ORAL ARGUMENT NOT YET SCHEDULED

No. 22-7033

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ISAAC HARRIS, *et al.*,

Plaintiffs-Appellees,

v.

MEDICAL TRANSPORTATION MANAGEMENT, INC.,

Defendant-Appellant.

On Appeal from the United States District Court
for the District of Columbia
No. 17-cv-01371
(Honorable Amit P. Mehta)

BRIEF FOR APPELLEES

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

Except for the following, all parties, intervenors, and amici appearing before the district court and in this Court are listed in the Brief for Appellant. Ambroise Agosse and Jeremie Tohotcheu have withdrawn as opt-in plaintiffs in the Fair Labor Standards Act collective action. The Chamber of Commerce of the United States and Professor Joan Steinman filed briefs as amicus curiae in this Court.

B. Ruling Under Review

Reference to the ruling under review appears in the Brief for Appellant.

C. Related Cases

Because this is an interlocutory appeal under Federal Rule of Civil Procedure 23(f) from an order granting class-action certification and such appeals do not stay proceedings in the district court unless a court so orders, this case continues to be litigated in *Harris v. Medical Transportation Management, Inc.*, No. 17-1371 (D.D.C.). This case has

not previously been before this Court beyond the Rule 23(f) petition in Case No. 21-8006 that resulted in this appeal.

/s/ *Michael T. Kirkpatrick*
Michael T. Kirkpatrick

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GLOSSARY

FLSA	Fair Labor Standards Act
MTM	Medical Transportation Management, Inc.

STATEMENT OF JURISDICTION

The district court has jurisdiction over this action under 28 U.S.C. §§ 1331 and 1367.

This Court granted appellant's petition under Federal Rule of Civil Procedure 23(f) for permission to file an interlocutory appeal of the district court's order of August 6, 2021, certifying an issue class under Federal Rule of Civil Procedure 23(c)(4), and has jurisdiction to review that aspect of the district court's order. *In re Med. Transp. Mgmt., Inc.*, No. 21-8006, 2022 WL 829169, at *1 (D.C. Cir. Mar. 17, 2022).

This Court should not exercise pendent appellate jurisdiction over the district court's disposition of the Fair Labor Standards Act (FLSA) collective-action issue, for reasons explained below in Section II.

STATEMENT OF ISSUES

1. Whether the district court properly exercised its discretion when it certified two issues for class-wide resolution pursuant to Rule 23(c)(4), where the court found the requirements of Rule 23(b)(3) to be satisfied for the certified issues but not for any cause of action as a whole.

2. Whether this Court should exercise pendent appellate jurisdiction over the district court's denial of appellant's motion to decertify the FLSA collective action.

3. Whether the district court properly exercised its discretion by denying appellant's motion to decertify the FLSA collective action, where plaintiffs are similarly situated as to a shared issue of law or fact that is material to the disposition of all plaintiffs' FLSA claims.

STATUTES AND REGULATIONS

Applicable statutes and rules appear in the addendum bound with the Brief of Appellant.

STATEMENT OF THE CASE

Defendant Medical Transportation Management, Inc. (MTM) provides non-emergency medical transportation to Medicaid participants in the District of Columbia, through contracts with the District. MTM subcontracts with transportation service providers that directly employ the drivers required to fulfill MTM's contracts. JA1880, JA2377. MTM controls many important aspects of the drivers' employment, including the hiring and removal of drivers, and restrictions on their appearance and conduct. JA1881. Some transportation service providers work only

for MTM, *see* MTM Br. 5, making their drivers entirely dependent on MTM.

Plaintiffs are drivers who allege that they were underpaid in violation of federal and D.C. wage laws. On July 13, 2017, plaintiffs filed a class and collective action against MTM, asserting violations of the FLSA, 29 U.S.C. § 201 *et seq.*; the D.C. Minimum Wage Act, D.C. Code § 32-1001 *et seq.*; the D.C. Living Wage Act, D.C. Code § 2-220.01 *et seq.*; and the D.C. Wage Payment and Collection Law, D.C. Code § 32-1301 *et seq.*[1] Plaintiffs assert that MTM is liable for wage violations as a "joint employer" or "general contractor" under the federal and local wage laws. JA1882. MTM filed a motion to dismiss, asserting that it is not a joint employer or general contractor. The district court denied the motion in relevant part. *Harris*, 300 F. Supp. 3d at 243.

On July 17, 2018, the district court conditionally certified plaintiffs' FLSA claims as a collective action and ordered that notice be sent to potential opt-in plaintiffs. JA2377–78 (citing *Harris v. Med. Transp. Mgmt., Inc.*, 317 F. Supp. 3d 421, 424 (D.D.C. 2018)). One-hundred fifty-

[1] Plaintiffs also alleged breach of contract under a third-party beneficiary theory. That claim was dismissed. *See Harris v. Med. Transp. Mgmt., Inc.*, 300 F. Supp. 3d 234 (D.D.C. 2018).

five current and former drivers, whose claims arose in the District of Columbia, joined the collective action, each alleging wage and overtime claims against MTM under the FLSA.[2] JA2378. On July 26, 2019, plaintiffs moved to certify a class of more than 800 drivers with respect to the D.C. wage claims under Rule 23(b)(3). *Id.*

On September 24, 2020, the district court denied plaintiffs' motion. The court held that plaintiffs met Rule 23(a)'s requirements of numerosity, commonality, typicality, and adequacy of representation, JA1886–91, and that plaintiffs satisfied Rule 23(b)(3)'s superiority requirement: "Class-wide resolution of certain central questions—particularly MTM's status as a joint employer or general contractor—is superior to litigating that question in dozens, if not hundreds, of individual actions." JA1892–93. Thus, the court concluded, "deciding the joint liability question in a single case covering an entire putative class is superior to multiple individual actions." JA1893. The court also held that plaintiffs satisfied Rule 23(b)(3)'s predominance requirement as to the joint-employer and general-contractor issues, because evidence

[2] Two drivers who opted into the collective action—Ambroise Agosse and Jeremie Tohotcheu—later withdrew. *See* D. Ct. ECF Nos. 207 & 208.

common to the class will resolve both issues. JA1896. Specifically, MTM's policy documents and service agreements with the transportation service providers, and testimony by MTM employees regarding MTM's control over drivers' hiring, training and removal and the rules and standards MTM imposes on drivers, "would be applicable to all class members." *Id.* Nevertheless, the district court denied class certification under Rule 23(b)(3) because it found that individual differences in the amounts of compensable work performed by, and pay received by, each class member would vary, precluding proof of liability with evidence common to the class. JA1896–1903.

In light of these findings, the court requested supplemental briefing on whether it should certify an issue class under Rule 23(c)(4) as to whether MTM is a joint employer or general contractor. *See* JA1905–06. Certifying such a class, the court stated, "could 'materially advance the resolution of the case,'" because "if MTM is neither a joint employer nor a general contractor, the case would come to an end. But if MTM is found to be a joint employer or a general contractor, it would be liable for the underpayment of wages to an individual class member if that individual can demonstrate a violation of District wage laws." *Id.*

On December 7, 2020, plaintiffs filed a supplemental memorandum supporting certification of an issue class under Rule 23(c)(4). JA1907. The same day, MTM filed a motion to decertify the FLSA collective action. JA1934.

On August 6, 2021, the district court certified a Rule 23(c)(4) class on the joint-employer and general-contractor issues and denied MTM's motion to decertify the collective action. JA2399–2400. Having already determined that the class satisfied the requirements of Rule 23(a) and 23(b) except as to predominance for the claims in their entirety, the district court focused on whether Rule 23(c)(4) permits certification of particular issues that satisfy Rule 23(b)(3)'s requirements. It held that "courts should apply Rule 23(b)(3)'s predominance and superiority prongs after common issues have been identified for class treatment under Rule 23(c)(4)." JA2391; JA2394. The court explained that "the vast majority of appellate courts" have embraced that view, consistent with the structure and plain language of Rule 23. JA2392–93. The court concluded that certification of the joint-employer and general-contractor issues would materially advance the litigation because all of plaintiffs' claims require

favorable resolution of at least one of those questions, and the issues will be resolved based on evidence common to the class. JA2395.

The district court denied MTM's motion to decertify the collective action, holding that the plaintiffs are "similarly situated" within the meaning of 29 U.S.C. § 216(b) as to whether MTM is a joint employer. JA2390. The court explained that the best interpretation of "similarly situated" is one that examines "whether plaintiffs are 'alike with regard to some material aspect of their litigation.'" JA2385 (quoting *Scott v. Chipotle Mexican Grill, Inc.*, 954 F.3d 502, 516 (2d Cir. 2020)). Applying that test, the court held that plaintiffs here are similarly situated because "[c]ommon evidence is likely to resolve the joint employer question," JA2387, and "[m]oving this matter forward collectively is potentially dispositive of the case," JA 2389. Thus, the district court concluded, "there can be no doubt that permitting this case to proceed as a collective action on the issue of whether MTM is a joint employer will benefit individual plaintiffs and the judicial system by the efficient resolution in one proceeding of a common issue of law and fact." *Id.*

On August 20, 2021, MTM filed a Rule 23(f) petition for permission to appeal the order granting issue class certification under Rule 23(c)(4),

and it included a request that this Court exercise pendent jurisdiction to review the district court's refusal to decertify the FLSA collective action. *See* Petition, *In re Med. Transp. Mgmt., Inc.*, No. 21-8006 (D.C. Cir. Aug. 20, 2021). On the same day, MTM filed in the district court a motion under 28 U.S.C. § 1292(b) seeking certification for interlocutory appeal of the decision denying decertification of the collective action. JA2401. This Court held MTM's Rule 23(f) petition in abeyance pending resolution of the § 1292(b) motion. Order, *In re Med. Transp. Mgmt., Inc.*, No. 21-8006 (D.C. Cir. Nov. 3, 2021). After the district court denied MTM's motion, JA2440, this Court granted the Rule 23(f) petition on the class-certification order and also directed the parties to address whether the Court should exercise pendent jurisdiction over the FLSA collective-action issue and the merits of that issue. *In re Med. Transp. Mgmt., Inc.*, 2022 WL 829169, at *1.

Litigation in the district court continues. On July 15, 2022, plaintiffs filed a motion for summary judgment on the merits of whether MTM is a joint employer or general contractor with respect to the drivers. *See Harris*, ECF No. 222.

SUMMARY OF ARGUMENT

This Court should affirm the district court's certification of two issues for class-wide resolution under Rule 23(c)(4). The district court correctly concluded that certifying the joint-employer and general-contractor issues would materially advance the litigation because plaintiffs must prevail on at least one of those threshold questions to move forward and the issues will be resolved based on evidence common to the class. The district court's conclusion that Rule 23(c)(4) permits certification of issues that satisfy Rule 23(b)(3)'s requirements even when no cause of action as a whole meets those requirements is supported by the text, structure, and history of Rule 23, and is consistent with the consensus among courts on that question.

This Court should not exercise pendent appellate jurisdiction over the FLSA issue. Different standards apply to the collective-action and Rule 23(c)(4) determinations, the issues are not inextricably intertwined, resolving the FLSA issue is not necessary to resolve the Rule 23(c)(4) issue, and the district court's denial of MTM's § 1292(b) motion counsels against exercising pendent appellate jurisdiction.

If this Court addresses the FLSA issue on the merits, it should affirm the district court's decision because the test applied by the district court to determine whether plaintiffs are "similarly situated" within the meaning of 29 U.S.C. § 216(b) is faithful to the FLSA's text and purpose.

STANDARD OF REVIEW

This Court reviews class-certification decisions under a "deferential standard" and may reverse such a decision only if it "resulted from the application of incorrect legal criteria or if it constituted an abuse of discretion." *McCarthy v. Kleindienst*, 741 F.2d 1406, 1410 (D.C. Cir. 1984).

This Court has not determined the standard for review of a decision denying decertification of an FLSA collective action. Other circuits review such decisions for abuse of discretion. *E.g.*, *Scott*, 954 F.3d at 515; *Mickles v. Country Club Inc.*, 887 F.3d 1270, 1279 (11th Cir. 2018); *Monroe v. FTS USA, LLC*, 860 F.3d 389, 401–02 (6th Cir. 2017); *Zavala v. Wal Mart Stores Inc.*, 691 F.3d 527, 534 (3d Cir. 2012).

Under an abuse of discretion standard, the Court "asks whether the district court based its ruling on an error of law, a clearly erroneous assessment of the evidence, or an improper weighing of the factors

limiting its discretion" and "reviews any embedded legal conclusions *de novo*." *In re Sealed Case*, 932 F.3d 915, 934 (D.C. Cir. 2019) (cleaned up).

ARGUMENT

I. Rule 23(c)(4) permits certification of issues for class-wide treatment even when the requirements of Rule 23(b)(3) have not been satisfied for a claim as a whole.

The district court held that an issue class may be certified under Rule 23(c)(4) if the issues certified satisfy Rule 23(b)(3)'s requirements, even though those requirements are not met by any of the class claims as a whole. JA2391. The court explained that "courts should apply Rule 23(b)(3)'s predominance and superiority prongs after common issues have been identified for class treatment under Rule 23(c)(4)." *Id.* Thus, the court rejected MTM's argument that "certification pursuant to Rule 23(c)(4) is appropriate only where the requirements of both Rule 23(a) and one of the subsections of Rule 23(b) are satisfied with respect to the entire action or specific cause of action." JA2395–96. The district court's decision to certify an issue class was correct and should be affirmed.

A. The consensus among courts is that Rule 23(c)(4) certification does not require that a claim as a whole satisfy Rule 23(b)(3).

Every court of appeals to consider the question has concluded that Rule 23(c)(4) certification of an issue class does not require a finding that

common issues predominate for a claim as a whole.[3] *See Russell v. Educ. Comm'n for Foreign Med. Graduates*, 15 F.4th 259, 274 (3d Cir. 2021) (holding that Rule 23(c)(4) may be utilized "even where predominance has not been (or cannot be) satisfied for the cause of action as a whole"); *Martin v. Behr Dayton Thermal Prods. LLC*, 896 F.3d 405, 413 (6th Cir. 2018) ("Rule 23(c)(4) contemplates using issue certification to retain a case's class character where common questions predominate within certain issues and where class treatment of those issues is the superior method of resolution."); *In re Deepwater Horizon*, 739 F.3d 790, 816 (5th Cir. 2014) (stating that Rule 23(c)(4) "permits district courts to limit class treatment to 'particular issues' and reserve other issues for individual determination"); *In re Nassau Cty. Strip Search Cases*, 461 F.3d 219, 225 (2d Cir. 2006) ("A court may employ Rule 23(c)(4)(A) to certify a class on a particular issue even if the action as a whole does not satisfy Rule

[3] In *In re Johnson*, 760 F.3d 66 (D.C. Cir. 2014), the Court declined to rule on "the appropriate use of an issue class" because that question had not been raised or briefed. *Id.* at 75. However, in finding no manifest error in the district court's certification of a Rule 23(b)(3) class "solely to resolve the questions concerning discrimination," this Court explained that Rule 23(c)(4) "expressly authorize[s]" a district court to "certif[y] a 'class action with respect to particular issues.'" *Id.* at 74–75 (quoting Rule 23(c)(4)).

23(b)(3)'s predominance requirement."); *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 439 (4th Cir. 2003) (rejecting the view that an issue class can be certified only if the entire action satisfies Rule 23(b)(3)); *Smilow v. Sw. Bell Mobile Sys., Inc.*, 323 F.3d 32, 41 (1st Cir. 2003) ("[E]ven if individualized determinations were necessary to calculate damages, Rule 23(c)(4)(A) would still allow the court to maintain the class action with respect to other issues."); *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996) ("Even if the common questions do not predominate over the individual questions so that class certification of the entire action is warranted, Rule 23 authorizes the district court in appropriate cases to isolate the common issues under Rule 23(c)(4)(A) and proceed with class treatment of these particular issues."). The Seventh and Eighth Circuits have similarly declined to adopt a rigid requirement that Rule 23(b)(3)'s criteria must be assessed with respect to an entire claim if a narrower issue is proposed for certification. *See McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482, 491 (7th Cir. 2012); *In re St. Jude Med., Inc.*, 522 F.3d 836, 841 (8th Cir. 2008).

Academic authorities have noted the circuits' consensus on a practical approach to Rule 23(c)(4) certification that does not depend on whether a claim as a whole satisfies Rule 23(b)(3).[4] Similarly, the Advisory Committee on Civil Rules observed in 2015 that the courts are "converging on the view that predominance is required only as to the issues."[5]

B. MTM's reliance on a footnote in *Castano* is misplaced.

Addressing the Rule 23(c)(4) issue, neither MTM nor its amicus the Chamber of Commerce mentions any of the appellate decisions cited above that reflect the consensus view that certification of an issue class does not require satisfaction of Rule 23(b)(3)'s requirements for a claim as a whole.[6] Rather, MTM and the Chamber rely solely on out-of-context

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[4] *See*, *e.g.*, Alon Klement & Robert Klonoff, *Class Actions in the United States and Israel: A Comparative Approach*, 19 Theoretical Inquiries L. 151, 161 (2018); Elizabeth J. Cabraser & Samuel Issacharoff, *The Participatory Class Action*, 92 N.Y.U. L. Rev. 846, 870–71 (2017); Elizabeth C. Burch, *Constructing Issue Classes*, 101 Va. L. Rev. 1855, 1892 (2015).

[5] Advisory Comm. on Civ. Rules, Minutes, April 9, 2015, at 41, https://www.uscourts.gov/sites/default/files/cv04-2015-min_0.pdf.

[6] By failing to engage with the out-of-circuit cases that are directly on point, including those that the district court relied on and that MTM cited in its district court briefing, *see* JA 1904–95, JA2215–23, JA2391–

dicta in a footnote in *Castano v. American Tobacco Co.*, 84 F.3d 734, 745 n.21 (5th Cir. 1996). *See* MTM Br. 23; Chamber Amicus Br. 7.

In *Castano*, the district court had certified a class pursuant to Rules 23(b)(3) and (c)(4). Under Rule 23(c)(4), it certified several issues, including "the liability issue[] of fraud," but it excised an element of fraud liability: reliance. *Castano v. Am. Tobacco Co.*, 160 F.R.D. 544, 560 (E.D. La. 1995), *rev'd*, 84 F.3d 734 (5th Cir. 1996). The Fifth Circuit ruled that the district court had erred in finding predominance and superiority *as to the issues certified*. 84 F.3d at 745. In footnote 21, on which MTM relies here, the court stated that "[a] district court cannot manufacture predominance through the nimble use of subdivision (c)(4). The proper interpretation of the interaction between subdivisions (b)(3) and (c)(4) is that a cause of action, as a whole, must satisfy the predominance

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98, MTM apparently seeks to reserve such discussion for its reply. Such gamesmanship deprives the Court of full briefing on the Rule 23(c)(4) issue. "A party forfeits an argument by failing to raise it in [its] opening brief," *Al-Tamimi v. Adelson*, 916 F.3d 1, 6 (D.C. Cir. 2019) (citing *Herron v. Fannie Mae*, 861 F.3d 160, 165 (D.C. Cir. 2017)), and courts refuse to consider arguments raised for the first time in reply because it deprives the opposing party of "a full and fair opportunity to adequately respond." *Env't Def. Fund, Inc. v. Costle*, 657 F.2d 275, 284 (D.C. Cir. 1981); *see also Bd. of Regents of Univ. of Wash. v. EPA*, 86 F.3d 1214, 1221 (D.C. Cir. 1996) (stating that the goal of forfeiture in such situations is "[t]o prevent ... sandbagging of appellees and respondents").

requirement of (b)(3) and that (c)(4) is a housekeeping rule that allows courts to sever the common issues for a class trial." Relying on this footnote, MTM fails to provide context: The footnote was elaborating on the court of appeals' holding that the district court erred in finding predominance as to the entire issue of fraud liability without considering whether the element of reliance affected predominance. *Id.* at 745 & n.21. Footnote 21 thus stands for a simple proposition: In certifications pursuant to Rule 23(b)(3) and (c)(4), a district court must do what it says it is doing. A court cannot "nimbl[y]" excise an element of liability from the Rule 23(b)(3) predominance analysis while at the same time purporting to certify that entire issue of liability for class-wide treatment. *Id.* at 745 n.21.

The *Castano* footnote was dicta, as the court's holding rested on the ground that the district court had not properly determined that common issues predominated or that class treatment would be superior even as to the matters certified by the district court. *See* 84 F.3d at 740–51. Thus, even the Fifth Circuit does not read *Castano* to preclude certifying issues, but not a claim as a whole, in appropriate circumstances. Indeed, in *Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468, 471 (5th Cir. 1986), which

Castano cites extensively with approval (including in footnote 21), the Fifth Circuit affirmed certification of the "state of the art" defense "and defense-related questions, including product identification, product defectiveness, gross negligence and punitive damages" in a complex asbestos case. In *Jenkins*, no cause of action was certified for class-wide treatment, and there was no determination that a claim as a whole satisfied predominance.

The Fifth Circuit's post-*Castano* decisions on Rule 23(c)(4) confirm that the Fifth Circuit embraces the consensus approach to issue-class certification. In *In re Rodriguez*, 695 F.3d 360, 363 (5th Cir. 2012), the Fifth Circuit affirmed the "narrow class certification" of a Rule 23(b)(2) class on the issue of injunctive relief, although damages remedies based on the same claims did not satisfy Rule 23(b)(3)'s predominance requirement. The court stated that "Rule 23(c)(4) explicitly recognizes the flexibility that courts need in class certification by allowing certification 'with respect to particular issues' and division of the class into subclasses." *Id.* at 369 n.13 (quoting *Bolin v. Sears, Roebuck & Co.*, 231 F.3d 970, 976 (5th Cir. 2000)).

In re Deepwater Horizon—the Fifth Circuit's most recent analysis of Rule 23(c)(4)—likewise belies MTM's reading of the *Castano* footnote. Over objections that Rule 23(b)(3) barred a district court's class certification because common issues did not predominate, *Deepwater Horizon* held that certification was "in accordance with … Rule 23(c)(4)." 739 F.3d at 806; *see also id.* at 815–16. The Fifth Circuit stated that "'determining liability on a class-wide basis, with separate hearings to determine—if liability is established—the damages of individual class members, or homogeneous groups of class members, is permitted by Rule 23(c)(4) and will often be the sensible way to proceed.'" *Id.* at 806 n.66 (quoting *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 800 (7th Cir. 2013)). *Deepwater Horizon* approvingly cited decisions of "many circuits" that had "divided and tried" "common and individual issues" "by means of … Rule 23(c)(4), which permits district courts to limit class treatment to 'particular issues' and reserve other issues for individual determination." *Id.* at 816.

C. MTM's assertion that issues can be certified for class treatment only if an entire claim is certifiable lacks support in the text, structure, and history of Rule 23.

MTM's argument that a claim as a whole must satisfy Rule 23(b)(3)'s requirements even when only specific issues are certified contradicts the Rule's plain terms. Rule 23(b) sets forth requirements for a "class action" to be "maintained." Rule 23(c)(4), in turn, allows "an action" to be "maintained *as a class action* with respect to *particular issues*." (emphasis added).

A court cannot meaningfully consider whether maintaining such a "class action" satisfies Rule 23(b)(3)'s requirements without considering the bounds Rule 23(c)(4) places on the "class action." The court must determine whether a "class action" limited to the certified issues satisfies predominance, not whether the portion of the action that is *not* a class action does so. That is, the court must consider whether common questions of law or fact predominate with respect to the issues that fall within the class action.

As originally adopted, Rule 23(c)(4) made this point explicitly. It stated: "When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be

divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly." Fed. R. Civ. P. 23(c)(4) (1966). As the Second and Fourth Circuits have explained, that language means that other provisions of Rule 23 must be applied *after* taking into account the class action's limitation to particular issues. *See Nassau*, 461 F.3d at 226; *Gunnells*, 348 F.3d at 439. When this "sequencing directive" was eliminated in the 2007 revisions of the Rule, "the Advisory Committee made clear that the changes to the Rule's language were 'stylistic only.'" *Martin*, 896 F.3d at 413 (citing Fed. R. Civ. P. 23(c)(4) adv. comm. note to 2007 amend.).

Ignoring this history, MTM argues that a court cannot consider certifying an issue under Rule 23(c)(4) unless it *first* finds that Rule 23(b)(3)'s requirements have been met with respect to an entire cause of action. MTM Br. 16. MTM rests its argument on the placement of the clause authorizing issue classes in subdivision (c), which, of course, comes after subdivision (b). MTM's focus on the placement of the clauses ignores that Rule 23(c)(4)'s broad grant of authority to certify issues "when appropriate" incorporates the "flexibility in application" generally appropriate under Rule 23. *Gunnells*, 348 F.3d at 424 (quoting *In re A.H.*

Robins, 880 F.2d 709, 740 (4th Cir. 1989)). The Rule permits courts to give common treatment to common issues to advance fair and efficient resolution of a case when the requirements for a broader certification are not met.

Permitting issue certification only when an entire claim can be certified under Rule 23(b)(3) would undermine that objective and "render[] subsection (c)(4) virtually null." *Nassau*, 461 F.3d at 226; *accord Martin*, 896 F.3d at 413. If an entire claim satisfied Rule 23(b)(3)'s requirements of predominance and superiority, a district court would not need to certify a narrower issue class. Under MTM's approach, "a court considering the manageability of a class action—a requirement for predominance under Rule 23(b)(3)(D)—[would have] to pretend that subsection (c)(4)—a provision specifically included to make a class action more manageable—does not exist until after the manageability determination [has been] made." *Nassau*, 461 F.3d at 227 (quoting *Gunnells*, 348 F.3d at 439). Thus, "a court could only use subsection (c)(4) to manage cases that the court had already determined would be manageable *without* consideration of subsection (c)(4)." *Id.* Such a reading would leave Rule 23(c)(4) "without any practical application,

thereby rendering it superfluous." *Gunnells*, 348 F.3d at 439. Indeed, accepting MTM's reading would violate one of the most basic interpretive canons: that a rule or statute "should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous." *Corley v. United States*, 556 U.S. 303, 314 (2009) (citations and quotation marks omitted).

D. The consensus view that issue certification under Rule 23(c)(4) does not require that a claim as a whole satisfy Rule 23(b)(3)'s requirements does not conflict with Supreme Court authority.

MTM asserts that assessing predominance only with respect to the common issues that have been identified for potential class treatment is inconsistent with Supreme Court authority, MTM Br. 25–28, citing *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997), and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999). Neither case, however, addresses the propriety of issue-class certification under Rule 23(c)(4).

Amchem involved an effort to certify a "sprawling" settlement class under Rule 23(b)(3). 521 U.S. at 624. The Supreme Court held that the predominance requirement was not met for the action as certified because of the "number of questions peculiar to the several categories of class members, and to individuals within each category, and the

significance of those uncommon questions." *Id.* Those concerns are not present here.

Ortiz involved an effort to certify a mandatory settlement class on a limited fund theory under Rule 23(b)(1)(B). The Court held that the proponents failed to show that the fund was limited by anything other than the parties' agreement or that the fund would be allocated by a process addressing conflicting interests of class members. 527 U.S. at 848–59. That issue is not present here.

From these inapposite decisions, MTM concludes that there is "no reason to believe that the Supreme Court would condone the district court's interpretation of Rule 23(c)(4)." MTM Br. 26. MTM fails to note that the Supreme Court has been asked to review at least five cases holding that Rule 23(c)(4) permits issue classes where entire actions or claims do not satisfy Rule 23(b)(3)'s predominance requirement, and it has denied certiorari each time—including as recently as this year. *See Educ. Comm'n for Foreign Med. Graduates v. Russell*, 142 S. Ct. 2706 (2022); *Behr Dayton Thermal Prods., LLC v. Martin*, 139 S. Ct. 1319 (2019); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. McReynolds*, 568

U.S. 887 (2012); *Pella Corp. v. Saltzman*, 562 U.S. 1178 (2011); *Healthplan Servs., Inc. v. Gunnells*, 542 U.S. 915 (2004).

E. The district court correctly determined that a class action is the superior method for resolving the common joint-employer and general-contractor issues.

The district court held that "[c]lass-wide resolution of … MTM's status as a joint employer or general contractor … is superior to litigating that question in dozens, if not hundreds, of individual actions." JA1892–93. Because MTM is jointly and severally liable for wage violations of the transportation service providers only if it is a joint employer or general contractor, proving MTM's status is a critical element of each of the plaintiffs' D.C.-law claims. If these issues are resolved in MTM's favor, the case will be over. *See* JA2389, JA2395. If they are decided in plaintiffs' favor, MTM will be liable for any underpayment of required wages, and all that will remain to be tried individually or in small groups is the amount of compensable time worked by drivers and whether any wages received for such work met or exceeded lawfully required rates. Either way, determining MTM's status will significantly advance the resolution of this case. Class-wide resolution of that key issue is entirely consistent with the Supreme Court's most recent relevant precedent, *Tyson Foods,*

Inc. v. Bouaphakeo, 577 U.S. 442 (2016), where the Court expressly recognized the utility of class actions to resolve "important questions common to all class members," even where "other important matters will have to be tried separately." *Id.* at 453 (citation omitted).

MTM's assertion that resolving a critical threshold issue on a class basis does nothing to move the entire case closer to resolution because "[a]t best, the district court can dispense an advisory opinion with respect to the 'issue class,'" MTM Br. 31, makes no sense. The outcome of the issue class will not be an "advisory opinion," but a definitive resolution of an actual controversy, binding on all parties, that will determine what, if any, issues remain for determination.

MTM also asserts that the district court erred in finding that the certified issues "are questions of law or fact common to the class" under Rule 23(a)(2). Relying on the Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011), MTM contends that a common question must address the conduct that caused the class members' injuries. MTM Br. 34–35. *Wal-Mart* does not so hold. Rather, *Wal-Mart* explains that, to show that "the class claims will share common 'questions of law or fact'" under (a)(2), the plaintiffs' claims must "depend upon a

common contention ... of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart*, 564 U.S. at 350 (quoting *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 158 (1982)).

Here, plaintiffs' claims depend on the common contention that MTM is a joint employer or general contractor. Those issues are "capable of class-wide resolution 'in one stroke,' as their resolution will depend on common evidence concerning, among other things, MTM's hiring, training, and performance requirements," JA1888 (quoting *Wal-Mart*, 564 U.S. at 350), as opposed to individualized facts regarding MTM's relationships with specific plaintiffs. "MTM's legal status as joint employer or general contractor thus presents a quintessential 'common question' under Rule 23(a)(2)." JA1889.

F. Dire predictions about issue-class certification ignore its longstanding use and Rule 23's procedural protections.

MTM and the Chamber posit that, if this Court affirms the district court's decision, the number of cases certified as class actions will soar, generating massive pressure on defendants to settle meritless claims.

MTM Br. 32–34; Chamber Amicus Br. 2–3, 19–23. The contention that the district court's decision establishes a new, less stringent path to class certification is wholly rebutted by the decades of cases, such as those cited above, in which courts have used issue-class certification to aid in resolving damages class actions.

Other aspects of class-action jurisprudence ensure fair and efficient use of issue-class certification. For example, issue-class certification requires the identification of common issues that drive the resolution of the litigation, and the issues must satisfy the predominance and superiority requirements of Rule 23(b)(3). The availability of interlocutory appeal under Rule 23(f) provides additional protection from casual or misguided use of Rule 23(c)(4).

Further, as the Third Circuit explained in rejecting the Chamber's concerns as "overblown," *Russell*, 15 F.4th at 275, class-action lawyers have less financial incentive to file cases seeking issue-class certification.

> Any lucrative potential payday for class action lawyers arises from securing a damages award, not from obtaining an order on a particular issue. That order, which can be thought of as a type of declaratory judgment, may eventually transform into a judgment awarding damages, but even then it is not clear that the future individualized proceedings would be controlled by the lawyers that won the issue-class order. In any case, even if a lawyer could obtain a quasi-declaratory

> ruling on a subset of common issues, the transformation of the case from a proposed class action to a set of individualized proceedings would spoil any settlement leverage that the lawyer had.

Id.

II. This Court should not exercise pendent appellate jurisdiction over the FLSA collective-action issue.

Although this appeal is before this Court pursuant to Rule 23(f), which grants appellate courts discretion to "permit an appeal from an order granting or denying class-action certification," MTM seeks pendent appellate review of the district court's decision denying decertification of the FLSA collective action. "A court exercises pendent jurisdiction when, while reviewing an order over which it has appellate jurisdiction, it entertains an appeal from another order that, although part of the same case or controversy, would not otherwise be within its jurisdiction." *Nat'l R.R. Passenger Corp. v. ExpressTrak, L.L.C.*, 330 F.3d 523, 527 (D.C. Cir. 2003). This Court should decline to review the decision denying decertification of the collective action and the issue on which it turns—whether plaintiffs are "similarly situated" under the FLSA's collective-action provision—because the rare circumstances where pendent appellate jurisdiction is proper are absent.

A. Pendent appellate jurisdiction is seldom appropriate.

"This court exercises pendent appellate jurisdiction sparingly." *Gilda Marx, Inc. v. Wildwood Exercise, Inc.*, 85 F.3d 675, 678 (D.C. Cir. 1996); *see Price v. Socialist People's Libyan Arab Jamahiriya*, 389 F.3d 192, 199–200 (D.C. Cir. 2004) ("The exercise of pendent appellate jurisdiction is often suggested, occasionally tempting, but only rarely appropriate."). The Supreme Court has taken "a relatively restrictive position on the circuit courts' power to exercise pendent appellate jurisdiction." *Gilda Marx*, 85 F.3d at 678 (citing *Swint v. Chambers Cnty. Comm'n*, 514 U.S. 35 (1995)). Even within the narrow circumstances where pendent appellate jurisdiction is proper, this Court has discretion not to exercise it. *Kilburn v. Socialist People's Libyan Arab Jamahiriya*, 376 F.3d 1123, 1136 (D.C. Cir. 2004).

Pendent appellate jurisdiction is appropriate "only when substantial considerations of fairness or efficiency demand it." *Gilda Marx*, 85 F.3d at 679.

> Such considerations may be presented, for example, when the nonappealable order is "inextricably intertwined" with the appealable order, or when review of the former is "necessary to ensure meaningful review of the latter." The appeals may be so closely related, or turn on such similar issues, that a single appeal should dispose of both simultaneously. In some

> cases, pendent review will likely terminate the entire case, sparing both this court and the district court from further proceedings and giving the parties a speedy resolution. By choosing to entertain a pendent appeal, we may sometimes be able to forestall a second appeal, thus streamlining the judicial process.

Id. (internal citations omitted). In contrast, "there are a number of circumstances that generally weigh against the exercise of pendent appellate jurisdiction," including where "the appealing party has, intentionally or not, circumvented the district court's authority to decide whether to endorse an interlocutory appeal under 28 U.S.C. § 1292(b)." *Id.*

B. The FLSA decision is not "inextricably intertwined" with the Rule 23 decision.

In *Gilda Marx*, the Court cited cases explaining what "inextricably intertwined" means in the context of pendent appellate jurisdiction. *Id.* (citing *Brennan v. Township of Northville*, 78 F.3d 1152, 1157–58 (6th Cir. 1996); *Dolihite v. Maughon*, 74 F.3d 1027, 1034–35 n.3 (11th Cir.1996); *Blue v. Koren*, 72 F.3d 1075, 1084 n.6 (2d Cir. 1995)). Those decisions explain that claims are "inextricably intertwined" where "the pendent claim is coterminous with, or subsumed in, the claim before the court on interlocutory appeal—that is, when the appellate resolution of

the collateral appeal necessarily resolves the pendent claim as well." *Brennan*, 78 F.3d at 1158 (discussing *Swint* and quoting *Moore v. City of Wynnewood*, 57 F.3d 924, 930 (10th Cir. 1995)); *accord Dolihite*, 74 F.3d at 1034–35 n.3 (citing *Blue*, 72 F.3d at 1084 n.6).

This Court's decision in *Barbour v. Washington Metropolitan Area Transit Authority*, No. 03-7044, 2003 WL 22095655 (D.C. Cir. Aug. 28, 2003) (per curiam), confirms this understanding of "inextricably intertwined." In *Barbour*, the Court rejected the exercise of pendent appellate jurisdiction over an order regarding immunity under the Americans with Disabilities Act (ADA), finding that it was not "inextricably intertwined" with the appeal of the rejection of an immunity defense under the Rehabilitation Act. Although the ADA issue may have had "some bearing" on the issue under the Rehabilitation Act, the latter presented an additional question and could be resolved without addressing the ADA issue, and resolution of the ADA issue would not have disposed of the entire case. *Id.* at *1. In contrast, in *National Railroad Passenger Corp.*, the Court explained that the pendent issue of arbitrability was "inextricably intertwined" with the appealable decision granting an injunction pending arbitration because the injunction was

"dependent upon" the "determination that the parties' dispute was arbitrable." 330 F.3d at 582.

Applying this standard, other courts of appeals have held that FLSA certification orders and Rule 23 certification orders are not inextricably intertwined. In *Myers v. Hertz Corp.*, 624 F.3d 537 (2d Cir. 2010), for example, the Second Circuit refused to exercise pendent jurisdiction because whether plaintiffs had met "the modest factual showing" that plaintiffs are "similarly situated" under FLSA is "quite distinct from the question whether plaintiffs have satisfied the much higher threshold of demonstrating that common questions of law and fact will 'predominate'" for purposes of the Rule 23(b)(3) class action. *Id.* at 555–56. Despite the presence of "admittedly similar" issues, *id.* at 556, the court explained that the FLSA decision was not inextricably intertwined with the Rule 23 class-certification decision because "resolution of the non-appealable order would require [the court] to conduct an inquiry that is distinct from and 'broader' than the inquiry required to resolve solely the issue over which [the court] properly ha[s] appellate jurisdiction." *Id.* at 553–54.

In *Reinig v. RBS Citizens, N.A.*, 912 F.3d 115 (3d Cir. 2018), the Third Circuit agreed with *Myers* and explained that "Rule 23 class certification and FLSA collective action certification are fundamentally different creatures" and involve distinct inquiries. *Id*. at 133. The court therefore held that "Rule 23 class certification and FLSA final collective action certification are not 'inextricably intertwined'" and "decline[d] to exercise pendent appellate jurisdiction over the FLSA collective action certification order." *Id.* at 131.

MTM asserts that *Myers* and *Reinig* are distinguishable because, according to MTM, the district court below certified the Rule 23 class action and FLSA collective "on the same basis," resulting in "the presentation of the same question on appeal." MTM Br. 40. The district court, however, granted Rule 23(c)(4) class certification based on its determination that the predominance and superiority requirements of Rule 23(b)(3) were met with respect to the issues certified, and denied decertification of the collective action based on its determination that the employees are "similarly situated" under the FLSA. *Compare* JA2381–85 ("similarly situated"), *with* JA2391–94 (Rule 23(c)(4) certification). Although both determinations implicate the same *merits* question—

whether MTM is a joint employer—the two types of certification are not inextricably linked for the reasons set forth in *Myers* and *Reinig*. As explained in Part III below, Rule 23 standards are inapplicable to the FLSA "similarly situated" standard, and Rule 23 imposes a *higher* standard for class certification—whether of an entire claim or of an issue class under Rule 23(c)(4)—than the FLSA's "similarly situated" standard for certification of an FLSA collective action. Indeed, not even MTM contends that Rule 23 class certification and the FLSA "similarly situated" standard embrace the same inquiry. *See* MTM Br. 58 (acknowledging that "some aspects of Rule 23 are not pertinent in the FLSA-collective context").

Because the issue whether plaintiffs are "similarly situated" is neither coterminous with nor subsumed by the issue of Rule 23(c)(4) class certification, and appellate resolution of the latter does not necessarily resolve the former, pendent appellate review of the FLSA decision is not proper.

C. Pendent appellate jurisdiction is not necessary to ensure meaningful review here.

MTM does not argue that pendent appellate jurisdiction is "necessary to ensure meaningful review," *Gilda Marx*, 85 F.3d at 679, of

this case, and for good reason. The Court can readily determine whether the district court properly exercised its discretion under Rule 23(c)(4) without considering the distinct issue of whether the plaintiffs are "similarly situated" under FLSA.

By contrast, in *National Railroad Passenger Corp.*, meaningful review of the district court's appealable orders enjoining the parties and confirming an arbitration award required review of the otherwise unappealable decision that the parties' dispute was arbitrable because that decision formed the basis of the appealable orders: "the district court can only enforce an arbitral award if the arbitrator had authority to grant it." 330 F.3d at 527–28. Here, review of the Rule 23(c)(4) class certification decision would not be "detrimentally impaired" by not reviewing the collective-action decision. *Id.* at 528. The determinations involve different legal standards, and the Rule 23(c)(4) certification is in no way premised on the propriety of a collective action.

D. This case will continue regardless of whether this Court resolves the FLSA collective-action issue.

MTM and its amicus Professor Steinman contend that the Court should exercise pendent appellate jurisdiction to promote efficiency. MTM Br. 47–49; Steinman Amicus Br. 17. Efficiency alone, however, does

not justify the "sparing[]" exercise of pendent review. *Gilda Marx*, 85 F.3d at 678; *accord Myers*, 624 F.3d at 554; *Reinig*, 912 F.3d at 130. Rather, "[c]onsiderations of … efficiency may … justify the exercise of pendent appellate jurisdiction *when the 'review will likely terminate the entire case*, sparing both this court and the district court from further proceedings and giving the parties a speedy resolution.'" *Jungquist v. Sheikh Sultan Bin Khalifa Al Nahyan*, 115 F.3d 1020, 1027 (D.C. Cir. 1997) (quoting *Gilda Marx*, 85 F.3d at 679) (emphasis added); *see KiSKA Const. Corp.-U.S.A. v. Washington Metro. Area Transit Auth.*, 167 F.3d 608, 611 (D.C. Cir. 1999) (same); *see also Rendall-Speranza v. Nassim*, 107 F.3d 913, 917 (D.C. Cir. 1997) (similar). Absent such circumstances, any efficiency benefits resulting from disposing of multiple issues at once do not suffice. *See*, *e.g.*, *Kilburn*, 376 F.3d at 1133–36; *accord Myers*, 624 F.3d at 554 (noting that "considerations of efficiency" alone do not justify pendent appellate review); *Reinig*, 912 F.3d at 130 (similar).

MTM concedes that deciding the collective-action issue "will not terminate the entire case." MTM Br. 47. Indeed, the joint-employer issue is the subject of a pending motion for summary judgment, and the issue will be decided, whether in a class action, a collective action, or in

"dozens, if not hundreds, of individual actions." JA1892–93. As the district court observed, "it is possible that decertification would not lessen the burden on the court and parties at all. … Either way, whether as a collective action or as a consolidation of individual actions, the joint-employer question likely will not be tested and resolved only for a small subset of drivers." JA2449. Thus, "an immediate appeal of the FLSA decertification denial would not conserve judicial resources and spare the parties from possibly needless expense if it should turn out that the district court's ruling is reversed." JA2440 (cleaned up).

MTM contends that it is efficient to take up the FLSA-collective issue now, because otherwise "MTM will be forced to appeal certification of the collective after final judgment." MTM Br. 48. MTM's intent to appeal if plaintiffs prevail in the district court is not a reason to disturb the final judgment rule. *See In re James*, 444 F.3d 643, 648 (D.C. Cir. 2006) (stating the Rule 23(f) does not "permit end runs around the final judgment rule").

Moreover, addressing the collective-action issue now will not necessarily conserve judicial resources. If the Court affirms the district court's issue-class certification, the joint-employer issue will be decided

for the entire class and the propriety of the collective action will not matter because every member of the collective action is also in the class. The propriety of the collective action would also be mooted if MTM were to prevail on the joint-employer question because plaintiffs' FLSA claims depend on establishing that MTM is a joint employer. Such considerations weigh against the exercise of pendent review. *Cf. Gilda Marx*, 85 F.3d at 679 ("Not only judicial economy but the prohibition on advisory opinions counsel against reaching an issue that might be mooted or altered by subsequent district court proceedings.").

E. Other considerations confirm the inappropriateness of pendent appellate review.

"[T]here are a number of circumstances that generally weigh against the exercise of pendent appellate jurisdiction." *Id.* MTM asserts that pendent appellate review is subject to an eight-factor test, *see* MTM Br. 42, and that where a case "lacks almost all factors disfavoring pendent review, the inverse must also be true: … pendent appellate jurisdiction is favored," *id.* 46. This Circuit, however, applies no such mechanical "test." *See Kilburn*, 376 F.3d at 1134. Further, the Court has neither provided a comprehensive list of considerations nor identified them as "factors" to be balanced. And it certainly did not suggest that

pendent appellate jurisdiction is "favored" if "almost all" such considerations are lacking. MTM's argument is contrary to the Court's direction that pendent appellate jurisdiction is "sparingly" exercised, *Gilda Marx*, 85 F.3d at 678, and generally "confined" to cases where pendent issues are inextricably intertwined with or necessary for meaningful review of appealable ones, *Kilburn*, 376 F.3d at 1134. In any event, additional considerations weigh against exercising pendent appellate jurisdiction here.

To begin with, "pendent appellate jurisdiction may be declined if the appealing party has, intentionally or not, circumvented the district court's authority to decide whether to endorse an interlocutory appeal under 28 U.S.C. § 1292(b) or Federal Rule of Civil Procedure 54(b)." *Gilda Marx*, 85 F.3d at 679; *see also Kilburn*, 376 F.3d at 1136 (stating that "§ 1292(b) [is] a reason for caution regarding pendent appellate jurisdiction"). Likewise, in *Swint*, the Supreme Court pointed to the "unlikel[ihood] that a § 1292(b) certification would have been forthcoming from the district judge" as an indication that exercising pendent jurisdiction would circumvent § 1292(b). 514 U.S. at 47 n.5.

Here, it is even clearer than in *Swint* that review would inappropriately circumvent § 1292(b) because certification under that section is not just unlikely: The district court declined to certify its decision denying decertification of the collective action. JA2440. In the face of that order, reviewing the collective-action issue would permit an end-run around § 1292(b).

MTM cites a single district court decision noting that a denial of § 1292(b) certification does not prohibit a party from *requesting* that this Court exercise pendent appellate jurisdiction. MTM Br. 43 n.3 (citing *Azima v. RAK Inv. Auth.*, 325 F. Supp. 3d 30, 34 (D.D.C. 2018)). True enough, but *granting* such a request is disfavored where it would circumvent § 1292(b). *See Gilda Marx*, 85 F.3d at 679; *cf. In re Trump*, 781 F. App'x 1, 2 (D.C. Cir. 2019) (denying a writ of mandamus to order a district court to certify an issue for interlocutory appeal under § 1292(b)).

In *Gilda Marx*, this Court also explained that pendent appellate jurisdiction is less likely to be appropriate where "the pendent appeal involved a separate cause of action from the one giving rise to the appealable order," or "the appealable order was itself interlocutory." 85

F.3d at 678. MTM concedes that these considerations weigh against pendent appellate review here. *See* MTM Br. 45.

III. The district court's decision denying decertification of the FLSA collective action was correct.

Applying the test set forth in *Scott*, 954 F.3d 502, and *Campbell v. City of Los Angeles*, 903 F.3d 1090 (9th Cir. 2018), the district court held that a collective action is proper because the plaintiffs here are "similarly situated" under 29 U.S.C. § 216(b) as to the issue whether MTM is a joint employer under the FLSA. JA2384–85, JA2390. That decision is correct and, if the Court reaches the issue, should be affirmed.

A. FLSA collective actions allow efficient resolution of common issues of law and fact.

The FLSA establishes federal minimum-wage and overtime-pay guarantees and was enacted with a "broad remedial goal." *Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, 173 (1989). Section 16(b) of the FLSA provides:

> An action to recover the liability prescribed in [this subsection] may be maintained against any employer … 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). An FLSA lawsuit filed on behalf of other "similarly situated" employees is a "collective action." *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 69 (2013). Its purpose is two-fold: to aid enforcement by letting employees pool resources when seeking relief, and to promote the "efficient resolution in one proceeding of common issues of law and fact." *Hoffmann-La Roche*, 493 U.S. at 170.[7]

"[T]here are significant differences between certification under Federal Rule of Civil Procedure 23 and the joinder process under § 216(b)." *Genesis Healthcare Corp.*, 569 U.S. at 71 n.1. "Rather than providing for a mere procedural mechanism, as is the case with Rule 23, § 216(b) establishes a '*right* ... to bring an action by or on behalf of any employee, and [a] *right* of any employee to become a party plaintiff to any such action,' so long as certain preconditions are met." *Scott*, 954 F.3d at 515 (quoting 29 U.S.C. § 216(b)); *see also Hoffmann-La Roche*, 493 U.S.

[7] *Hoffmann-La Roche* involved a claim under the Age Discrimination in Employment Act, which incorporates the "similarly situated" standard from the FLSA. *See Hoffmann-La Roche*, 493 U.S. at 167. Thus, its discussion of the "similarly situated" standard applies to both statutes.

at 173 ("Congress gave employees and their 'representatives' the right to bring actions to recover amounts due under the FLSA."). Unlike absent class members in Rule 23 class actions, "every plaintiff who opts in to a collective action has [full] party status." Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1807 (3d ed.).

B. The employees here are "similarly situated" because their claims share a material common issue.

The FLSA does not define "similarly situated," and this Court has not ruled on that term's meaning. However, recent appellate decisions explain that plaintiff-employees are "similarly situated, and may proceed in a collective, to the extent they share a similar issue of law or fact material to the disposition of their FLSA claims." *Scott*, 954 F.3d at 516; *Campbell*, 903 F.3d at 1117.

1. The district court correctly concluded that the test set forth in *Campbell* and *Scott* "is the most in tune with the text and purpose of section 216(b)." JA2384. As the *Campbell* and *Scott* courts explained, "[t]he natural answer to … 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." *Campbell*, 903 F.3d at 1114; *accord Scott*, 954 F.3d at 515–16.

Congress's goal in providing employees "the advantage of lower individual costs to vindicate rights by the pooling of resources" and the "efficient resolution in one proceeding of common issues of law and fact," *Hoffman-La Roche*, 493 U.S. at 170, "is only achieved—and, therefore, a collective can only be maintained—to the extent party plaintiffs are alike in ways that matter to the disposition of their FLSA claims," *Campbell*, 903 F.3d at 1114; *accord Scott*, 954 F.3d at 516. Thus, "in the collective action context, what matters is not just *any* similarity between party plaintiffs, but a legal or factual similarity material to the resolution of the party plaintiffs' claims, in the sense of having the potential to advance these claims, collectively, to some resolution." *Campbell*, 903 F.3d at 1115.

The joint-employer issue easily satisfies the *Campbell* and *Scott* test. MTM concedes that whether it is a "joint employer" is a "preliminary question" on which plaintiffs must prevail to pursue their FLSA claims against it. MTM Br. 67. That question will be answered based on common evidence. If MTM is *not* a joint employer, the case ends. JA2389. If it is, then the case will proceed. *Id.* Thus, proceeding collectively on the joint-employer issue is "potentially dispositive of the case." *Id.* "That is the

definition of material, and it is precisely the type of issue Congress anticipated employees could pursue collectively." *Id.*

2. MTM claims the district court's ruling "appears to go even further than *Scott* or *Campbell* in expanding the availability of collective actions and what it means to be 'similarly situated,'" because the question whether MTM is a joint employer does not reflect a "common employer practice that, if proved, would help demonstrate a violation of the FLSA." MTM Br. 67. Neither *Campbell* nor *Scott*, however, held that a common FLSA-violating policy or practice is necessary for plaintiffs to be "similarly situated" under § 216(b). And MTM's suggestion of such a requirement is untethered from the statutory text and purpose.

a. In *Campbell*, the court found that the plaintiffs were *not* similarly situated where their "sole justification" for proceeding collectively turned on their allegation of a common FLSA-violating policy for which they had no evidence. 903 F.3d at 1120. *Campbell* did not hold, however, that plaintiffs are "similarly situated" *only* if the alleged common policy would establish an FLSA violation.

In *Scott*, the court stated that an approach to "similarly situated" that examines whether the plaintiffs are alike in some material respect

is "consistent" with the standard applied in other decisions, citing not only *Campbell*, but also *Halle v. West Penn Allegheny Health System Inc.*, 842 F.3d 215, 226 (3d Cir. 2016), and *McGlone v. Contract Callers, Inc.*, 49 F. Supp. 3d 364, 367 (S.D.N.Y. 2014). *See Scott*, 954 F.3d at 516. In *Halle* and *McGlone*, the courts stated that the plaintiffs were similarly situated where they alleged a common employer policy or practice that, if proved, would violate the FLSA. *Halle*, 842 F.3d at 226; *McGlone*, 49 F. Supp. 3d at 367. That *Scott* stated that the "similarly situated" standard it adopted is "consistent" with the standards applied in *Halle* and *McGlone* establishes only that a common violative policy or practice is *sufficient* to demonstrate that plaintiffs are "similarly situated" under § 216(b). As the district court here explained, "[a]lthough a common policy or practice might be *sufficient* to show party plaintiffs are similarly situated, this case illustrates why a common policy or practice is not *necessary*." JA2389.

Further, proceeding collectively on the joint-employer question is entirely consistent with *Campbell*'s and *Scott*'s recognition that, in light of Congress's goals of pooling resources and efficiently resolving cases, "[i]t follows that if named plaintiffs and party plaintiffs share legal or

factual similarities material to the disposition of their claims, 'dissimilarities in other respects should not defeat collective treatment.'" *Scott*, 954 F.3d at 516 (quoting *Campbell*, 903 F.3d at 1114). That is, if plaintiffs are similar "in some respects material to the disposition of their claims, collective treatment may be *to that extent* appropriate, as it may *to that extent* facilitate the collective litigation of the party plaintiffs' claims." *Scott*, 954 F.3d at 516. Here, the district court permitted the collective proceeding only to the extent it will answer the shared, material joint-employer question. JA2390.

b. MTM emphasizes the language in 29 U.S.C. § 216(b) that provides for collective actions in cases brought "to recover the liability prescribed" by the FLSA, and argues that the phrase imposes a requirement that—to be "similarly situated"—employees must share a common issue that completely resolves liability. MTM Br. 59–60. The more natural reading of the phrase, however, is that it simply identifies the type of proceeding that can be pursued on a collective basis.

MTM's argument also should be rejected because it would impose a higher bar to the FLSA collective action than the statute requires, undermining the remedial purpose of the statute. *See*, *e.g.*, *Grayson v. K*

Mart Corp., 79 F.3d 1086, 1095 (11th Cir. 1996) (holding that "a unified policy, plan, or scheme of discrimination may not be required to satisfy the more liberal 'similarly situated' requirement of § 216(b)"); *O'Brien v. Ed Donnelly Enters., Inc.*, 575 F.3d 567, 584 (6th Cir. 2009) ("Showing a 'unified policy' of violations is not required" under § 216(b)), *abrogated on other grounds by Campbell-Ewald Co. v. Gomez*, 577 U.S. 153 (2016); *O'Brien*, 575 F.3d at 585 ("We do not mean to require that all collective actions under § 216(b) be unified by common theories of defendants' statutory violations").

Moreover, the upshot of MTM's position—decertification of the FLSA collective action because of the absence of a common FLSA-violating practice—could result in more than one hundred individual lawsuits by the plaintiffs who have opted into the collective and require the joint-employer issue to be litigated repeatedly. Such a result would undermine Congress's purposes of promoting "pooling of resources" to vindicate employee rights and "efficient resolution in one proceeding of common issues of law and fact." *Hoffmann-La Roche*, 493 U.S. at 170.

C. Rule 23's requirements do not apply to the FLSA standard for "similarly situated."

Despite acknowledging the "differences between the FLSA and Rule 23," MTM Br. 57, and that "some aspects of Rule 23 are not pertinent in the FLSA-collective context," *id.* 58, MTM insists that the district court erred by not applying Rule 23 standards to § 216(b). MTM is wrong.

1. As the district court correctly held, Rule 23 requirements have no place in the "similarly situated" inquiry. *See* JA2388. "[T]he consensus view" of the courts of appeals "reject[s] the analogy to Rule 23" as "lacking in support in either the FLSA or the Federal Rules of Civil Procedure." *Campbell*, 903 F.3d at 1111.

"[I]n language and structure, section 216(b) and Rule 23 bear little resemblance to one another." *Id.* at 1112; *compare* 29 U.S.C. § 216(b) *with* Fed. R. Civ. P. 23. Thus, "it is well-established that the FLSA's similarly situated requirement is independent of, and unrelated to, Rule 23's requirements, and it is quite distinct from the much higher threshold of demonstrating that common questions of law and fact will predominate for Rule 23 purposes." *Scott*, 954 F.3d at 518 (cleaned up) (collecting cases); *see*, *e.g.*, *Campbell*, 903 F.3d at 1112 ("The limited statutory

requirements of a collective action … necessarily impose a lesser burden [than Rule 23]"); *Calderone v. Scott*, 838 F.3d 1101, 1104 (11th Cir. 2016) ("The certification requirements for a Rule 23 class action are more demanding" than the requirements of § 216(b)); *O'Brien*, 575 F.3d at 585 (describing Rule 23 as "a more stringent standard" than § 216(b)).

Both Congress and the judicial rule-makers intended that Rule 23 and the FLSA's similarly situated standard reflect distinct requirements. "While Congress could have imported the more stringent criteria for class certification under Fed. R. Civ. P. 23, it has not done so in the FLSA." *O'Brien*, 575 F.3d at 584; *accord Campbell*, 903 F.3d at 1113. Likewise, when Rule 23 was amended in 1966 "to resemble its modern form, including for the first time Rule 23(a)'s requirements of commonality, typicality, numerosity, and adequacy, and Rule 23(b)(3)'s requirements of predominance and superiority," *Scott*, 954 F.3d at 519, the rule-makers expressly disclaimed the notion that the new Rule 23 requirements applied to section 216(b): "The present provisions of 29 U.S.C. § 216(b) are not intended to be affected by Rule 23, as amended." Fed. R. Civ. P. 23 adv. comm. note to 1966 amend.

In addition, FLSA collective actions and Rule 23 class actions "serve fundamentally different purposes." *Scott*, 954 F.3d at 519. "Unlike Rule 23, the collective action mechanism is, in effect, tailored specifically to vindicating federal labor rights." *Campbell*, 903 F.3d at 1112–13; *accord Scott*, 954 F.3d at 519. Thus, "where the conditions of § 216(b) are met, employees have a substantive 'right' to proceed as a collective." *Scott*, 954 F.3d at 519. In contrast, this substantive right "does not exist under Rule 23." *Id.* Rule 23 "is neither a creation of statute nor a provision of specific applicability to certain substantive rights or remedial schemes." *Campbell*, 903 F.3d at 1113. Rather, it simply "provides a general procedural mechanism for the resolution of claims on a class-wide basis." *Scott*, 954 F.3d at 519.

Further, "the FLSA not only imposes a lower bar than Rule 23, it imposes a bar lower in some sense even than Rules 20 and 42, which set forth the relatively loose requirements for permissive joinder and consolidation at trial." *Scott*, 954 F.3d at 520 (quoting *Campbell*, 903 F.3d at 1112). "Whereas Federal Rules of Civil Procedure 20 and 42 allow district courts discretion in granting joinder or consolidation, the FLSA,

which declares a right to proceed collectively on satisfaction of certain conditions, does not." *Id.* (internal brackets omitted).

MTM's reliance on "analogies" between Rule 23 and § 216(b) has no grounding in the text or purpose of the FLSA. Instead, MTM asserts that both FLSA collective actions and Rule 23 class actions "are forms of representative litigation." MTM Br. 55. Not so: "A collective action … is not a comparable form of representative action. Just the opposite[.]" *Campbell*, 903 F.3d at 1105. When originally enacted in 1938, the FLSA provided that employees may "designate an agent or representative to maintain such action for and in behalf of all employees similarly situated." *Scott*, 954 F.3d at 519 (quoting Fair Labor Standards Act of 1938, ch. 676, 52 Stat. 1060, 1069 (1938) (codified at 29 U.S.C. § 216(b))). In its 1947 amendment to the FLSA, Congress "expressly … put an end to representational litigation in the context of actions proceeding under § 216(b)" and added the opt-in requirement for plaintiffs to proceed collectively. *Scott*, 854 F.3d at 519 (citing Portal to Portal Act of 1947, Pub. L. No. 80-49, 61 Stat. 84, 87 (1947), *codified at* 29 U.S.C. § 216(b) (1946 Supp. II)); *accord Campbell*, 903 F.3d at 1105. Under the 1947 amendments, each opt-in plaintiff has party status, unlike unnamed

members of Rule 23 class actions represented by a named plaintiff. Wright & Miller § 1807. As *Campbell* explains:

> A collective action is more accurately described as a kind of mass action, in which aggrieved workers act as a collective of individual plaintiffs with individual cases—capitalizing on efficiencies of scale, but without necessarily permitting a specific, named representative to control the litigation, except as the workers may separately so agree.

903 F.3d at 1105.

MTM observes (at 56–57) that the term "similarly situated" has been used by the Supreme Court in cases involving Rule 23 class actions, that the advisory committee note to the 1966 amendments to Rule 23 references "persons similarly situated," and that the equity courts likewise used that phrase. But none of those sources establishes that the generic use of "similarly situated" to describe class members' relationship to the named plaintiff equates Rule 23's detailed criteria with the FLSA's statutory "similarly situated" standard. And as explained above, the same advisory committee note expressly disclaimed the application of Rule 23 requirements to FLSA collective actions.

2. MTM argues that the "similarly situated" standard for FLSA collectives should incorporate the Rule 23 requirements of commonality

and predominance. Numerous courts, however, have rejected importing these requirements into § 216(b), and this Court should do the same.

As to commonality, courts have "uniformly rejected th[e] conclusion" that the commonality principles set forth in *Wal-Mart* "should apply to the 'similarly situated' requirement in FLSA suits," "reaffirming that the FLSA's 'similarly situated' requirement is less demanding than Rule 23." Wright & Miller § 1807 (collecting cases); *see also* 1 *McLaughlin on Class Actions* § 2:16 (stating that "a collective action need not satisfy the requirements of Rule 23(a) and 23(b)" and that "the FLSA's 'similarly situated' requirement has generally been deemed less demanding than the Rule 23 commonality requirement").

Similarly, nearly all courts of appeals to consider the issue have held that the "similarly situated" standard does not incorporate Rule 23's predominance inquiry. *See Campbell*, 903 F.3d at 1111 (collecting cases). In *Scott*, for example, the Second Circuit reversed a district court's ruling that "collective plaintiffs could not be similarly situated because class plaintiffs' common issues did not predominate over individualized ones." *Scott*, 954 F.3d at 521. The court reasoned that "Section 216(b) has nothing comparable to Rule 23(b)(3)'s requirement[s] of predominance."

Id. at 519. Other courts of appeals have reached the same conclusion. *See*, *e.g.*, *O'Brien*, 575 F.3d at 584–85 (stating that requiring predominance "is a more stringent standard than is statutorily required"). In contrast, the Seventh Circuit stated in the FLSA context that "plaintiffs may be similarly situated if common questions predominate" among them. *Alvarez v. City of Chicago*, 605 F.3d 445, 449 (7th Cir. 2010). To the extent that MTM suggests that plaintiffs are similarly situated *only* if common questions predominate (a proposition the Seventh Circuit did not adopt), that suggestion lacks grounding in the text or purpose of § 216(b).[8]

In any event, the collective action here would satisfy requirements of commonality and predominance if they applied, for the same reasons the D.C.-law issue class satisfies them. As with the class action, the relevant question would be whether commonality and predominance were satisfied with respect to the part of the case that will be resolved collectively—not the claim as a whole. The collective action would satisfy

[8] MTM did not cite *Alvarez*, but instead cited *Espenscheid v. DirectSat USA, LLC*, 705 F.3d 770 (7th Cir. 2013), which cited *Alvarez* and suggested that the Rule 23 and § 216(b) standards had "largely merged." As *Campbell* explained, however, "*Espenscheid*'s depiction of section 216(b) reflects the Seventh Circuit's desire for '[s]implification' more than the text of the FLSA." *Campbell*, 903 F.3d at 1111.

a Rule 23-style commonality requirement because plaintiffs' claims depend on the common contention that MTM is a joint employer, which will be resolved "in one stroke" based on common evidence. JA1888. And resolution of that common issue in a collective action would meet a predominance requirement imported from Rule 23 because common questions predominate as to the threshold, material joint-employer issue. JA1896.[9]

D. This Court should reject the so-called ad hoc or multifactor approach.

In adopting the *Scott* and *Campbell* standard for "similarly situated," the district court correctly rejected the so-called "ad hoc" approach (which MTM calls a "multifactor" analysis, *see* MTM Br. 63–64). *See* JA2384. Under that approach, "rather than considering [how] the opt-in plaintiffs are *similar* in ways material to the disposition of their FLSA claims, district courts consider [how] the plaintiffs are factually *disparate* and the defenses are *individualized*." *Scott*, 954 F.3d

[9] The Chamber contends that the similarly situated standard also incorporates the Rule 23 typicality requirement, Chamber Amicus Br. 11–17. FLSA collective actions, however, are "nonrepresentative actions," and "have no place for conditions such as … typicality." *Campbell*, 903 F.3d at 1112; *accord Scott*, 954 F.3d at 519.

at 517. Courts that use the ad hoc approach consider, first, "the disparate factual and employment settings of the individual plaintiffs," second, "the various defenses available to defendants [that] appear to be individual to each plaintiff," and third, "fairness and procedural considerations." *Campbell*, 903 F.3d at 1113 (citation omitted). Although MTM does not explicitly advocate the ad hoc approach, it focuses on "dissimilarities" among the plaintiffs, MTM Br. 61, notes that other courts have adopted "multifactor" approaches, and cites cases that have applied the ad hoc approach, *id.* 63–64.

The ad hoc approach is not the best understanding of "similarly situated" because it examines that term "at such a high level of abstraction that it risks losing sight of the statute underlying it." *Campbell*, 903 F.3d at 1114; *accord Scott*, 954 F.3d at 517. "[R]ather than beginning with the term's meaning … the ad hoc approach tends to explain what the term similarly situated does not mean—not what it does." *Id.* (cleaned up).

Moreover, "an open-ended inquiry into the procedural benefits of collective action … invites courts to import, through a back door, requirements with no application to the FLSA—for example, the Rule

23(b)(3) requirements of adequacy of representation, superiority of the group litigation mechanism, or predominance of common questions." *Campbell*, 903 F.3d at 1115; *accord Scott*, 954 F.3d at 517. Indeed, that is precisely what MTM seeks to do in asking this Court to apply Rule 23 standards.

Further, that individual plaintiffs may be dissimilar on other issues should not preclude collective treatment of shared material issues of law or fact. *Scott*, 954 F.3d at 516 (stating that if the plaintiffs "share legal or factual similarities material to the disposition of their claims, 'dissimilarities in other respects should not defeat collective treatment'" (quoting *Campbell*, 903 F.3d at 1114)). Requiring more than one hundred seriatim actions litigating exactly the same issue—the result MTM seeks—would undermine Congress's broad, remedial intent in providing employees with the right to pursue FLSA collective actions. *Scott*, 954 F.3d at 516; *Campbell*, 903 F.3d at 1114.

Nonetheless, plaintiffs here are similarly situated as to the joint-employer issue under the ad hoc approach. Consideration of "the disparate factual and employment settings of the individual plaintiffs," *Campbell*, 903 F.3d at 1113, does not preclude proceeding collectively

because the joint-employer question—which turns on whether MTM shares or codetermines the essential terms and conditions of the drivers' employment—will be answered identically for all plaintiffs using common evidence regarding MTM's policies and practices. MTM's argument that the drivers are not similarly situated because they were not employed in the same department, division, or location, had different salaries, and days that were structured differently, MTM Br. 63–64, ignores plaintiffs' contention that MTM's status as a joint employer can be established based entirely on facts that are the same for all members of the collective action. As the district court noted, "MTM is likely to be a joint employer for all drivers or for none at all." JA2387.

As to the second ad hoc factor—"the various defenses available to defendants which appear to be individual to each plaintiff," *Campbell*, 903 F.3d at 1113—MTM asserts that it "will unquestionably have 'individualized defenses' dependent on the specific allegations of particular plaintiffs employed directly by different [transportation service providers]." MTM Br. 63–64. MTM does not explain what those "unquestionabl[e]" individualized defenses might be. The differences in payment rates and schedules that MTM identifies, for example, do not

provide MTM distinct defenses to plaintiffs' contention that common evidence of *MTM*'s policies and practices demonstrates that it is a joint employer.

Finally, "fairness and procedural considerations," *Campbell*, 903 F.3d at 1113, weigh heavily in favor of collective resolution of the joint-employer issue. Absent collective adjudication, that same issue will be litigated, using the same evidence, seriatim in more than one hundred individual actions. "[T]here can be no doubt that permitting this case to proceed as a collective action on the issue of whether MTM is a joint employer will benefit individual plaintiffs and the judicial system by the efficient resolution in one proceeding of a common issue of law and fact." JA2389.

CONCLUSION

The district court's certification of an issue class under Rule 23(c)(4) should be affirmed. This Court should decline to exercise pendent appellate jurisdiction over the district court's decision regarding the FLSA collective. If the Court reaches that issue, it should affirm the district court's denial of MTM's motion to decertify the collective action.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and the Rules of this Court, it contains 12,144 words.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook font.

/s/ *Michael T. Kirkpatrick*
Michael T. Kirkpatrick

CERTIFICATE OF SERVICE

I certify that on July 25, 2022, I caused the foregoing to be filed with the Clerk of the Court through the Court's ECF system, which will serve notice of the filing on all registered filers in this case.

s/ *Michael T. Kirkpatrick*
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