No. 25-559

IN THE

Supreme Court of the United States

CRACKER BARREL OLD COUNTRY STORE, INC.,

Petitioner,

v.

ANDREW HARRINGTON, *et al.*,

Respondents.

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

REPLY BRIEF

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

120896

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Page

Cases

Cited Authorities

Statutes

Other Authorities

INTRODUCTION

If "what's past is prologue,"[1] then today's disarray over Fair Labor Standards Act collective certification will only worsen tomorrow. Rather than converging on a single standard, the circuits are *diverging*. In less than a decade, "loose consensus" adopting the step one leniency of *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), has given way to a four- or five-way split. *Campbell v. City of Los Angeles*, 903 F.3d 1090, 1108-09, 1117 (9th Cir. 2018) (criticizing *Lusardi's ad hoc* standard, requiring a common material question); *Swales v. KLLM Transp. Servs., L.L.C.*, 985 F.3d 430, 433, 443 (5th Cir. 2021) (rejecting *Lusardi* and requiring that district courts "rigorously enforce at the outset of the litigation" the FLSA's "similarly situated" requirement); *Clark v. A&L Homecare & Training Ctr., LLC,* 68 F.4th 1003, 1010 (6th Cir. 2023) (rejecting *Lusardi* and *Swales* and requiring at step one a "strong likelihood"); *Richards v. Eli Lilly & Co.*, 149 F.4th 901 (7th Cir. 2025) (rejecting preceding standards for a "material factual dispute as to whether the proposed collective is similarly situated"). Later decisions (like *Clark* and *Richards*) are engaging directly with earlier ones without convergence.

Only this Court's intervention can restore uniformity.

1. Mr. Harrington's principal response is that the issue was not "pressed or passed upon below" because the Ninth Circuit "expressly declined to reach" it. (BIO 11-12.) This reading of the record is disingenuous.

---

1. William Shakespeare, THE TEMPEST, Act 2, Scene 1.

It draws an illusory distinction between the "two-step process" and the "burden a plaintiff must satisfy." (BIO 1.) But *Lusardi* split certification into two steps in order to apply a lenient standard before authorizing notice. If there were only one step, a more rigorous showing could not be avoided. And if a preponderance showing were required before notice is authorized, the number of steps would not matter; dividing the process into steps is a matter of case management under *Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165 (1989).[2]

a. Contrary to Mr. Harrington's representation, Cracker Barrel *did* "address 'the standard [a] district court should apply in evaluating' whether to approve notice." (BIO 11-12 [*quoting* Pet. App. 7a n.4].). The first question in its opening brief was: "Whether a district court, in determining whether putative plaintiffs are 'similarly situated' to named plaintiffs under § 216(b) of the FLSA, should 'rigorously enforce the similarly situated requirement' through a period of preliminary discovery as held by the Fifth Circuit in *Swales* . . . , or must follow the two-step certification process detailed in *Lusardi* . . . ." (9th Cir. ECF Dkt. 21, p. 15.) From the case's onset Cracker Barrel asked the district court to "utilize the standard set forth in *Swales*." (D. Ariz. ECF Dkt. 32, p. 7.)

b. Mr. Harrington chides Cracker Barrel for not using the phrase "preponderance of the evidence" in its briefing below. (BIO 11.) But the "rigorously enforce" standard of *Swales* "*mean[s]*…that the district court

2. Unlike the recently denied petition in Case No. 25-476, Cracker Barrel does not ask this Court to overrule *Hoffmann-La Roche*. (*See* Pet. ii n.2.)

must find by a preponderance of the evidence that those employees are similarly situated to the original plaintiffs." *Clark*, 68 F.4th at 1009–10 (*citing Swales*, 985 F.3d at 434) (emphasis added). When this Court handed down *E.M.D. Sales v. Carrera*, 604 U.S. 45 (2025)—after the appeal below was briefed—only the *label* changed. *Swales*' "rigorously enforce" standard became better described as "show by a preponderance." But the *idea* remained the same.

c. How the Ninth Circuit addressed *E.M.D. Sales* is exactly the problem: it insisted it was "bound" to endorse step one leniency in a two-step approach (even while stating that the case which bound it "did not address" the question), upheld pre-notice authorization without resolving the evidentiary standard, and refused supplemental briefing on *E.M.D. Sales* while still offering a merits view that the latter "said nothing" about how courts should manage notice. (*See* Pet.App. 6a-7a & nn.3-4.) That is a reason to grant, not deny, review. A circuit's professed inability (or unwillingness) to define the threshold for court-authorized notice confirms the need for this Court's guidance.

2. Mr. Harrington minimizes the inter-circuit split, arguing there is "no conflict" because most circuits have not addressed the "pre-notice burden" issue. (BIO 13.) But the disarray is already real, entrenched, and will not vanish with "percolation." Mr. Harrington speculates the ruling below "may end up generating broad consensus." (BIO 19.) But the Ninth Circuit had an opportunity to do so after issuing *Campbell* in 2018. Its revision of *Lusardi* did not "generat[e] broad consensus"—the split widened and deepened. There is no reason to suspect its reaffirmation of *Campbell* here will narrow anything.

3. *E.M.D. Sales* cannot be limited as Mr. Harrington argues. The decision's "explication[] of the governing rules of law"—its "mode of analysis"—carries as much precedential force as its application to FLSA exemptions. *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 668 (1989) (Kennedy, J., concurring in part and dissenting in part) ("explication[] . . ."); Antonin Scalia, *The Rule of Law as a Law of Rules,* 56 U. Chi. L. Rev. 1175, 1177 (1989) ("mode of analysis"). Central to that mode of analysis is its holding that preponderance is the "default standard of proof" under the FLSA. *E.M.D. Sales*, 604 U.S. at 50. That default applies equally to the § 216(b)'s requirement that a collective be "similarly situated." To grant the conditional relief[3] of court-supervised notice without a preponderance showing that notice is going to "similarly situated" employees cannot be reconciled with this principle. Preponderance must come *before* mailing notice.

4. Finally, Mr. Harrington argues the district court properly exercised its case management discretion. But a statutory requirement, and its proper standard of proof, are not matters of case management discretion. The policy preferences of courts—even their wide discretion to manage cases efficiently—do not override Congress' choice of statutory language. *See, e.g., E.M.D. Sales*, 604 U.S. at 53; *Encino Motorcars, LLC v. Navarro,* 584 U.S. 79, 80 (2018).

---

3. Notably, Mr. Harrington's original complaint in the district court concedes that a finding of "similarly situated" is a statutory claim, as it is the first item listed in his "prayer for relief" and expressly references § 216(b) as its basis for relief. (*See* D. Ariz ECF Dkt. 1, pp. 24-25.)

5. This case is an excellent vehicle to restore national uniformity to FLSA collective litigation. Notice has not issued; the district court stayed proceedings pending appeal; and the order expressly ties tolling to the date notice is distributed —meaning the question matters *now*, and resolution by this Court will concretely determine the proper next step in this litigation. (Pet.App. 41a, 54a.)

Further, this Court need not devote the time and resources of full briefing, argument and decision to achieve national uniformity. Summary reversal following GVR with a short *per curiam* opinion holding that before a district court allow notice, a plaintiff must show to a preponderance that the collective is "similarly situated" will be enough to bring the circuits into accord. (*See* Pet. 29 n.18.)

The petition should be granted.

REASONS FOR GRANTING THE PETITION

I. The Ninth Circuit Passed Upon The Question By Affirming Authorization Of Notice Without Requiring A Preponderance Showing, And By Refusing To Engage *E.M.D. Sales*.

Mr. Harrington argues because Cracker Barrel did not use the words "preponderance of the evidence" in its briefing below, and because the "burden a plaintiff must satisfy" is a distinct question from whether a "two-step process" should be employed (BIO 1), the Ninth Circuit "did not reach" the question presented. (BIO 12.) Not so.

1. Cracker Barrel consistently argued below that the district court and Ninth Circuit should apply the

Fifth Circuit's "rigorously enforce" standard, which "means . . . predominance." *Swales*, 985 F.3d at 434 ("rigorously enforce"); *Clark*, 68 F.4th at 1009–10 ("means . . . predominance"). (*See also* 9th Cir. ECF Dkt. 21, p. 15 [raising *Swales* in first issue presented for review].) The Ninth Circuit passed upon the issue by refusing to address it. It affirmed the district court's decision to move forward with a two-step mechanism and to allow notice without requiring a conclusive similarity determination at the outset—stating that the circuit had "already endorsed the two-step approach" and was "bound by that precedent." (Pet.App. 6a-7a.) That holding rejected the argument Cracker Barrel raised: it allows court-authorized notice to issue before the plaintiff has proved similarity by a preponderance. (*See* Pet. i.)

2. The Ninth Circuit's treatment of *E.M.D. Sales* confirms the question was "passed upon." When *E.M.D. Sales* was handed down, Cracker Barrel sought leave to file a supplemental brief addressing it. Nearly half of Cracker Barrel's oral argument was devoted to it. The Circuit denied leave. But the Circuit did not stop at saying the point was "waived"; it opined that *E.M.D. Sales* "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." (Pet.App. 6a-7a n.3.) That is a merits position about the relevance of *E.M.D. Sales* to notice. The Circuit *did* "pass upon" Cracker Barrel's argument.

3. This Court routinely grants review where lower courts' avoidance of a standard is itself the problem. Mr. Harrington invokes the "court of review, not first view" maxim. (BIO 12.) But this case is not about filling

a *factual* gap. It is about a recurring legal question that the Ninth Circuit acknowledged remains unresolved, while affirming a method of sending notice that materially affects parties' rights and settlement pressure. (Pet. 14-15.) That posture—affirmance plus non-commitment—creates the same practical consequences as an explicit adoption of a less-than-preponderance standard, and it is the kind of institutional deadlock that justifies this Court's intervention.

II. The Split Is Real, Widening, And Consequential—Mr. Harrington Re-Labels The Disagreement Instead Of Disputing It.

Mr. Harrington argues *Swales*, *Clark* and *Richards* are the "only three courts" to depart from *Lusardi*, and they are "broadly consistent." (BIO 13.) In other words, there is only a wide two-way split for this Court to settle. Although this is enough, the split is wider and deeper than he suggests.

1. There are *five* competing approaches: (1) *Lusardi's* "step one leniency"; (2) the Ninth Circuit's "leniency plus" under *Campbell*; (3) the Fifth Circuit's "rigorously enforce"/preponderance approach under *Swales*; (4) the Sixth Circuit's "strong likelihood" approach under *Clark*; and (5) the Seventh Circuit's "material factual dispute" approach under *Richards*. (Pet. 3-6, 14-15.) This is not "broad consistency"; it is doctrinal fragmentation, spinning off into entropy.

2. That the majority of circuits have not "held" anything amplifies the need for review. (*See* BIO 13.) It is exactly why litigants cannot predict what standard will

apply in the half of the circuits that have not yet addressed the question, and why the split invites forum shopping among the others.[4] In the Fifth Circuit, the number of certification rulings fell by half from 2024 to 2025. In the Sixth, they fell 92% from 2023 (when *Clark* was decided) to 2025. These drops in certification ruling reflects a drop in collective action filings. Those circuits were "once a hotbed of filings." But after adopting the most stringent certification standards of the five, "[p]laintiffs filed fewer wage & hour lawsuits." Duane Morris LLP, CLASS ACTION REVIEW 2026, p. 9.[5] Uniform administration of federal law is defeated. (*See* Pet. i, 14-15.)

3. Different standards lead to different results on similar facts. Take Ms. Barbara Tripp's dispute with her employer Perdue Foods discussed by *amicus curiae*. (*Amicus* Brf. 11-12.) She attempted to join a collective action against her employer in the Middle District of Georgia. Applying a "somewhat heightened standard of scrutiny" at step one, the district court denied conditional certification. *See Parker v. Perdue Foods, LLC*, 2024 WL

4. In another context (the distinct issue raised in Mr. Harrington's companion petition in Case No. 25-534) his counsel already told the legal press that the "easy solution" to get around his loss below "is to just file . . . a collective action within the First Circuit, which allows for nationwide notice." Emmy Freedman, *9th Circ. Limits Cracker Barrel Collective To In-State Workers*, LAW360 (July 2, 2025) (quoting counsel) (available on the internet at https://www.law360.com/articles/2359995/9th-circ-limits-cracker-barrel-collective-to-in-state-workers).

5. Available on the internet at https://cdn.prod.website-files.com/6392041b1e5410ee3fb63644/69651e2f876587a79ebcf32a_Duane%20Morris%20Class%20Action%20Review%20%E2%80%93%202026%20-%20Executive%20Summary.pdf.

1120391 (M.D. Ga. Mar. 14, 2024). But when she brought the same claim based on the same facts in the District of Maryland a few months later, the court applied step one leniency and granted conditional certification. *See Tripp v. Perdue Foods, LLC*, 2024 WL 4770282 (D. Md. Nov. 13, 2024).

4. Mr. Harrington's "recency" argument is backwards. He argues because decisions like *Richards* are recent and district-court applications are "limited," the issue has not "come into focus." (BIO 19.) But recency cuts for review here for two reasons. First, it shows active, accelerating divergence: courts are not converging on a common rule; they are adopting different ones. Second, it highlights the stakes of letting conflicting approaches harden into entrenched, divergent practices.

III. *E.M.D. Sales* Strongly Supports Review And Supplies The Correct Analytic Starting Point: Courts May Not Dilute Statutory Lanuguage For The Sake Of Case Management.

Mr. Harrington follows the Ninth Circuit in arguing *E.M.D. Sales* is confined to the employer's burden on an exemption defense and "said nothing" about notice. (BIO 20.) Mr. Harrington gives short shrift to this Court's ruling:

1. The precedential force of *E.M.D. Sales* cannot be so cabined: it extends to the opinion's "mode of analysis." Scalia, *The Rule of Law as a Law of Rules,* 56 U. Chi. L. Rev. at 1177. Even Mr. Harrington concedes it holds the "usual standard of proof in civil litigation is preponderance of the evidence," and the FLSA's exemptions provided

no reason to depart from that default. (BIO 20.) That reasoning applies equally when the statute itself sets a condition for moving forward collectively: coworkers may proceed together only if they are "similarly situated." (Pet. i.)

2. Notice facilitation is not a neutral "administrative" step; it is the mechanism by which § 216(b)'s "similarly situated" requirement is applied. Once court-authorized notice goes out, litigation posture changes: potential opt-ins are recruited into the case, discovery and settlement dynamics shift, and the defendant faces a collective suit rather than an individual one. The petition's central point is that § 216(b)'s statutory limitation cannot be honored if courts allow notice to issue on a lenient, sub-preponderance showing and postpone meaningful similarity scrutiny until later—or never. (Pet. 3-6, 14-15.)

3. Mr. Harrington's reliance on the district court's "discretion" to find the collective "sufficiently likely" to be similarly situated at step one cannot overcome a statutory condition. (*See* BIO 5.) The entire point of Cracker Barrel's question is that discretion has limits: Congress did not allow a collective action when it is "sufficiently likely" the collective are "similarly situated"; it authorized a collective action only they are actually "similarly situated." (Pet. i.) If a preponderance standard governs civil adjudication of statutory conditions absent warrant to apply a different standard, a court cannot substitute a lesser probabilistic guess simply because it is convenient at an early stage of the case.

4. Even Mr. Harrington's preferred Seventh Circuit decision recognizes the relevance of the preponderance

standard to the ultimate similarity determination. He cites *Richards* for the idea that plaintiffs must *ultimately* show similarity "by a preponderance of the evidence," while arguing it does not decide whether that showing is required "before notice." (BIO 15-16.) Precisely. The key question is *when* the statutory condition must be shown to permit court action that expands the case via notice. *E.M.D. Sales* makes clear that courts should not invent heightened or diluted burdens without statutory instruction; and § 216(b) provides no instruction authorizing a diluted one at the moment notice is sent.

Whether one labels the question "notice management" or "collective-action procedure," it is still a matter of statutory construction. The Court should grant review to prevent discretionary gloss from swallowing the statute's condition.

IV. This Case Is An Ideal Vehicle: No Notice Has Issued, Proceedings Were Stayed, Tolling Is Tied To Notice, And The Question Is Cleanly Presented.

The procedural posture here makes this an unusually suitable vehicle to address the question raised.

1. The case is frozen at the moment the legal rule matters most. The district court stayed "all proceedings" pending appeal and granted equitable tolling "until the date on which notice is… disseminated to the putative collective." (Pet. App. 41a, 54a.) That means the decision this Court reviews will directly govern what happens next: whether notice may be sent on a lesser showing or only after the plaintiff proves similarity by a preponderance.

2. The Ninth Circuit's uncertainty shows the need for this Court's guidance now. Mr. Harrington emphasizes that the Ninth Circuit "has not resolved the issue." (BIO 13.) But that is not a basis to deny *certiorari* where the lower court refused to address an inter-circuit split. It is a basis to grant certiorari to establish a national rule.

3. The question is a recurring legal one, not case-specific. It does not turn on disputed facts about particular employees' job duties. It turns on what showing must be made—and when—before a court uses its authority to facilitate collective litigation under § 216(b). The petition's framing highlights the enormous scope of the FLSA and the systemic importance of a uniform rule. (Pet. i, 14-15.)

In short: the case is clean, the issue is outcome-determinative for the next procedural step, and the split is ripe.

CONCLUSION

Mr. Harrington asks this Court to wait and hope for consensus even as standards multiply and diverge. His brief reinforces, rather than undermines, the case for review. The petition for a writ of certiorari should be granted.

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