindicated through arbitration. (Doc. 29 at 9).

Plaintiffs ask the Court to adopt the “effective vindication” doctrine as articulated by the Tenth Circuit. *See Nesbitt v. FCNH, Inc.*, 811 F.3d 371, 376 (10th Cir. 2016). This doctrine, originally developed from Supreme Court dictum, invalidates arbitration agreements on public policy grounds when an agreement waives a party’s

Appendix G

right to pursue statutorily guaranteed remedies. *Id.* at 377 (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19, 105 S. Ct. 3346, 87 L. Ed. 2d 444 (1985)). Here, because the Agreement does not require the arbitrator to award attorney fees and costs if Plaintiffs were to prevail, Plaintiffs claim their statutory rights will not be adequately vindicated by the Agreement, and it should therefore be found invalid. Cracker Barrel argues it is unnecessary to decide whether to employ the effective vindication doctrine because Plaintiffs' statutory rights to attorney fees and costs are not at risk. (Doc. 39 at 8).

The Agreement states an "Arbitrator may award any relief to either party to which Cracker Barrel or [the employee] may be entitled by law." (Doc. 21-3 at 4). Plaintiffs interpret this to mean the arbitrator wields the discretion to award FLSA fees and costs. Cracker Barrel, however, cites several cases in which courts have interpreted similar language to mean the arbitrator shall issue an award when the underlying statutory right requires one. *See Bell v. Ryan Transp. Serv., Inc.*, 176 F. Supp. 3d 1251, 1260 (D. Kan. 2016) ("[C]ourts have uniformly rejected this argument [that the arbitrator may decline to issue an attorney fee award under the FLSA] for various reasons, including the persuasive reason that such language simply contemplates those statutes which allow but do not require an award of fees."); *Smith v. VMware, Inc.*, 2016 U.S. Dist. LEXIS 1245, 2016 WL 54120, at *6 (N.D. Cal. Jan. 5, 2016) (construing "may" as requiring an arbitrator to award prevailing plaintiff attorney fees and costs); *Clerk v. First Bank of Del.*, 735 F. Supp. 2d 170, 185

Appendix G

(E.D. Pa. 2010) (“[T]he term permitting the arbitrator to award such fees does not make the provision substantively unconscionable.”); *Sage Popovich, Inc. v. Colt Int’l, Inc.*, 588 F. Supp. 2d 913, 918 (N.D. Ind. 2008) (“While Plaintiff could be successful at arbitration and not be awarded attorney’s fees, the possibility of being awarded such fees is just as likely. This ambiguity does not render the Arbitration Agreement unenforceable . . .”).

The Court finds the cases cited by Cracker Barrel persuasive. There is no question that if Plaintiffs prevail, they will be entitled to an award of reasonable attorney fees and costs. *See* 29 U.S.C. § 216(b). But not every statutory award of attorney fees and costs is mandatory, and the Agreement’s language reflects this. The Court interprets the Agreement to mean that if an award is mandatory, the arbitrator must grant the award. *See Kuehner*, 84 F.3d at 319 (arbitration agreements must be constructed in a manner favoring arbitration). Therefore, it is unnecessary to determine whether to adopt the effective vindication doctrine as formulated in *Nesbitt*. Plaintiffs’ attorneys will receive an award if they prevail. Therefore, this section is not unconscionable.

b. Whether the Confidentiality Requirement Invalidates the Agreement

Plaintiffs next argue the Agreement is substantively unconscionable because it requires employees to agree to “confidential binding arbitration.” (Doc. 29 at 13) (quoting Doc. 21-3 at 1). Plaintiffs’ legal argument on this point is short. They cite a District of Arizona decision

Appendix G

that invalidated a confidentiality provision. (*Id.*) (citing *Longnecker v. Am. Exp. Co.*, 23 F. Supp. 3d 1099, 1110 (D. Ariz. 2014)). *Longnecker* voided a confidentiality provision because it required that parties “maintain the privacy and confidentiality of the arbitration hearing unless applicable law provides to the contrary.” 23 F. Supp. 3d at 1110. Although no Arizona law spoke to the issue, the court found that such a provision was invalid under California law because it unfairly kept “plaintiffs in the dark regarding prior arbitration decisions and only defendants would benefit from this provision.” *Id.* Because of this unfairness, the court voided the confidentiality provision. *Id.*

It is possible that if each individual Plaintiff is bound by a confidentiality agreement, Cracker Barrel stands to benefit from its accumulated knowledge of each claim. California courts call this advantage the “repeat player effect,” and they have held that it does not, standing alone, render arbitration agreements unconscionable per se. *Mercuro v. Superior Ct.*, 96 Cal. App. 4th 167, 116 Cal. Rptr. 2d 671, 679 (Cal. Ct. App. 2002). Plaintiffs have made no other argument as to why the Agreement is unconscionable, nor have they expanded on what this particular confidentiality agreement entails. Certainly, *Longnecker* does not stand for the proposition that the mere existence of a confidentiality provision renders an arbitration agreement invalid. Therefore, without further explanation or argument, Plaintiffs fail to persuade the Court that confidential binding arbitration is substantively unconscionable. See *Green Tree*, 531 U.S. at 91 (party resisting arbitration bears burden to show why arbitration is unsuitable).

*Appendix G***c. Whether the Agreement Violates Arizona Law**

Next, Plaintiffs argue two of the Agreement’s provisions violate Arizona law and, as a result, are substantively unconscionable. (Doc. 29 at 13). The first is the provision calling for a “conciliation” process before submitting the dispute to arbitration. (Doc. 21-3 at 2). The second is a provision that states that if a resolution is not achieved through conciliation, “the parties agree that arbitration is the required and exclusive forum for the resolution of all disputes (other than disputes which by statute are not arbitrable)” (*Id.*)

Plaintiffs argue these two provisions violate an Arizona statute permitting employees to file a claim with the Department of Labor for unpaid wages of five thousand dollars or less. A.R.S. § 23-356. The Department of Labor is then permitted to investigate and award damages to the employee. *Id.* Plaintiffs argue that this right cannot be waived by contract. (Doc. 29 at 14). For support, Plaintiffs cite A.R.S. § 23-364, which states that “[n]o verbal or written agreement or employment contract may waive any rights under this article.”²

If, as Plaintiffs argue, the right to an agency investigation is not waivable by contract, then the Agreement accommodates this by excluding “disputes which by statute are not arbitrable.” (Doc. 21-3 at 2). By

2. Because the Agreement accommodates disputes that are not arbitrable, the Court need not determine whether the right to file a claim in § 23-356 falls within the same article as § 23-364.

Appendix G

the Agreements own terms, Plaintiffs are free to pursue statutorily protected remedies without proceeding to arbitration. Furthermore, nothing prohibits an employee from filing a claim under A.R.S. § 23-356 should conciliation be unsuccessful. The Agreement, then, does not violate Arizona law.

With regard to the conciliation requirement, Plaintiffs argue that because courts must approve private FLSA settlements, “the mandatory conciliation process . . . is an impossible procedure for FLSA claims” (Doc. 29 at 15). But Plaintiffs have not pointed to any concrete hurdle impeding court approval of a settlement reached through conciliation or arbitration. Furthermore, Cracker Barrel has represented that it will not seek to enforce the conciliation requirement. (Doc. 39 at 9 n.2). In sum, Plaintiffs have not demonstrated how the Agreement violates Arizona law.

d. Whether the Agreement is Procedurally Unconscionable

Plaintiffs finally argue the Agreement is procedurally unconscionable because the named Plaintiffs and some of the opt-in Plaintiffs do not remember signing the Agreement. (Doc. 29 at 17). They cite to no authority standing for the proposition that an employee who does not remember signing a contract may void it by simply saying “I forgot.”

To evidence the named Plaintiffs’ assent, Cracker Barrel presents electronic records showing the named

Appendix G

Plaintiffs digitally signed the Agreement. Along with these records, Cracker Barrel has attached the affidavit of one of its human resources employees explaining that Cracker Barrel employees routinely sign the Agreement as part of employee training. (*See* Doc. 21-2). As part of this training, employees log on to an online program using their “personal email address or individual access number along with their confidential password.” (*Id.* at 3). The program guides them through several modules, including one that covers the Agreement. (*Id.*) “Once the employee is presented with the arbitration agreement to read and review, he or she is instructed to ‘Please close this document and mark ‘complete’ to signify that you have read, understood and will comply with the agreement.’” (*Id.* at 4). Cracker Barrel retains the electronic records indicating that all four named Plaintiffs have signaled their assent to the Agreement. (*Id.*)

Plaintiffs object to this affidavit and move to strike it on the grounds that it is hearsay and speculative because the human resources employee did not witness the named Plaintiffs consenting to the Agreement. (Doc. 30). The Court rejects this argument for two reasons. First, because the Agreement was signed in the regular course of employee training, the documents fall within the business records exception to the hearsay rule. Fed. R. Evid. 803(6) (B). Second, the human resources affiant sufficiently details the employee training process so to authenticate the named Plaintiffs’ assent to the Agreement. *See Martin v. TEKsystems Mgmt. Inc. (Fn)*, 2021 U.S. Dist. LEXIS 107262, 2021 WL 2334389, at *3 (D. Ariz. June 8, 2021) (finding that an affidavit explaining employee

Appendix G

training and onboarding was sufficient to authenticate the digital signatures to an arbitration agreement). It is not speculative. Therefore, the Court denies Plaintiffs' request to strike the affidavit.

Having exhausted Plaintiffs' arguments, the Court finds Plaintiffs have not shown the Agreement is procedurally unconscionable.

IV. Conclusion

The Court finds the Agreement is not unconscionable, and there being no dispute that the claims fall within it, the Court will order the named Plaintiffs to proceed with arbitration. The Court's decision in this regard should be unsurprising given that several other courts reviewing the same Agreement, as Plaintiffs concede, have found it enforceable. (Doc. 29 at 6 n.5) (citing *Vest v. Cracker Barrel Old Country Store, Inc.*, 371 F. Supp. 3d 593, 596 (W.D. Mo. 2018); *Rodriguez v. Cracker Barrel Old Country Store, Inc.*, 2017 U.S. Dist. LEXIS 203761, 2017 WL 6349173, at *10 (E.D. Ky. Dec. 12, 2017); *Franklin v. Cracker Barrel Old Country Store*, 2017 U.S. Dist. LEXIS 222809, 2017 WL 7691757, at *7 (E.D. Mo. Apr. 12, 2017)).

Cracker Barrel seeks to dismiss this matter because the named Plaintiffs are subject to arbitration. As noted at the outset, at least two of the opt-in Plaintiffs are alleged to have been minors during their employment with Cracker Barrel and are not subject to the Agreement. Therefore, the Court cannot dismiss this matter in its entirety.

Appendix G

However, it is not necessary for the Court to maintain an action with a split among Plaintiffs who are subject to arbitration, and those who are not. All the claims of the named Plaintiffs are subject to arbitration and the Court may, therefore, dismiss them. *See Johnmohammadi*, 755 F.3d at 1074

Plaintiffs also concede that they were capable of amending their Complaint to include these opt-in Plaintiffs as named Plaintiffs. (Doc. 29 at 5 n.3). Therefore, the Court will dismiss Plaintiffs' Complaint and grant leave to file a first amended complaint within thirty days of this Order naming Plaintiffs who are exempt from the arbitration. Prior to filing any amended complaint, the Parties shall meet and confer to discuss which proposed Plaintiffs are not subject to the Agreement. Any opt-in Plaintiff whose claims are subject to the Agreement, shall proceed with arbitration.

Accordingly,

IT IS HEREBY ORDERED that Defendant's Motion to Compel Arbitration (Doc. 21) is **granted**. The Court will dismiss named Plaintiffs Ashley Gillespie, Tonya Miller, Tami Brown, and Sarah Mangano to pursue their claims in arbitration under the parties' Agreement.

IT IS FURTHER ORDERED that Plaintiffs' Motion to Strike (Doc. 30) is **denied**.

Appendix G

IT IS FURTHER ORDERED that Plaintiffs' Motion for Conditional Certification (Doc. 8) is **denied** without prejudice.

IT IS FURTHER ORDERED that Plaintiffs' Complaint (Doc. 1) is dismissed. Plaintiffs may file a first amended complaint no later than thirty days (30) after the date of this Order. In the first amended complaint, Plaintiffs shall certify that they have met and conferred with Defendant in good faith to identify and name Plaintiffs who are not subject to arbitration. Any and all opt-in Plaintiffs who are subject to the Agreement must withdraw from this action to pursue their claims in arbitration or they will be summarily dismissed. If no first amended complaint is filed within (30) days of this Order, the Clerk of Court shall dismiss this action without further order of the Court.

IT IS FINALLY ORDERED that the Court having ruled on the Motion for Conditional Certification and the Motion to Compel Arbitration, the stay on this matter shall be lifted. (Doc. 45).

Dated this 12th day of November, 2021.

/s/ Diane J. Humetewa
Honorable Diane J. Humetewa
United States District Judge

130a

**APPENDIX H — ORDER OF THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT,
FILED AUGUST 8, 2025**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 23-15650 24-1979
D.C. No. 2:21-cv-00940-DJH

ANDREW HARRINGTON; KATIE LIAMMAYTRY;
JASON LENCHERT; DYLAN BASCH,

Plaintiffs-Appellees,

v.

CRACKER BARREL OLD COUNTRY STORE, INC.,

Defendant-Appellant.

Filed August 8, 2025

ORDER

Before: HAWKINS, CLIFTON, and BADE, Circuit
Judges.

The panel has voted to deny the petitions for panel
rehearing [Dkt. Entry Nos. 59 and 60 in 23-15650 and
Dkt. Entry Nos. 51 and 52 in 24-1979].

Appendix H

Judge Bade has voted to deny both petitions for rehearing en banc, and Judges Hawkins and Clifton so recommend. The full court has been advised of the petitions for rehearing en banc and no judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 40.

The petitions for panel rehearing and petitions for rehearing en banc are denied.

132a

APPENDIX I — EXCERPT OF 29 U.S.C. § 216(b)

29 U.S.C. § 216(b)

* * *

An action to recover the liability prescribed in the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.

* * * *