No. 25-559

IN THE

Supreme Court of the United States

CRACKER BARREL OLD COUNTRY STORE, INC.,
Petitioner,

v.

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

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the district court acted within its discretion in concluding that members of this putative Fair Labor Standards Act collective action are sufficiently likely to be "similarly situated" that notice of the lawsuit may be sent to individuals who may be eligible to opt in to the action.

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INTRODUCTION

Since its enactment almost ninety years ago, the Fair Labor Standards Act (FLSA) has authorized employees to seek redress for violations of the Act by initiating a "collective action" on behalf of themselves and other employees who are "similarly situated." Because the FLSA requires employees who wish to participate in a collective action to affirmatively opt in, this Court has made clear that district courts have a duty to manage the opt-in process, including by approving timely and accurate notice of the action to be sent to employees who may be similarly situated to the plaintiff.

As recognized below, district courts have almost universally coalesced around a two-step process for managing FLSA collective actions like this one. At the first step, the plaintiff must make a sufficient threshold showing that members of the proposed collective action are similarly situated. If the plaintiff does so, the court will authorize the plaintiff to disseminate notice to other employees who are potentially eligible to opt in. At the second step, after the opt-in period closes and the full roster of opt-in members is known, the court will make a final determination whether the opt-in members are similarly situated and so can proceed collectively.

Below, Cracker Barrel unsuccessfully challenged the district court's decision to use this two-step process for assessing similarity. In this Court, though, Cracker Barrel raises a different issue: what evidentiary burden a plaintiff must satisfy to establish that members of a proposed collective action are "similarly situated" prior to a court's authorizing notice. Because Cracker Barrel did not present that

issue below, however, the court of appeals did not address it. The court ruled that the district court acted within its discretion in using a two-step process, and it expressly "d[id] not reach th[e] issue" of "the standard the district court should apply" in authorizing notice. Pet. App. 7a n.4. That Cracker Barrel's petition seeks review of an issue that was neither pressed nor passed upon below is reason enough to deny it.

Moreover, the issue does not merit review in any event. Unlike the court below, three courts of appeals have recently weighed in on the issue of the showing needed to secure approval to send notice, and all are broadly in alignment. All three courts agree that the burden is more than minimal and that district courts must review all relevant evidence from both sides before deciding whether to approve notice. Although the three courts frame their analyses in somewhat different terms, district courts are only just beginning to apply the decisions, and it is too soon to tell whether differences in the decisions' language will translate into divergent outcomes in practice. Cracker Barrel, at least, has not shown such divergence as of now.

Cracker Barrel is also wrong to contend that the evidentiary standard applied by the district court in this case conflicts with this Court's decision in *E.M.D. Sales, Inc. v. Carrera*, 604 U.S. 45 (2025)—a decision that the court of appeals acknowledged and distinguished. As the decision below explains, *E.M.D. Sales* addresses the burden of proof that an employer must satisfy to prevail on an affirmative defense to an FLSA claim. It says nothing about the circumstances under which a court may grant approval to give notice of a collective action.

Review is unwarranted for the further reason that the district court's decision to approve notice in this case reflects a sound application of its case-management discretion. Respondents challenge certain of Cracker Barrel's practices with respect to tipped workers. After receiving evidence from both sides, the district court approved the dissemination of notice to tipped workers who were allegedly subject to the challenged practices. The court reasoned that those workers all have the same job positions and responsibilities as Respondents and so are "similarly situated" with respect to the alleged FLSA violations. While Cracker Barrel denies that it has unlawful policies in place, the district court properly held that this contention can be evaluated on a collective basis after discovery, with the benefit of any evidence held by the opt-in members of the collective action.

This Court should deny the petition for review.

STATEMENT

Legal Background

Congress enacted the FLSA in 1938 to promote an express national policy of "correct[ing] and as rapidly as practicable … eliminat[ing]," 29 U.S.C. § 202(b), labor conditions that are "detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers," *id.* § 202(a). To further its aim of "protect[ing] all covered workers from substandard wages and oppressive working hours," the FLSA requires covered employers to pay a minimum hourly wage and to provide additional overtime pay to employees who work more than forty hours in a week. *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 214 (2016)

(quoting *Barrentine v. Ark.-Best Freight Sys., Inc.*, 450 U.S. 728, 739 (1981)); *see* 29 U.S.C. §§ 206–207.

The FLSA provides that a worker who is injured by an employer's violation of these statutory guarantees may file a lawsuit "for and in behalf of himself … and other employees similarly situated," as long as each employee who wishes to be included in a so-called collective action "gives his consent in writing to become … a party" and files that consent with the court. 29 U.S.C. § 216(b). By giving workers "the opportunity to proceed collectively," the FLSA allows them "the advantage of lower individual costs to vindicate rights by the pooling of resources." *Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, 170 (1989). The collective-action mechanism also benefits "[t]he judicial system" by enabling "efficient resolution in one proceeding of common issues of law and fact arising from the same alleged … activity." *Id.*

This Court has recognized, however, that such benefits "depend on employees receiving accurate and timely notice concerning the pendency of [a] collective action, so that they can make informed decisions about whether to participate." *Id.* The Court has thus held that a district court presiding over a collective action "has a managerial responsibility to oversee the joinder of additional parties to assure that the task is accomplished in an efficient and proper way." *Id.* at 170–71. In exercising this responsibility, the Court has explained, "it lies within the discretion of a district court" to "monitor[]" a plaintiff's "preparation and distribution" of "timely, accurate, and informative" notice of the lawsuit to employees who may be eligible to opt in to the collective action. *Id.* at 171–72; *see id.* at 169 (holding that "district courts have discretion, in

appropriate cases, to implement 29 U.S.C. § 216(b) … by facilitating notice to potential plaintiffs").

District courts have generally coalesced around a two-step process for managing FLSA collective actions. *See Richards v. Eli Lilly & Co.*, 149 F.4th 901, 906 (7th Cir. 2025), *cert. pet. filed*, No. 25-476 (Oct. 15, 2025). At the first step, commonly known as "conditional certification," if the plaintiffs make a threshold showing that members of the proposed collective action are sufficiently likely to be similarly situated, the court will authorize notice of the action to be sent to potential opt-in members and set a deadline for opting in. *Id.* at 906–07; *see Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 75 (2013) (explaining that the "sole consequence of conditional certification is the sending of court-approved written notice to employees"). At the second step, which typically occurs after the opt-in deadline and the close of discovery, the employer may seek "decertification" of the collective action. *Richards*, 149 F.4th at 907. If the district court then determines, based on a complete record, that the plaintiffs have not carried their burden of showing that the workers who have opted in to the collective action "are, in fact, similarly situated," the action will proceed solely with respect to the original named plaintiffs' individual claims. *Id.*

Factual and Procedural Background

1. Petitioner Cracker Barrel is a national restaurant chain that employs or has employed Respondents Andrew Harrington, Katie Liammaytry, Jason Lenchert, and Dylan Basch as servers. D. Ct. Dkt. 74 ¶¶ 1, 6–9. Respondents' operative complaint alleges that Cracker Barrel subjects servers like them to three practices that violate the FLSA: Cracker Barrel

pays servers less than the minimum wage for untipped workers despite assigning them significant untipped duties; gives servers inadequate notice of their below-minimum pay rate; and requires servers to perform unpaid, off-the-clock work. *Id.* ¶¶ 1–4. Respondents raise these claims on behalf of themselves and current and former Cracker Barrel servers who were employed during a specified timeframe in states where Cracker Barrel pays servers less than the untipped minimum. Pet. App. 71a.

In March 2023, the district court granted conditional certification of the proposed collective action. *Id.* at 56a–98a. The court began by explaining that it could plausibly be inferred, based on the complaint's allegations and evidence produced by Respondents, that Cracker Barrel had violated its servers' FLSA rights. *Id.* at 75a–80a. The court then held that Respondents had satisfied their "burden … to establish [that] they are similarly situated to the rest of the" members of the proposed collective action. *Id.* at 81a. As the court explained, Respondents "all … are current or former tipped employees for Cracker Barrel" and so "are similarly situated" to members of the proposed collective action "with regard to their pay provisions." *Id.* at 82a. Moreover, because Respondents "all … are 'servers' and have the same job duties," and because Respondents had produced evidence that Cracker Barrel servers nationwide are uniformly required to perform the same untipped tasks, the court found that members of the proposed collective action "are similarly situated with regard to their job requirements." *Id.* And the court further observed that Respondents had "provide[d] declarations of other potential [collective action] members 'confirming Cracker Barrel's nationwide FLSA viola-

tions'" and testifying to having observed "other servers at their locations being treated the same." *Id.*

The court acknowledged that Cracker Barrel had "submit[ted] its own affidavits and declarations to justify its … policies as compliant under the FLSA." *Id.* at 83a. The court, however, found that "[t]he declarations and affidavits provided by [Respondents] and potential [collective action] members contain substantial allegations that they were 'victims' of Cracker Barrel's uniform, nationwide policies." *Id.* (citation omitted). Faced with competing evidence "at this first stage of certification," the district court held that it was premature to "resolve factual disputes, decide substantive issues relating [to] the merits of the claims, or make credibility determinations." *Id.* The district court accordingly found that Respondents had adequately demonstrated "for notice purposes" that members of the collective action were similarly situated. *Id.* At the same time, the court left open the possibility that Cracker Barrel may, "after discovery," seek "'decertification' of the collective action if it can show that [Respondents] do not satisfy the 'similarly situated' requirement in light of further evidence." *Id.* at 74a (citation omitted).

In addition, the court rejected Cracker Barrel's argument that notice should not be sent to workers whose FLSA claims may be subject to arbitration. *Id.* at 85a–87a. Observing that the viability of Cracker Barrel's affirmative defense depends on plaintiff-specific factors, the court found it premature to assess that defense on an incomplete record. *Id.* at 86a–87a.

Finally, the court rejected Cracker Barrel's argument that notice should not be disseminated to employees who worked for Cracker Barrel outside the

forum state of Arizona, holding that because one of the plaintiffs had been employed in Arizona, the court had personal jurisdiction over Cracker Barrel with respect to the collective action. *Id.* at 87a–90a.

The court thus authorized notice of the lawsuit to be sent to potential opt-in members, and it set a ninety-day deadline for opting in. *Id.* at 92a.

2. Before notice was disseminated, Cracker Barrel moved for the district court to certify the conditional certification order for interlocutory appeal under 28 U.S.C. § 1292(b). Pet. App. 42a. Among other things, Cracker Barrel argued that the § 1292(b) criteria supported interlocutory review of the question whether the district court had permissibly applied a two-step process for determining whether the case could proceed on a collective basis or whether, instead, the district court should have applied a one-step process purportedly adopted by the Fifth Circuit in *Swales v. KLLM Transport Services, LLC*, 985 F.3d 430 (5th Cir. 2021). Pet. App. 42a–43a. Although the court saw no "substantial ground for difference of opinion" on that question, *id.* at 49a, it granted Cracker Barrel's motion because it found that two other issues—whether notice was proper as to opt-in members who had signed arbitration agreements or as to non-Arizona opt-in members—satisfied the § 1292(b) standard. *See id.* at 46a–49a. The court then stayed dissemination of notice to potential opt-in plaintiffs pending resolution of Cracker Barrel's petition to the Ninth Circuit for permission to appeal. *Id.* at 54a.

3. The Ninth Circuit granted Cracker Barrel's petition for interlocutory appeal. In addition to the two issues that the district court had stated were appropriate for review, the court of appeals opted to

address the arguments that Cracker Barrel made as to whether "the district court follow[ed] the correct procedure in granting preliminary certification." Pet. App. 3a. That issue, the Ninth Circuit held, was "easily resolved" in favor of affirmance. *Id.* at 5a.

As the Ninth Circuit explained, the "two-step 'certification' procedure" that the district court employed is "generally accepted" and had previously been "endorsed" by circuit precedent. *Id.* at 6a; *see id.* at 2a (describing the "two-step 'certification' process" as the "near-universal practice" (quoting *Campbell v. City of Los Angeles*, 903 F.3d 1090, 1100 (9th Cir. 2018))). The court then rejected Cracker Barrel's argument that this Court's decision in *E.M.D. Sales* is "irreconcilable" with the precedent that permits the two-step approach. *Id.* at 6a n.3. The court explained that *E.M.D. Sales*, which addresses the issue of what burden of proof an employer must satisfy to establish that a particular employee is exempt from the FLSA's protections, says "nothing about how a district court should manage a collective action or the procedure it should follow when determining whether to exercise its discretion to facilitate notice to prospective opt-in plaintiffs." *Id.*

Crucially, the Ninth Circuit "d[id] not reach th[e] issue" that Cracker Barrel presents in its petition: what "standard the district court should apply in evaluating a preliminary certification motion." *Id.* at 7a n.4. Instead, the court noted that Cracker Barrel "challenged only the district court's use of the two-step procedural mechanism"; it did not challenge the evidentiary standard that the district court applied in approving the dissemination of notice. *Id.*

In a ruling that Cracker Barrel does not challenge before this Court, the court of appeals also held that the district court did not abuse its discretion in authorizing notice to be sent to workers whose FLSA claims may be subject to arbitration because "multiple fact issues" remain in dispute about the enforceability of Cracker Barrel's arbitration provision. *Id.* at 9a; *see also id*. at 7a–8a (citing decisions from the Fifth, Sixth and Seventh Circuits and stating that notice should not be authorized if it is undisputed that the claims of potential opt-in members are subject to arbitration).

The court of appeals reversed in one respect: It ruled that the district court erred in approving notice for potential opt-in members who had not been employed in Arizona. *Id.* at 10a–16a. Respondents have filed a petition for certiorari seeking review of that ruling. *See Harrington v. Cracker Barrel Old Country Store, Inc.*, U.S. No. 25-534 (filed Oct. 30, 2025).

All in all, the Ninth Circuit affirmed the district court's discretionary judgment that notice may be sent to workers who may be eligible to opt in, although it held as a matter of law that non-Arizona workers would not be eligible. Pet. App. 16a.

4. Cracker Barrel petitioned the Ninth Circuit for panel rehearing and rehearing en banc. The court denied the petitions, with no judge calling for a vote. Pet. App. 130a–31a.

REASONS FOR DENYING THE WRIT

I. Cracker Barrel's question presented was not raised below, and the court of appeals thus expressly declined to rule on it.

Cracker Barrel seeks review of an issue that it did not present below and that the court of appeals

expressly declined to reach: whether "preponderance of the evidence" or some other showing of similarity is required of an FLSA plaintiff who hopes to proceed collectively to establish that notice may be sent to potential opt-in members. Pet. i–ii; *id.* at 8 (arguing for review of "the pre-notice burden-of-proof issue").

In its petition, Cracker Barrel takes the position that notice may be approved only if "a plaintiff shows by a preponderance of the evidence that the members of the collective receiving notice are 'similarly situated' to the named plaintiff within the meaning of 29 U.S.C. § 216(b)." *Id.* at i–ii. The term "preponderance of the evidence," though, appears nowhere in Cracker Barrel's opposition to Respondents' motion in the district court for leave to disseminate notice. *See* D. Ct. Dkt. 78. It appears nowhere in Cracker Barrel's motion asking the district court to certify for interlocutory review its order approving notice. *See* D. Ct. Dkt. 84. And it appears nowhere in Cracker Barrel's opening or reply briefs in the Ninth Circuit. *See* App. Ct. Dkt. 9; App. Ct. Dkt. 31.[1]

Indeed, as the decision below explicitly observes, Cracker Barrel's arguments in the court of appeals did not address "the standard [a] district court should

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[1] After briefing was complete, Cracker Barrel sought leave to file a supplemental brief arguing that authorization of notice was inconsistent with the decision in *E.M.D. Sales*, which held that preponderance of the evidence is the standard for establishing an employer's affirmative defense to an FLSA claim. App. Ct. Dkt. 46. Observing that *E.M.D. Sales* says "nothing" about the issue on appeal—"how a district court should manage a collective action or the procedure it should follow when determining whether to exercise its discretion to facilitate notice to prospective opt-in plaintiffs"—the court of appeals declined to allow the supplemental brief. Pet. App. 6a n.3; *see also infra* Part II.B.

apply in evaluating" whether to approve notice. Pet. App. 7a n.4. Rather, Cracker Barrel "challenged only the district court's use of [a] two-step procedural mechanism" to assess whether members of the collective action are similarly situated. *Id.* This was the issue that Cracker Barrel asked the district court to certify for interlocutory appeal. *See, e.g.*, D. Ct. Dkt. 84 at 10 (asking whether "[a] two-step approach to collective certification" is "proper"). And this was the issue that Cracker Barrel presented in its Ninth Circuit briefing. *See, e.g.*, App. Ct. Dkt. 9 at 42 (urging the Ninth Circuit to require "a single-step analysis").

Because Cracker Barrel did not present the court of appeals with the issue of the burden that an FLSA plaintiff must satisfy to secure authorization to send notice to potential opt-in members, the Ninth Circuit stated that it "d[id] not reach that issue." Pet. App. 7a n.4. Further, the court noted that the issue remains unresolved in the Ninth Circuit. *Id.*

This Court's "traditional rule[] … precludes a grant of certiorari" where, as here, "the question presented was not pressed or passed upon below." *United States v. Williams*, 504 U.S. 36, 41 (1992) (citation omitted); *see Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005) (refusing to opine on issues "not addressed by the Court of Appeals" because "we are a court of review, not of first view"). Adherence to that rule requires denial of Cracker Barrel's petition.

II. The question presented does not merit review.

A. There is no conflict on the issue in the courts of appeals.

The issue of what evidentiary showing of similarity is sufficient to permit a district court to conclude, in

its discretion, that a plaintiff may disseminate notice to potential opt-in members does not merit review in any event—and certainly not in this case. The Ninth Circuit has not resolved the issue, Pet. App. 7a n.4, and only three courts of appeals have examined it. The approaches of those three courts are broadly consistent, even though their opinions use differing language to describe the approaches.

1. The majority of the courts of appeals have not addressed the question of what evidentiary burden a plaintiff must satisfy to obtain court approval to send notice of a collective action. Cracker Barrel concedes that the Fourth, Eighth, and D.C. Circuits "have not addressed the question." Pet. 16. And although Cracker Barrel claims that the First, Third, Tenth, and Eleventh Circuits "have acquiesced" to a low evidentiary standard "without express adoption," *id.*, the cases that Cracker Barrel cites neither review a district court's ruling with respect to notice nor opine on whether notice was properly authorized or withheld. *See Kwoka v. Enterprise Rent-a-Car Co. of Bos., LLC*, 141 F.4th 10, 12 (1st Cir. 2025) (reviewing a timeliness issue); *Zavala v. Wal Mart Stores Inc.*, 691 F.3d 527, 534 (3d Cir. 2012) (analyzing "the standard for final certification" *after* notice has been disseminated and the opt-in process has ended); *Thiessen v. Gen. Elec. Capital Corp.*, 267 F.3d 1095, 1099 (10th Cir. 2001) (reviewing dismissal of opt-in members); *Hipp v. Liberty Nat'l Life Ins. Co.*, 252 F.3d 1208, 1217–19 (11th Cir. 2001) (per curiam) (affirming a finding, following the notice and opt-in process, that plaintiffs were similarly situated).

The case that Cracker Barrel cites in support of its claim that the Second Circuit has "expressly adopted" a lenient standard, Pet. 16, is similar. As with the

cases from the First, Third, Tenth, and Eleventh Circuits, the decision in *Scott v. Chipotle Mexican Grill, Inc.*, 954 F.3d 502 (2d Cir. 2020), announces no holding as to notice. Rather, *Scott* reviews a district court's "decertification" of an FLSA collective action based on the plaintiffs' failure to establish that they were "similarly situated" after notice was sent and the opt-in window closed. *Id.* at 507–09. Whether the district court had properly approved notice (and what standard it should have used in doing so) was not addressed in *Scott*.

Cracker Barrel also counts the Ninth Circuit among the courts of appeals that are supposedly split over the pre-notice burden issue. *See* Pet. 17–18. But the Ninth Circuit's opinion here "d[id] not reach that issue," and the court noted that prior circuit precedent likewise "did not address" it. Pet. App. 7a n.4. Indeed, although Cracker Barrel cites the court's opinion in *Campbell* as setting out the evidentiary "requir[ement] at step one" of the two-step certification process, Pet. 5, Cracker Barrel later contradicts itself by conceding that the decision below is "correct[]" that *Campbell* "did not address the standard [a] district court should apply in evaluating a preliminary certification motion." *Id.* at 13 n.11 (second quoting Pet. App. 7a n.4).

2. Three courts of appeals—the Fifth, Sixth, and Seventh Circuits—have addressed the showing that a plaintiff must make to be eligible for a district court's discretionary authorization to send notice to potential opt-in members. These circuits' decisions are not in conflict with one another.

The Fifth Circuit's 2021 *Swales* opinion was the first appellate decision to rule on "the legal standard

that district courts should use when deciding whether to send notice in an FLSA collective action." 985 F.3d at 439. Although *Swales* emphasizes that district courts should "rigorously enforce" the FLSA's similarity requirement "at the outset of the litigation," *id.* at 443, it does not set forth the evidentiary burden of proof. Rather, *Swales* focuses on the process that district courts should use in deciding whether to approve notice. Under *Swales*, "a district court should identify, at the outset of the case, what facts and legal considerations will be material to determining whether a group of 'employees' is 'similarly situated'" and "should authorize preliminary discovery accordingly." *Id.* at 441. Then, "[a]fter considering all available evidence," the district court should decide whether the plaintiffs "have … met their burden of establishing similarity," whether the court "needs further discovery to make this determination," or whether "only certain subcategories of [employees] … should receive notice." *Id.* at 443.

Cracker Barrel reads *Swales* to hold that a plaintiff must conclusively "show 'similarly situated' by a preponderance of the evidence before notice may be sent." Pet. 18. That opinion, however, does not state what evidentiary burden a plaintiff must satisfy before a court may authorize notice. Indeed, far from announcing a categorical rule on that point, *Swales* emphasizes that "[t]he bottom line is that [a] district court has broad[] litigation-management discretion." 985 F.3d at 443. So, for example, where "the evidence necessary to resolve a similarity dispute is likely in the hands of yet-to-be-noticed plaintiffs," *Richards*, 149 F.4th at 913, nothing in *Swales* suggests that a district court would abuse its discretion by authorizing notice and initiating the opt-in process

before demanding that the plaintiff show similarity by a preponderance of the evidence.

Next, in the 2023 decision in *Clark v. A&L Homecare & Training Center, LLC*, 68 F.4th 1003 (6th Cir. 2023), the Sixth Circuit addressed "the showing of similarity that is necessary for a district court to facilitate notice of an FLSA suit." *Id.* at 1007. Like the Fifth Circuit, the Sixth Circuit opined that, "[t]o the extent practicable, … court-approved notice of [a] suit should be sent only to employees who are in fact similarly situated." *Id.* at 1010. And like the Fifth Circuit, the Sixth Circuit held that "[t]he parties can present … evidence" as to similarity and that "the district court should consider that evidence" prior to ruling on notice. *Id.* at 1012. At the same time, the Sixth Circuit expressed doubt that "a district court can conclusively make 'similarly situated' determinations as to employees who are in no way present in the case" and explained that this Court's decision in *Hoffmann-La Roche* supports the view that notice may be sent to employees who "*might* be similarly situated to the original plaintiffs, and who thus might be eligible to join the suit." *Id.* at 1010. Distilling these considerations, the Sixth Circuit ultimately held that, "for a district court to facilitate notice of an FLSA suit to other employees, the plaintiffs must show a 'strong likelihood' that those employees are similarly situated to the plaintiffs themselves." *Id.* at 1011.

Finally, less than six months ago, the Seventh Circuit became the third court of appeals to address the standard for "assessing the propriety of notice to a proposed collective." *Richards*, 149 F.4th at 905. In *Richards*, the court "join[ed] the Fifth and Sixth Circuits" and rejected an "overly permissive notice standard" that would require only a "modest" showing

from the plaintiff. *Id.* at 911. Echoing *Clark*, the court also acknowledged that, "[w]hile some factual disputes about the similarity of a proposed collective may be definitively resolved prior to notice, others cannot be because the evidence necessary to establish similarity resides with yet-to-be-noticed plaintiffs." *Id.* (citing *Clark*, 68 F.4th at 1010). The court thus reasoned that the proper notice standard must allow leeway for "the sound discretion of the district court." *Id.* at 913. Therefore, the court held, once a plaintiff has "ma[de] a threshold showing that there is a material factual dispute as to whether the proposed collective is similarly situated," a district court must decide whether notice is proper based on its "assessment of the factual dispute before it." *Id.* For example, if "the evidence necessary to resolve a similarity dispute is likely in the hands of yet-to-be-noticed plaintiffs," a district court may allow notice prior to resolving the dispute. *Id.* But if "a similarity dispute can be resolved by a preponderance of the evidence before notice," the court "may authorize limited and expedited discovery to make this determination and tailor (or deny) notice accordingly." *Id.*

Although the descriptions of the notice standard by the Fifth, Sixth, and Seventh Circuits are "slightly different" from one another, *id.* at 908, they are similar in their fundamentals. All three courts recognize that "[t]he watchword" with respect to notice "is flexibility." *Id.* at 914; *see Clark*, 68 F.4th at 1010 (observing that the issue of similarity "tend[s] to be factbound, meaning [it] depend[s] on the specific facts" and evidence before the court); *Swales*, 985 F.3d at 443 (acknowledging a district court's "broad[] litigation-management discretion"). All three courts require district courts to consider all available

evidence of similarity or dissimilarity prior to ruling on notice. *See Richards*, 149 F.4th at 913; *Clark*, 68 F.4th at 1012; *Swales*, 985 F.3d at 443. And all three courts agree that district courts should, where possible, seriously endeavor to assess similarity prior to notice, even if making a conclusive ruling at that stage may not always be efficient or practicable. *See Richards*, 149 F.4th at 913–14 (distinguishing similarity disputes that may be capable of resolution prior to notice from those that may not); *Clark*, 68 F.4th at 1010–11 (requiring a showing of similarity prior to notice but observing that relevant evidence may not be available until after notice and a chance to opt in); *cf. Hamm v. Acadia Healthcare Co.*, 748 F. Supp. 3d 404, 411 (E.D. La. 2024) (observing that *Swales* may not foreclose the possibility of further proceedings on the issue of similarity even after notice has been sent to potential opt-in members).

Cracker Barrel's petition identifies no relevant differences in how district courts applying *Swales*, *Clark*, and *Richards* are proceeding with respect to notice. And statistics cited by Cracker Barrel (which predate the Seventh Circuit's decision in *Richards*) suggest that district courts in the Fifth and Sixth Circuits, at least, are generally in alignment. *See* Pet. 27 (stating that during a two-year period, courts in the Fifth Circuit approved notice in eight out of twelve cases (66.7%), as compared to eleven out of nineteen cases (57.9%) in the Sixth Circuit).

To the extent that the approaches taken by the Fifth, Sixth, and Seventh Circuits may wind up causing district courts to exercise their discretion in meaningfully different ways, the recency of the *Swales*, *Clark*, and *Richards* decisions and the scarcity of district court cases applying them militate

in favor of further percolation. For example, district courts in the Seventh Circuit have thus far applied *Richards* only three times in determining whether to authorize notice. *See Gower v. Roundy's Supermarkets Inc.*, 2025 WL 3537391, at *5 (N.D. Ill. Dec. 10, 2025) (authorizing notice where evidence needed conclusively to determine similarity was likely in the hands of yet-to-be-noticed parties); *Sims v. Am. Heritage Protective Servs., Inc.*, 2025 WL 3240900, at *3–6 (N.D. Ill. Nov. 20, 2025) (denying notice based on defendant's unrebutted evidence of dissimilarity); *Dobrov v. Hi-Tech Paintless Dent Repair, Inc.*, 2025 WL 2720663, at *5 (N.D. Ill. Sept. 24, 2025) (making a conclusive finding on similarity prior to notice because the record was sufficiently developed to do so). Such a limited sample makes it difficult to predict how district courts in the Seventh Circuit will exercise their discretion as compared to district courts in the Fifth and Sixth Circuits.

Given the recency of the relevant circuit precedent, it is unsurprising that the picture of how courts are implementing the decisions in practice has not yet come into focus. This Court should not grant review of an issue that most courts of appeals (including the court of appeals in this case) have not yet addressed and that may end up generating broad consensus.

B. *E.M.D. Sales* does not speak to the question presented.

Cracker Barrel argues at length, *see* Pet. 20–26, that the evidentiary standard that the district court here applied (and that the Ninth Circuit declined to review) conflicts with this Court's recent decision in *E.M.D. Sales*. As the court below remarked, Pet. App. 6a n.3, *E.M.D. Sales* has no bearing on the issue.

In *E.M.D. Sales*, this Court addressed "the standard of proof that an employer must satisfy to show that an employee is exempt" from the FLSA's protections. 604 U.S. at 47. Although the Fourth Circuit had held that an employer must prove the applicability of an exemption by clear and convincing evidence, *see id.* at 49, this Court rejected that heightened evidentiary standard. As the Court explained, "[t]he usual standard of proof in civil litigation is preponderance of the evidence," and the FLSA's exemptions offer no reason to depart from that default standard. *Id.* at 47.

Cracker Barrel argues that the notice standard applied in this case conflicts with *E.M.D. Sales*, which it reads to require an FLSA plaintiff to establish by a preponderance of the evidence, prior to the dissemination of notice, that members of a proposed collective action are "similarly situated." Pet. 20–21. *E.M.D. Sales*, however, "said nothing about how a district court should manage a collective action or the procedure it should follow when determining whether to exercise its discretion to facilitate notice to prospective opt-in plaintiffs." Pet. App. 6a n.3; *see Richards*, 149 F.4th at 912 (citing *E.M.D. Sales* for the idea that "plaintiffs must [ultimately] establish their similarity … by a preponderance of the evidence" but noting that it does not speak to "[w]hether a plaintiff can reasonably be expected to make this showing before notice[]").

Whatever implications *E.M.D. Sales* has for the evidentiary burden that plaintiffs (or defendants) must satisfy to establish the elements of their claims (or defenses), the burden necessary to support the dissemination of notice is "a different question

altogether," *Richards*, 149 F.4th at 912—and one as to which *E.M.D. Sales* is entirely silent.

III. The district court properly exercised its case-management discretion in this case.

Resolving the issue that Cracker Barrel presented to it, the court of appeals addressed a district court's process for considering whether a plaintiff has shown that other employees are similarly situated for purposes of an FLSA collective action. As the court of appeals explained, the "near-universal" view is that a district court has discretion to employ a two-step process to assess whether members of a collective action are similarly situated; a district court need not make a conclusive finding with respect to similarity in every case prior to approving notice. Pet. App. 2a (quoting *Campbell*, 903 F.3d at 1100); *see Waters v. Day & Zimmermann NPS, Inc.*, 23 F.4th 84, 89 (1st Cir. 2022) (noting the "loose consensus" among district courts around a two-step approach (quoting *Campbell*, 903 F.3d at 1108)). Thus, multiple courts of appeals have affirmatively stated that a two-step approach is a permissible (though not mandatory) exercise of a district court's case-management discretion. *See Scott*, 954 F.3d at 515 (2d Cir.); *Zavala*, 691 F.3d at 536 (3d Cir.); *Clark*, 68 F.4th at 1010–11 (6th Cir.); *Richards*, 149 F.4th at 913 (7th Cir.); *Campbell*, 903 F.3d at 1110 (9th Cir.); *Thiessen*, 267 F.3d at 1105 (10th Cir.); *Morgan v. Family Dollar Stores, Inc.*, 551 F.3d 1233, 1260 (11th Cir. 2008).

Below, Cracker Barrel asked the court of appeals to adopt a "one-step mechanism" that Cracker Barrel read the Fifth Circuit to have adopted in *Swales*. App. Ct. Dkt. 9 at 72. Under Cracker Barrel's proposed process, the decision whether a case may proceed as a

collective action must be definitively made before notice is given. *Swales*, though, does not foreclose the use of a two-step process in appropriate cases, such as cases where "the evidence necessary to resolve a similarity dispute is likely in the hands of yet-to-be-noticed plaintiffs." *Richards*, 149 F.4th at 913; *see Hamm*, 748 F. Supp. 3d at 411 ("The Fifth Circuit has not ruled on whether a defendant may bring a motion to decertify after the initial certification of an FLSA collective action under the *Swales* framework.").

More fundamentally, whatever level of pre-notice fact-finding it requires, "*Swales* did not change the inquiry as to whether an FLSA action may proceed as a collective action." *Segovia v. Fuelco Energy LLC*, 2021 WL 2187956, at *10 (W.D. Tex. May 28, 2021). Even after *Swales*, then, the Fifth Circuit has affirmed district courts' conclusions on similarity in cases where the courts used a two-step procedure. *See, e.g.*, *Badon v. Berry's Reliable Resources, LLC*, 2024 WL 4540334, at *4 (5th Cir. Oct. 22, 2024) (per curiam); *Loy v. Rehab Synergies, LLC*, 71 F.4th 329, 333–35 & n.1 (5th Cir. 2023). These decisions underscore that *Swales* does not alter the substantive legal standards that apply in FLSA actions or that govern whether they may proceed collectively.[2]

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[2] Even as to the dissemination of notice, statistics cited by Cracker Barrel suggest that *Swales* has not led district courts in the Fifth Circuit to different outcomes from district courts elsewhere. During the two-year, post-*Swales* period examined by the sources that Cracker Barrel cites, dissemination of notice was approved in the majority of cases in the Fifth Circuit, just as in every other circuit. Pet. 27. Indeed, Cracker Barrel's statistics show little difference between the approval rate in the Fifth Circuit (67%) and in the Ninth Circuit (71%). *Id.*

The courts of appeals' broad recognition that a district court has discretion as to the best process for evaluating similarity rests on a sound foundation of common sense. As the Seventh Circuit has explained, a court's ability to assess similarity before the full roster of opt-in members has been established will "turn[] largely on the nature of plaintiffs' allegations." *Richards*, 149 F.4th at 912. "For example, if the common thread connecting plaintiffs' claims is an employer's informal policy of requiring work off the clock, it may be impossible to prove which employees were subject to that policy until opt-in plaintiffs are identified." *Id.* at 912–13. In other cases, though, "it may be readily proven prior to notice that a challenged policy was limited in scope—for example, to only a particular type of worker or geographic location." *Id.* at 913; *see Clark*, 68 F.4th at 1010. Cracker Barrel offers no reason to deprive district courts of the discretion to make appropriate case-by-case decisions about whether the identities of the opt-in members must be discovered before a definitive assessment of similarity is possible.

Moreover, requiring a one-size-fits-all approach would "leave district courts ill-equipped to efficiently resolve the varied factual disputes that can arise when defining the scope of a collective action." *Richards*, 149 F.4th at 912. It would also flout this Court's recognition that a district court must have "procedural authority to manage the process of joining multiple parties in a manner that is orderly[] [and] sensible." *Hoffmann-La Roche*, 493 U.S. at 170. And conducting extensive discovery and factfinding prior to the dissemination of notice may in some cases cause delay that threatens opt-in members' ability to assert timely claims. *See Clark*, 68 F.4th at 1012 (Bush, J.,

concurring) (explaining that "significantly length-en[ing] the period before potential plaintiffs are notified of a pending FLSA lawsuit" means that "many potential plaintiffs may not learn of the FLSA action until after the limitations period for some or all of their claims has run"). In many cases, too, requiring additional factfinding before notice may be inefficient or even unworkable, if relevant evidence as to similarity is likely to rest in the hands of employees who will not opt in until after receiving notice.

Furthermore, although Cracker Barrel assails the supposedly "relaxed legal burden" applied by the district court, Pet. 14, the district court based its decision to approve notice on "declarations and affidavits provided by [Respondents] and potential class members [that] contain substantial allegations that they were 'victims' of Cracker Barrel's uniform, nationwide policies." Pet. App. 83a. The evidence established that members of the proposed collective action "are similarly situated with regard to their pay provisions" and "with regard to their job requirements." *Id.* at 82a. To be sure, Cracker Barrel submitted its own evidence "to justify its current policies as compliant under the FLSA." *Id.* at 83a. But rather than rule prematurely on "substantive issues" in the case, the district court recognized that, irrespective of whether Cracker Barrel's practices are lawful, members of the collective action are similarly situated as "current or former tipped serve[r]s at Cracker Barrel who are paid under the tip credit scheme" that allegedly violates the FLSA. *Id.*

Thus, under the law prevailing in every circuit, including under the decisions of the Fifth, Sixth, and Seventh Circuits that Cracker Barrel endorses in whole or in part, the district court would have acted

well within its discretion to conclude that notice is appropriate here. By its terms, the notice invites only those employees who were subject to the challenged practices to opt in. *See* D. Ct. Dkt. 76-13 at 3. The lawfulness of those practices is therefore a question common to members of the collective action. Cracker Barrel's objection that those members may be numerous is an objection to the statutory authorization of collective litigation, not a reason to withhold notice from the workers who were allegedly injured by Cracker Barrel's unlawful wage and hour policies.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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