Note

What Have I Opted Myself Into? Resolving the Uncertain Status of Opt-In Plaintiffs Prior to Conditional Certification in Fair Labor Standards Act Litigation

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On March 1, 2005, loan officer Christopher Chemi filed a collective action against Champion Mortgage alleging that their policy of classifying loan officers as exempt from receiving overtime pay violated the Fair Labor Standards Act (FLSA).[1] Three months later, Chemi moved to conditionally certify the collective action, a move which would have led the court to send notice of the suit to other potential plaintiffs and subsequently allow those plaintiffs to opt into the suit by submitting a consent form to the court.[2] In the year it took for the court to decide this motion, plaintiffs' counsel established a website to publicize the suit, and 112 current and former loan officers at Champion

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1. Letter Order at 2, Chemi v. Champion Mortg., No. 05-cv-1238 (D.N.J. June 19, 2006), ECF No. 72. "Collective action" is the term used to describe representative suits brought under the FLSA pursuant to 29 U.S.C. § 216(b) (2006). *See* FED. R. CIV. P. 23; 7B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1807 (3d ed. 2005).

2. Letter Order, *supra* note 1, at 2, 15–16; Memorandum of Law in Opposition to Plaintiffs' Motion to Certify Class as Collective Action and in Support of Cross-Motion to Strike Opt-in Forms at 1, *Chemi*, No. 05-cv-1238, 2005 WL 2099222 (D.N.J. July 29, 2005), ECF No. 37-1.

Mortgage filed consent forms to join the suit.[3] The court struck all 112 plaintiffs who had opted into the suit, stating that plaintiffs' counsel should not have solicited potential plaintiffs before conditional certification was granted and a court-authorized notice of the suit had been sent to these plaintiffs.[4]

On November 25, 2003, Chad Wombles filed a complaint against Title Max of Alabama alleging that managers and assistant managers had been forced to work over seventy hours per week without being paid overtime wages in violation of the FLSA.[5] Despite the fact that Wombles was one of seven managers who had already filed consent forms, the court denied conditional certification because "the plaintiffs have failed to demonstrate that there are other employees who desire to opt in to this action."[6] The contradiction is obvious: had plaintiffs' counsel more aggressively solicited potential plaintiffs, the collective action may have been certified; yet the act of solicitation itself may have led the court to strike the opt-in plaintiffs, as the court did in *Chemi v. Champion Mortgage*.[7]

These two cases are by no means unique. FLSA case law is wildly inconsistent on a number of procedural questions involving precertification opt-in plaintiffs (PreCOIs)[8] in collective actions under the FLSA. This confusion is largely attributable to the fact that the existence of PreCOIs is not statutorily contemplated. Section 216(b) of the FLSA allows actions to be brought "[o]n behalf of . . . other employees similarly situated" who consent to joining the suit.[9] But the statute fails to define who is "similarly situated," specify how that determination is

3. Letter Order, *supra* note 1, at 3, 17.

4. *Id.* at 18.

5. Complaint and Demand for Jury Trial at 3–4, Wombles v. Title Max of Ala., Inc., No. 3:03-cv-01158CWO (M.D. Ala. Nov. 25, 2003), ECF No. 1 (stating that defendants had a policy of requiring employees "to work 60–80 hours per week for a salaried amount"); *see also Wombles*, No. 3:03-cv-01158CWO, 2005 WL 3312670, at *2 (M.D. Ala. Dec. 7, 2005) ("The plaintiffs allege . . . [they] worked between 70–75 hours per week.").

6. *Wombles*, 2005 WL 3312670, at *3.

7. *Id.*; Letter Order, *supra* note 1, at 17–18.

8. The term PreCOI, as used in this Note, refers to individuals who are not named plaintiffs (i.e., named as plaintiffs in the original complaint), but who have filed consent forms to join the FLSA collective action after the complaint has been filed but before the court has granted conditional certification (or any other dispositive motions). *See* WRIGHT ET AL., *supra* note 1 (describing the filing of the complaint and subsequent conditional certification process in an FLSA collective action).

9. 29 U.S.C. § 216(b) (2006).

made, or state whether such a determination is necessary for employees to become parties to the action.[10]

To fill in the first two of these three gaps in the statute, federal courts have developed a two-stage certification process to determine whether the employees are similarly situated.[11] At the first stage, known as conditional certification, if the court makes a preliminary determination that the complaint has successfully defined a group of similarly situated employees, notice of the suit is sent to this class of employees, and they may join the action by returning a signed consent form to the court.[12] For the sake of clarity, once conditional certification has been granted, the group of opt-in plaintiffs will be referred to in this Note as post-certification opt-ins (PostCOIs).[13]

While the certification process helps to determine whether employees are similarly situated, it does not address the question of whether employees who want to join the suit have to wait for conditional certification before they may join the suit. In other words, if the statute requires opt-in plaintiffs to be similarly situated, does the court need to certify this before employees may join the suit? And if plaintiffs may join the suit prior to this determination, what is their status? This Note seeks to answer these questions through an interpretation of existing statutory language.

Ideally, the conditional certification stage would occur very early in the case, making the problems posed by PreCOIs largely irrelevant. While this is sometimes the case, it is becoming increasingly common for cases to take a year or more before conditional certification is granted.[14] This may happen for a

10. *See id.*; *see also* James M. Fraser, *Opt-In Class Actions Under the FLSA, EPA, and ADEA: What Does It Mean to Be "Similarly Situated"?*, 38 SUFFOLK U. L. REV. 95, 96 n.5, 111 (2004) (noting that the statute neither defines the term "similarly situated" nor outlines how courts should determine whether plaintiffs are similarly situated).

11. *See* Hipp v. Liberty Nat'l Life Ins. Co., 252 F.3d 1208, 1218–19 (11th Cir. 2001) (outlining the two-stage process and recommending that federal district courts adopt it as a matter of practice); WRIGHT ET AL., *supra* note 1.

12. *See* WRIGHT ET AL., *supra* note 1.

13. The group known as PostCOIs includes both parties who were formerly PreCOIs as well as parties that submit their consent forms after receiving court-authorized notice of the suit. *See id.*

14. *See, e.g.*, Morgan v. Family Dollar Stores, Inc., 551 F.3d 1233, 1243 (11th Cir. 2008) (granting conditional certification twenty-two months after the complaint was filed); Lopez v. Tyson Foods, No. 8:06CV459, 2008 WL 3485289, at *1, *4 (D. Neb. Aug. 7, 2008) (granting conditional certification over two years after the complaint was filed); Toure v. Cent. Parking Sys., No. 05 Civ. 5237 (WHP), 2007 WL 2872455, at *9 (S.D.N.Y. Sept. 28, 2007) (same).

number of reasons, one of which is the need to resolve procedural questions revolving directly or indirectly around the status of PreCOIs: whether PreCOIs may join the suit before certification, whether plaintiffs' counsel can solicit PreCOIs and to what extent, and whether PreCOIs can be compelled to participate in discovery.[15]

These procedural questions have a number of important implications. The statute of limitations for FLSA claims is only two years,[16] and does not toll for an individual plaintiff until she files a consent form with the court to join the suit.[17] Given that "a claim for unpaid overtime under the FLSA accrues at the end of each pay period when it is not paid," limiting employees' ability to join a suit before it is conditionally certified may severely limit employees' ability to obtain relief under the FLSA, as an employee can only recover lost wages for the two years preceding the date on which the employee joins the suit.[18] Procedural rules that differ between circuits may lead to uneven enforcement of the statute, especially where certain circuits' rules are more plaintiff-friendly.[19] Finally, these procedural issues may implicate judicial economy if PreCOIs are required to participate in discovery,[20] if plaintiffs must amend

15. *See infra* Part II.A.

16. 29 U.S.C. § 255(a) (2006). The statute of limitations is three years where the employer's FLSA violations are found to be willful. *Id.*

17. *Id.* §§ 255–56.

18. Cook v. United States, 855 F.2d 848, 851 (Fed. Cir. 1988); *see* also Craig Becker & Paul Strauss, *Representing Low-Wage Workers in the Absence of a Class: The Peculiar Case of Section 16 of the Fair Labor Standards Act and the Underenforcement of Minimum Labor Standards*, 92 MINN. L. REV. 1317, 1330 (2008) (arguing that requiring employees to wait until the collective action is conditionally certified to join the suit "often significantly reduces the back pay ultimately awarded to opt-in plaintiffs").

19. *See* Margaret H. Lemos, *The Consequence of Congress's Choice of Delegate: Judicial and Agency Interpretations of Title VII*, 63 VAND. L. REV. 363, 428–29 (2010) (arguing that inconsistent standards of employer liability for supervisor sexual harassment was responsible for "substantial geographic disuniformity" in the enforcement of Title VII); Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1121 (1987) (arguing that diverse circuit applications of vague statutory language impedes "uniform national administration of the laws").

20. *See* Nantiya Ruan, *Facilitating Wage Theft: How Courts Use Procedural Rules to Undermine Substantive Rights of Low-Wage Workers*, 63 VAND. L. REV. 727, 737–38 (2008) (describing recent increase in FLSA filings and courts' motivation to stem the tide of litigation); *see also infra* Part II.A.3.

their complaint for PreCOIs to join the suit,[21] or if procedural uncertainty makes disputes between the parties more likely.[22]

This Note argues that minimizing this procedural inconsistency requires defining the status of PreCOIs in terms of whether employees may opt into collective actions before conditional certification and what their status is should they do so. This Note fills this gap by forwarding an interpretation of the statute that both defines the status of PreCOIs while providing a framework to address procedural questions that arise prior to conditional certification.

Part I of this Note discusses the history of the collective action mechanism and the development of the two-stage certification process. Part II outlines the areas of procedural uncertainty at early stages of FLSA litigation related to the uncertain status of PreCOIs, then introduces three possible interpretations of the statute to address this uncertainty. Part III evaluates each interpretation, concluding that courts should adopt an interpretation under which potential plaintiffs may join the suit as provisional plaintiffs upon the filing of the complaint, yet are not considered similarly situated, and thus not parties to the suit, until the court grants conditional certification.

I. FLSA COLLECTIVE ACTION MECHANISM AND THE DEVELOPMENT OF THE TWO-STAGE CERTIFICATION PROCESS

The FLSA was enacted in 1938 and established national minimum wage and overtime pay standards.[23] Under the original Act, class actions could be brought using the "spurious class action" mechanism available under Rule 23.[24] Judgments in spurious class actions included all parties who had intervened before a trial on the merits.[25]

21. *See* Whalen v. United States, 85 Fed. Cl. 380, 387 (2009) (noting that allowing notice "benefits the judicial system by promoting efficient resolution of common issues if law and fact arising from the same alleged discriminatory activity"); *see also infra* Part II.A.1.

22. *See* Nicki Herbert, Note, *Appellate Review of a "Strong Basis in Evidence" in Public Contracting Cases*, 77 U. COLO. L. REV. 193, 206 (2006).

23. Fair Labor Standards Act of 1938, Pub. L. No. 75-718, 52 Stat. 1060 (codified as amended at 29 U.S.C. §§ 201–19 (2006)).

24. *See* Marc Linder, *Class Struggle at the Door: The Origins of the Portal-to-Portal Act of 1947*, 39 BUFF. L. REV. 53, 168 & n.659 (1991).

25. *Id.* at 168.

Congress overhauled the FLSA's class action mechanism by passing the Portal-to-Portal Act in 1947.[26] Congress had four primary objectives in making this change. First, Congress sought to prohibit union representatives from bringing suits on behalf of unionized workers.[27] Second, Congress wanted to eliminate opt-out class actions by requiring that all plaintiffs consent before joining the suit.[28] Third, Congress sought to require employees to join the action early in the litigation, unlike the spurious class action device, to provide notice to employers of the number and size of claims against them.[29] Finally, they wanted opt-in plaintiffs to be bound if they were in a position to benefit from the outcome in the suit.[30]

Two sections of the Portal-to-Portal Act form the procedural framework for the collective action mechanism. Section 216(b) reads:

> An action to recover . . . may be maintained against any employer . . . by any one or more employees for and *in behalf of himself* or themselves *and other employees similarly situated*. *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.[31]

Section 256 describes when an action is considered to have been commenced for the purpose of calculating the statute of limitations period (listed in § 255). Section 256 reads:

> In determining when an action is commenced for the purposes of section 255 of this title, an action . . . shall be considered to be com-

26. Portal-to-Portal Act of 1947, ch. 52, § 5, 61 Stat. 87 (codified as amended at 29 U.S.C. § 216(b)).

27. *See id.* ch. 52, § 5(a) (amending the FLSA by eliminating the grant of authority to file representative actions); Linder, *supra* note 24, at 172; Note, *Fair Labor Standards Under the Portal-to-Portal Act*, 15 U. CHI. L. REV. 352, 360 (1948).

28. *See* 93 CONG. REC. 2182 (1947) (statement of Sen. Donnell, Senate floor leader) ("Certainly there is no injustice in that, for if a man wants to join in the suit, why should he not give his consent, in writing?"); Linder, *supra* note 24, at 168, 173 (explaining the "spurious class action" mechanism in place before § 216(b) was passed, then arguing that "the entire line of argument" contained in the legislative debate "makes sense only if interpreted as motivated by a general animus against what in 1966 became Rule 23(b)(3) class actions").

29. At the Senate debate over the Portal-to-Portal Act, Senator Donnell objected to the "spurious class action" whereby it would "be possible for 10,000 men to wait 3 years [before joining the suit], with the employers not knowing how many thousands of dollars or millions of dollars . . . of claims will be asserted against them." 93 CONG. REC. 2182.

30. Linder, *supra* note 24, at 169, 173.

31. 29 U.S.C. § 216(b) (emphasis added).

> menced on the date when the complaint is filed; except that *in the case of a collective or class action instituted* under the Fair Labor Standards Act of 1938, . . . *it shall be considered to be commenced* in the case of any individual claimant—
>
> (a) on the date when the complaint is filed, if he is specifically named as a party plaintiff in the complaint and his written consent to become a party plaintiff is filed on such date in the court in which the action is brought; or
>
> (b) if such written consent was not so filed or if his name did not so appear—*on the subsequent date on which such written consent is filed* in the court in which the action was commenced.[32]

This statutory language differs from Rule 23 in several ways.[33] First, Rule 23 putative class members become plaintiffs once the class is certified unless they opt out, whereas potential plaintiffs must opt into an FLSA collective action by filing a consent form.[34] Second, under Rule 23, the claims of all class members are tolled for statute-of-limitations purposes from the date the suit was filed,[35] while an FLSA plaintiff's claims are not tolled until the plaintiff's consent form is filed with the court.[36] Third, while Rule 23 lays out specific criteria that must be met to certify a class action,[37] the FLSA requires plaintiffs to be "similarly situated," but does not define the term.[38]

These differences create two procedural challenges unique to the FLSA. First, all potential plaintiffs must be notified of the suit, and their consent forms must be processed.[39] If the court leaves this to the parties, employees might join the suit based on misleading information that may prejudice the defense or compromise the rights of employees who are misled into opting in.[40] However, court involvement in this process

32. *Id.* § 256 (emphasis added).

33. *Compare* 29 U.S.C. § 216(b), *and* 29 U.S.C. § 256, *with* FED. R. CIV. P. 23.

34. *See* FED. R. CIV. P. 23(c)(1)–(2); WRIGHT ET AL., *supra* note 1.

35. *See* Am. Pipe & Const. Co. v. Utah, 414 U.S. 538, 554 (1974) (holding that the commencement of a class action suspends the statute of limitations for all putative class members, and offering the rationale that this rule would prevent putative class members from filing duplicative suits to toll the statute).

36. 29 U.S.C. § 256(b).

37. FED. R. CIV. P. 23(a) (requiring that the class be numerous, have common questions of law or fact, common defenses, and the ability of the named plaintiffs to represent the class).

38. *See* 29 U.S.C. § 216(b); Brian R. Gates, Note, *A "Less Stringent" Standard? How to Give FLSA Section 16(b) a Life of Its Own*, 80 NOTRE DAME L. REV. 1519, 1525 (2005) ("The congressional record . . . is completely silent as to any definition of the 'similarly situated' standard.").

39. *See* WRIGHT ET AL., *supra* note 1.

40. *See* Hoffmann-La Roche Inc. v. Sperling, 493 U.S. 165, 170–72 (1989); Woods v. N.Y. Life Ins. Co., 686 F.2d 578, 580 (7th Cir. 1982).

changes the court's historically passive role in litigation while potentially compromising its impartiality by sending the message that the court endorses the merits of the suit.[41]

The second challenge that courts face is defining the term "similarly situated" and developing a procedure to make that determination.[42] While "federal courts have had almost seventy years to become familiar with section 16(b) and its 'similarly situated' standard,"[43] courts continue to struggle not only with how to define the term, but also whether it creates a stricter or more lenient standard for initiating a representative action than Rule 23.[44] Legislative guidance is similarly absent regarding procedural rules for certifying a collective action.[45]

To address these two problems, a two-step certification process has evolved through case law.[46] The Supreme Court's decision in *Hoffmann-La Roche Inc. v. Sperling* laid the foundation for this process by authorizing court involvement in sending notice to potential plaintiffs as a case management tool, holding that Section 216(b) grants courts "the requisite procedural authority" to promulgate procedural rules so long as they are "not otherwise contrary to statutory commands."[47] The two-step certification process was first articulated in *Lusardi v.*

41. *See Hoffmann-La Roche*, 493 U.S. at 180–81 (Scalia, J., dissenting).

42. *See* Gates, *supra* note 38.

43. *Id.* at 1564.

44. *See* Bayles v. Am. Med. Response of Colo., Inc., 950 F. Supp. 1053, 1058 (D. Colo. 1996) (describing four different approaches to defining "similarly situated"); *see also* Gambrell v. Weber Carpet, Inc., No. 10-2131-KHV, 2010 WL 4226153, at *1 (D. Kan. Oct. 21, 2010) ("[T]he Tenth Circuit has approved an ad hoc approach by which the Court determines on a case-by-case basis whether the members of the putative class are similarly situated.").

45. *See* Gates, *supra* note 38 ("'Congress did not explicitly attempt to spell out the metes and bounds intended for [FLSA] representative actions nor did it suggest procedures to be followed' in the . . . representative actions authorized in section 16(b)." (quoting G. W. Foster, Jr., *Jurisdiction, Rights, and Remedies for Group Wrongs Under the Fair Labor Standards Act: Special Federal Questions*, 1975 WIS. L. REV. 295, 324)); *see also* Prescott v. Prudential Ins. Co., 729 F. Supp. 2d 357, 363 (D. Me. 2010) ("The FLSA does not define 'similarly situated' or prescribe a method for certifying a collective action.").

46. *See* WRIGHT ET AL., *supra* note 1.

47. Hoffmann-LaRoche Inc. v. Sperling, 493 U.S. 165, 170, 172 (1989). *Hoffmann-LaRoche* pertained to a collective action brought under the Age Discrimination in Employment Act (ADEA). As part of the original statute enacted in 1967, the ADEA incorporated § 216(b) of the FLSA, and thus each statute relies upon the same statutory language for its collective action mechanism. *Id.* at 165. As a result, ADEA and FLSA case law regarding the collective action mechanism is used interchangeably. Myers v. Hertz Corp., 624 F.3d 537, 554 n.9 (2d Cir. 2010).

Xerox Corp., two years prior to the Supreme Court's decision in *Hoffmann-La Roche*,[48] but was not endorsed by a circuit court until the Fifth Circuit did so in 1995.[49] While district courts have discretion as to whether or not to use the procedure,[50] the practice has become the norm.[51]

At stage one, the notice or conditional certification stage, a lenient standard is applied to determine if the proposed collective is similarly situated.[52] If this standard is met, the collective is conditionally certified, and notice of the action is sent to po-

48. Lusardi v. Xerox Corp., 118 F.R.D. 351 (D.N.J. 1987).

49. Mooney v. Aramco, 54 F.3d 1207, 1218–19 (5th Cir. 1995), *overruled in part on other grounds by* Desert Palace, Inc. v. Costa, 539 U.S. 90, 101–02 (2003).

50. Davis v. Westgate Planet Hollywood Las Vegas, LLC, No. 2:08-cv-00722-RCJ-PAL, 2009 WL 5038508, at *2 (D. Nev. Dec. 15, 2009) ("The Supreme Court has made it clear that while the district court has the discretion to conditionally certify a collective action under the FLSA, conditional certification is not mandatory.").

51. *See* Encinas v. J.J. Drywall Corp., 265 F.R.D. 3, 6 (D.C. Cir. 2010); Whalen v. United States, 85 Fed. Cl. 380, 383 (2009); Sandoz v. Cingular Wireless LLC, 553 F.3d 913, 915 n.2 (5th Cir. 2008) (referring to the two-step approach as the typical manner in which collective actions proceed); Morgan v. Family Tree Stores, Inc., 551 F.3d 1233, 1261 (11th Cir. 2008) (advocating the use of the two-stage certification process by Eleventh Circuit courts); Thiessen v. Gen. Elec. Capital Corp., 267 F.3d 1095, 1105 (10th Cir. 2001) (explicitly endorsing the two-stage certification process for use by Tenth Circuit courts); Johnson v. VCG Holding Corp., 802 F. Supp. 2d 227, 233 (D. Me. 2011) ("The general practice of district courts within the First Circuit . . . has been to adopt a 'two-tiered' approach to certification of collective actions under the FLSA."); Blaney v. Charlotte-Mecklenburg Hosp. Auth., No. 3:10-CV-592-FDW-DSC, 2011 WL 4351631, at *3 (W.D.N.C. Sept. 16, 2011) (showing that Fourth Circuit district courts adopt the two-step certification process); Bollinger v. Residential Capital, LLC, 761 F. Supp. 2d 1114, 1119 (W.D. Wash. 2011) ("Within the Ninth Circuit, district courts have adopted the two-tiered . . . approach."); Spicer v. Pier Sixty LLC, 269 F.R.D. 321, 336 (S.D.N.Y. 2010) (Second Circuit); Lugo v. Farmer's Pride Inc., 737 F. Supp. 2d 291, 299 (E.D. Pa. 2010) (Third Circuit); Smallwood v. Ill. Bell Tel. Co., 710 F. Supp. 2d 746, 750 (N.D. Ill. 2010) (Seventh Circuit); Noble v. Serco, Inc., No. 3:08-76-DCR, 2009 WL 3154252, at *1 (E.D. Ky. Sept. 28, 2009) (Sixth Circuit); Resendiz-Ramirez v. P&H Forestry, LLC, 515 F. Supp. 2d 937, 941 (W.D. Ark. 2007) (Eighth Circuit). The only instance in which courts deviate from this norm is when extensive discovery has already taken place, and the district court proceeds directly to the second stage of the certification process. *See, e.g.*, Smith v. T-Mobile USA, Inc., No. CV 05-5274 ABC (SSx), 2007 WL 2385131, at *4 (C.D. Cal. Aug. 15, 2007); Torres v. Gristede's Operating Corp., No. 04 Civ. 3316 (PAC), 2006 WL 2819730, at *7 n.7, *9–11 (S.D.N.Y. Sept. 29, 2006); Ray v. Motel 6 Operating, L.P., No. 3-95-828, 1996 WL 938231, at *4 (D. Minn. Mar. 18, 1996).

52. *See, e.g.*, Hipp v. Liberty Nat'l Life Ins. Co., 252 F.3d 1208, 1218 (11th Cir. 2001); *Mooney*, 54 F.3d at 1212–13.

tential plaintiffs, who must return a consent form included with the notice.[53]

At the second stage, after discovery is complete or nearly complete, defendants move for decertification, and a much more stringent standard is applied.[54] If the motion is denied, the action proceeds as a collective action; if granted, the claims of the opt-in plaintiffs are dismissed without prejudice, and they may proceed with their cases on an individual basis.[55] While the certification process has helped to address certain procedural issues left unresolved by § 216(b), significant procedural uncertainty remains at early stages of a collective action.

II. PROBLEMS ASSOCIATED WITH THE UNCERTAIN STATUS OF PRECOIS AND POTENTIAL STATUTORY INTERPRETATIONS TO RESOLVE THIS UNCERTAINTY

This Part will begin by looking at the uncertain status of PreCOIs under the FLSA and how that uncertainty manifests itself in several specific contexts. Having identified the need for a defined status of PreCOIs, this Part will then analyze the relevant statutory language and suggest three possible interpretations that provide this definition.

A. THE UNCERTAIN STATUS OF PRECOIS RESULTS IN SEVERAL PROCEDURAL INCONSISTENCIES

While § 216(b) sets out the requirements for becoming a "party plaintiff," it does not specify when that occurs.[56] While the statute requires additional plaintiffs to be similarly situated and to submit a written consent form to the court to join the suit, the statute does not specify whether party plaintiff status is conferred upon the filing of consent, or a judicial determination that the potential plaintiff is similarly situated to the named plaintiff(s).[57] The conditional certification process makes this problem particularly acute by creating a formal mechanism to determine whether plaintiffs are similarly situated.[58]

53. *Hipp*, 252 F.3d at 1218; WRIGHT ET AL., *supra* note 1.

54. *Morgan*, 551 F.3d at 1261–62; WRIGHT ET AL., *supra* note 1.

55. *See* Gayle v. United States, 85 Fed. Cl. 72, 77–78 (2008).

56. 29 U.S.C. § 216(b) (2006).

57. *Id.*

58. *Cf.* O'Brien v. Ed Donnelly Enter., 575 F.3d 567, 583 (6th Cir. 2009) ("The district court followed a two-stage certification process, as many courts do, to determine whether the opt-in plaintiffs and lead plaintiffs were similarly situated.").

Some courts have read the statute as conferring party plaintiff status once written consent has been filed with the court, while others have argued that conditional certification confers this status.[59] This uncertain status of PreCOIs creates a number of procedural problems.

1. When PreCOIs May Join the Suit

While most courts generally allow opt-in plaintiffs to join the suit at any time after the suit has commenced,[60] some do not allow opt-in plaintiffs to join the suit before conditional certification has been granted.[61] In *Whalen v. United States*, the Federal Claims Court held that filing notice was not enough for PreCOIs to join the action. "[S]imilarly situated employees who file consents to join an action brought under the FLSA should be added as party plaintiffs to the action by means of an amended complaint."[62] Along similar lines, other courts have argued in dicta that conditional certification should act as a prerequisite for opt-ins to join the suit.[63] The potential problems

59. *Compare* Barefield v. Rob Noojin Roofing, Inc., No. 8:07-cv-1610-T-27TBM, 2009 WL 51278, at *5 n.6 (M.D. Fla. Jan. 7, 2009) (holding that conditional certification was not necessary to make plaintiff's consent form active, because "he was a party plaintiff upon the filing of his consent-to-join"), *and* Kaiser v. At The Beach, No. 08-CV-586-TCK—FHM, 2009 WL 4506152, at *6 (N.D. Okla. Nov. 24, 2009) (filing of consent forms conferred party plaintiff status upon opt-in plaintiffs prior to certification), *with* Morgan v. Family Dollar Stores, Inc., 551 F.3d 1233, 1259 (11th Cir. 2009) ("[T]he importance of certification, at the initial stage, is that it authorizes either the parties, or the court itself, to facilitate notice of the action to similarly situated employees. After being given notice, putative class members have the opportunity to opt-in."), *and* Pereira v. Foot Locker, Inc., 261 F.R.D. 60, 62 (E.D. Pa. 2009) ("Pursuant to the FLSA, there are two requirements for potential plaintiffs to be included in the collective action: plaintiffs must (1) be 'similarly situated' and (2) give written consent.").

60. *See, e.g.*, Myers v. Hertz Corp., 624 F.3d 537, 555 n.10 (2d Cir. 2010) (observing that § 216(b) does not restrict plaintiffs "from opting in to the action by filing consents with the district court, even when the notice described in *Hoffmann-La Roche* has not been sent"); Riojas v. Seal Produce, Inc., 82 F.R.D. 613, 617 (S.D. Tex. 1979) ("To become a party plaintiff under § 216(b), an individual *need only* consent in writing and have that consent filed in Court. There is no further need to comply with any requirements of a class action which might be necessary under Rule 23." (emphasis added)).

61. *See, e.g.*, Melendez Cintron v. Hershey P.R., Inc., 363 F. Supp. 2d 10, 17 (D.P.R. 2005) (striking consents of PreCOIs where plaintiffs' counsel failed to seek authorization to notify the putative class).

62. Whalen v. United States, 85 Fed. Cl. 380, 384 n.2 (2009).

63. *Morgan*, 551 F.3d at 1259; Colson v. Avnet, Inc., 687 F. Supp. 2d 914, 925 (D. Ariz. 2010) (stating in dicta that conditional certification "will permit

are significant: if a court adopts the approach in *Whalen*, a plaintiff would be required to amend the complaint every time a potential plaintiff seeks to join the suit, lest they be stricken from the collective action.[64]

2. Solicitation of Potential Plaintiffs by Plaintiffs' Counsel

Whether plaintiffs' counsel may solicit clients prior to conditional certification depends upon one's interpretation of the role of conditional certification in conferring party status. If § 216(b) requires only the filing of the employees' consent form to confer party plaintiff status, solicitation of plaintiffs appears appropriate. But if a court must find that the proposed collective is similarly situated before plaintiffs may join the suit, solicitation of potential plaintiffs would undermine the central role of conditional certification in the notice process.[65] This was the approach adopted by the court in *Chemi*, arguing that "[o]utside the context of a notice process supervised by the Court, plaintiffs' attorneys are not permitted unilaterally to send unsolicited notices."[66] Some courts take a more moderate approach, refusing to impose a blanket prohibition of solicitation given the lack of a statutory prohibition of such activity.[67] At the other end of the spectrum are courts that allow virtually all forms of solicitation, including solicitations to an uncertified collective, either on First Amendment grounds[68] or based on the court's ability to correct any misleading communications at the

potential class members to opt-into the lawsuit"); Letter Order, *supra* note 1, at 18.

64. *Whalen*, 85 Fed Cl. at 384 n.2; Letter Order, *supra* note 1, at 18.

65. Bouder v. Prudential Fin., Inc., No. 06-CV-4359, 2007 WL 3396303, at *2 (D.N.J. Nov. 8, 2007); Letter Order, *supra* note 1, at 18 (holding that by moving for conditional certification and soliciting clients on their own, plaintiffs were trying to "have their cake and eat it too").

66. Letter Order, *supra* note 1, at 17.

67. *See, e.g.*, Wertheim v. Arizona, No. Civ. 92–453 PHX RCB, 1993 WL 603552, at *8 (D. Ariz. Sept. 30, 1993) ("There is no express statutory requirement that consents may only be filed after the court authorizes notice . . . . [T]he court is reluctant to conclude that section 256(a) per se forbids the filing of consents until after the court authorizes notice.").

68. *See, e.g.*, Gordon v. Kaleida Health, 737 F. Supp. 2d 91, 95–96, 101 (W.D.N.Y. 2010) (noting First Amendment implications of barring plaintiffs' counsel from contact with prospective collective action members). *But see* Maddox v. Knowledge Learning Corp., 499 F. Supp. 2d 1338, 1344 (N.D. Ga. 2007) (holding that prohibiting plaintiffs' counsel from soliciting potential plaintiffs did not violate the First Amendment so long as the court has good cause and is sensitive to First Amendment concerns).

court-approved notice stage.[69] Regardless of the justification relied upon by the court, courts that view conditional certification as a prerequisite to commencing a collective action are more likely to place greater restrictions on precertification solicitation.[70] By defining the role of conditional certification in determining the status of PreCOIs, this Note hopes to resolve this inconsistency.

3. Participation in Discovery by PreCOIs

Traditionally, opt-in plaintiffs have not needed to participate in discovery prior to conditional certification, given the lenient evidentiary standard that generally requires only a "modest factual showing."[71] With the explosion of wage and hour litigation over the past decade,[72] however, many courts are applying a stricter standard, and more extensive discovery is typically conducted prior to conditional certification.[73]

Because greater discovery is being conducted at this stage, disputes often arise over whether PreCOIs should be required to participate in discovery before plaintiffs may move for conditional certification.[74] Where PreCOIs are viewed as having full

69. *See* Rubery v. Buth-Na-Bodhaige, Inc., 514 F. Supp. 2d 431, 435 (W.D.N.Y. 2007) ("Moreover, the Letter Notice's inaccuracies can be remedied by the issuance of a corrective notice in the event class certification is granted.").

70. *See* Morgan v. Family Dollar Stores, Inc., 551 F.3d 1233, 1259 (11th Cir. 2008) (noting the relationship between initial certification and notice).

71. *See* Myers v. Hertz Corp., 624 F.3d 537, 555 (2d Cir. 2010) (stating that plaintiffs must make a "modest factual showing"); Cameron-Grant v. Maxim Healthcare Servs., 347 F.3d 1240, 1243 n.2 (11th Cir. 2003) (noting that a court's initial determination is made on the basis of "minimal evidence"); Betancourt v. Maxim Healthcare Servs., No. 10C4763, 2011 WL 1548964, at *4 (N.D. Ill. Apr. 21, 2011) (employing the "modest factual showing" framework).

72. Ruan, *supra* note 20, at 735 (documenting more than a four-fold increase in the number of FLSA cases filed in federal courts between 1997 and 2007). This trend appears to be continuing, as the number of FLSA lawsuits filed in federal court rose ten percent in 2010, and this increase was expected to continue in 2011. SEYFARTH SHAW LLP, ANNUAL WORKPLACE CLASS ACTION LITIGATION REPORT: 2011 EDITION, at 3, 5 (2011).

73. *See* Ahle v. Veracity Research Co., No. 09-00042 ADM/RLE, 2009 WL 3103852, at *5 (D. Minn. Sept. 23, 2009) (applying a heightened standard to protect employers from "the expense and effort of [sending] notice to a conditionally certified class of claimants").

74. *Cf.* Ruan, *supra* note 20, at 745 ("While full discovery into liability and damages is not required, some discovery typically must occur. Minimal discovery [of PreCOIS] is needed because courts rely upon allegations supported by employee declarations or affidavits, in addition to the compliant to determine whether plaintiffs and potential opt-ins are similarly situated.").

party status, courts are more likely to compel discovery. In *Green v. Harbor Freight Tools USA, Inc.*, the defendant served notices of depositions on seven PreCOIs.[75] The court rejected plaintiffs' motion for a protective order preventing defendants from deposing four of the opt-in plaintiffs, arguing that defendant was entitled to conduct discovery "so that it may at least test the veracity of *plaintiffs'* mere allegation that they are similarly situated victims of a common decision, policy, or plan."[76]

Compare that to *Purnamasadi v. Ichiban Japanese Restaurant*, where the court placed the entire evidentiary burden on the named plaintiffs prior to conditional certification, holding that at this stage, the burden is upon the named plaintiffs to demonstrate that they are similarly situated to other employees, thereby establishing "the right of the *plaintiffs* to establish a collective action," and thereby allow each party to "conduct[] discovery concerning the opt-in plaintiffs."[77]

The court's reasoning in each case demonstrates that these conflicting opinions reflect divergent views of the status of PreCOIs. When PreCOIs are viewed as party plaintiffs, as in *Green Harbor Tools*, it appears reasonable to compel them to submit to depositions before considering a motion for conditional certification. But when full party status exists only for the named plaintiffs, as in *Ichiban*, compelling discovery appears inappropriate.

Whether defendants may demand that PreCOIs be deposed prior to conditional certification has two important implications. First, PreCOIs who fail to respond to these requests are likely to be struck from the suit—compelling discovery of PreCOIs is one way defendants can reduce the size of the plaintiff collective.[78] Second, deposing PreCOIs will almost certainly delay conditional certification, which may reduce the ability of

75. Green v. Harbor Freight Tools USA, Inc., No. 09-2380-JAR, 2010 WL 686263, at *1 (D. Kan. Feb. 3, 2010).

76. *Id.* at *1–2 (emphasis added).

77. Purnamasidi v. Ichiban Japanese Rest., No. 10cv1549 (DMC)(JAD), 2010 WL 3825707, at *3 (D.N.J. Sept. 24, 2010) (quotation omitted).

78. Federal Rule of Civil Procedure 37(b)(2)(A)(vi) authorizes courts to render a default judgment against a party who fails to appear for a deposition. *See In re* Am. Family Mut. Ins. Overtime Pay Litig., No. 06-cv-17430-WYD-CBS, 2009 WL 1120293, at *2 (D. Colo. Apr. 27, 2009) (dismissing four opt-in plaintiffs for failing to appear to scheduled depositions).

PostCOIs to recover, since an individual's FLSA claims are not tolled until a consent form is filed.[79]

4. PreCOIs and the Tolling of the Statute of Limitations Period

The explicit statutory language of § 256(b) states that an opt-in plaintiff's FLSA claims do not toll until consent is filed with the court.[80] However, courts have failed to reconcile this language with the judge-made certification process, which did not exist, and was not contemplated, when the Portal-to-Portal Act was passed.[81]

Courts continue to strictly enforce the tolling requirements of § 256, but have added a procedural process which precedes the mailing of notice and that often eats up one to two years[82] of the FLSA's two year statute of limitations period.[83] Procedural rules and decisions that delay conditional certification may weaken employees' ability to assert their statutory rights.[84] If the conditional certification process is viewed as a statutory prerequisite for potential plaintiffs to opt in, courts may need to be more lenient in equitably tolling the statute of limitations for PostCOIs, especially where the defendants are largely responsible for delaying the certification process.[85]

5. PreCOIs and Preclusion

Whether PreCOIs are bound by decisions occurring prior to conditional certification, and thus precluded from bringing a

79. 29 U.S.C. § 256(b) (2006); Becker & Strauss, *supra* note 18, at 1330, 1333–38.

80. 29 U.S.C. § 256.

81. *See* Gates, *supra* note 38 (discussing Congress's failure to anticipate the development of a judge-made procedural framework following enactment of the Portal to Portal Act).

82. *See supra* note 14 and accompanying text.

83. The FLSA's two-year statute of limitations period is extended to three years in the event of a willful violation. 29 U.S.C. § 255(a).

84. Becker & Strauss, *supra* note 18, at 1330–32 (arguing that where defendants are able to delay facilitating notice, damage awards are typically low, and the statute fails to deter employers from violating minimum wage and overtime laws).

85. *Cf.* Ewer v. United States, 63 Fed. Cl. 396, 402 (2005) ("Plaintiffs correctly note that the FLSA limitations period is not a statute of repose; thus, principles of equitable tolling apply."). Courts have generally only applied the doctrine of equitable tolling in extraordinary circumstances. *E.g.*, Cranney v. Carriage Servs., Inc., 559 F. Supp. 2d 1106, 1108–09 (D. Nev. 2008) ("The doctrine of equitable tolling only applies in rare situations.").

similar suit, hinges on the party status of PreCOIs. The preclusion doctrine is intended to "preclude parties from contesting matters that they have had a full and fair opportunity to litigate . . . ."[86] Claim preclusion may generally only be applied against a party to the original suit, although preclusion may also be asserted against a party who was adequately represented in the initial action.[87] Inappropriately applied preclusion may undermine a party's due process rights by denying them their "day in court."[88] Rule 23 class actions protect the rights of absent parties by requiring: (1) adequate representation by the named plaintiffs; (2) notice of the action; and (3) the opportunity to opt out.[89]

The notice certification process that has evolved under FLSA case law is designed to satisfy these three requirements.[90] Consent and notice are satisfied because "[i]n a § 216(b) action, no one is bound by the judgment unless they opt in."[91] Conditional certification is designed to ensure that all parties are adequately represented, because "the 'similarly situated' test will ensure that all parties are properly joined in the same action."[92]

Issues of preclusion may arise should a dispositive motion be granted before a collective action has been conditionally cer-

86. Montana v. United States, 440 U.S. 147, 153 (1979).

87. Taylor v. Sturgell, 553 U.S. 880, 892–95 (2008).

88. *See* Martin H. Redish & William J. Katt, Taylor v. Sturgell, *Procedural Due Process, and the Day-in-Court Ideal: Resolving the Virtual Representation Dilemma*, 84 NOTRE DAME L. REV. 1877, 1877 (2009) ("The notion that the individual litigant possesses a foundational constitutional right to his day in court before his rights may be judicially altered has long served as a guide for the shaping of modern procedure.").

89. *See Taylor*, 553 U.S. at 900–01 (stating that nonparty preclusion in the class action context requires adequate representation by a knowingly representative party with aligned interests); Mendez v. Radec Corp., 260 F.R.D. 38, 47 (W.D.N.Y. 2009) ("'[D]ue process requires at a minimum' that putative class members be given notice of the class action and an opportunity to exclude themselves from the class prior to any judgment being rendered which might affect their rights." (quoting Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812 (1985))).

90. *Cf.* Fraser, *supra* note 10, at 117 ("Rule 23 promotes judicial economy and protects parties' rights, and these goals are equally relevant in § 216(b) actions.").

91. Bonilla v. Las Vegas Cigar Co., 61 F. Supp. 2d 1129, 1136 (D. Nev. 1999).

92. *Id.* ("The § 216(b) requirement that plaintiffs consent to the suit serves essentially the same due process concerns that certification serves in a Rule 23 action.").

tified.[93] Should PreCOIs attempt to later bring the same claim in a later suit, the question becomes whether they are precluded from bringing the suit based on their participation as PreCOIs in the earlier action. The question turns on the status of PreCOIs, as whether a plaintiff is precluded from bringing a suit because of an earlier, similar suit, turns on whether they were a "party" to the original action.[94] If filing a consent form confers full party status, PreCOIs would likely be precluded from bringing the future suit.[95]

While few cases have tackled this question in the FLSA context, the two cases to decide related issues have split, based on each court's interpretation of when opt-in plaintiffs become parties to the suit. In *McElmurry v. U.S. Bank National Ass'n*, the Ninth Circuit relied upon the language of § 216(b) to state, in dicta, that filing a consent form conferred party plaintiff status, and thus opt-in plaintiffs are precluded from bringing a subsequent suit.[96] The Eastern District of Virginia reached the opposite conclusion in *Adams v. School Board of Hanover County*, allowing PreCOIs to withdraw from the suit without prejudice despite adverse rulings in the case, given that they were not parties to the suit before conditional certification was granted.[97]

This Section has demonstrated that case law regarding a number of procedural issues that arise prior to conditional cer-

93. For a discussion of the use of preclusion in collective litigation, see Debra Lyn Bassett, *Just Go Away: Representation, Due Process, and Preclusion in Class Actions*, 2009 BYU L. REV. 1079, 1082–96, 1118–25.

94. *See Taylor*, 553 U.S. at 898–99. However, preclusion would not be applied if the decision were either a denial of a conditional certification motion or the grant of a decertification motion; in each case the court would dismiss the claims of opt-in plaintiffs without prejudice, granting them leave to file their claims on an individual, not collective, basis. WRIGHT ET AL., *supra* note 1 ("[S]ome courts, when deciding on final certification, also have weighed the putative benefits of proceeding as a collective action against allowing individual suits to proceed . . . . If final certification is not granted, the court decertifies the class, dismisses the opt-in plaintiffs without prejudice, and permits any remaining individuals to proceed to trial.").

95. For the assertion that an opted-in plaintiff would be later precluded because of the change in party status, see WRIGHT ET AL., *supra* note 1 ("[E]very plaintiff who opts in to a collective action has party status . . . [O]nly those plaintiffs who have opted in are bound by the results of the litigation.").

96. McElmurry v. U.S. Bank Nat'l Ass'n, 495 F.3d 1136, 1139 (9th Cir. 2007) (arguing, in dicta, that "plaintiffs who expressly join the collective action are bound by its results").

97. Adams v. Sch. Bd., No. 3:05CV310, 2008 WL 5070454, at *17–19 (E.D. Va. Nov. 26, 2008).

tification is inconsistent. This inconsistency may impact the ability of plaintiffs to join the suit and to recover. Judicial economy is also impacted, as rulings on these issues may delay conditional certification and ultimately the resolution of the case. Finality is also implicated by the uncertain status of PreCOIs. While each procedural issue is unique, Part II.A demonstrates that they share one common feature—each issue could be resolved more easily with a clear statutory interpretation of the status of PreCOIs.

B. POTENTIAL STATUTORY INTERPRETATIONS RESOLVING PROCEDURAL UNCERTAINTY PRIOR TO CONDITIONAL CERTIFICATION

This Section analyzes the statutes that shape FLSA collective actions, and advances three possible interpretations to resolve the procedural uncertainty surrounding PreCOIs. To provide this resolution, each interpretation must address three basic procedural questions: (1) when potential plaintiffs may opt into an FLSA suit; (2) whether they can enter the suit as opt-in plaintiffs, or if the complaint must be amended to add these plaintiffs as named plaintiffs; and (3) when they become party plaintiffs, and are thereafter bound by the outcome of the case.

1. Potential Interpretations of FLSA Statutory Language

At first glance, the second sentence of § 216(b) clearly defines the status of PreCOIs by stating that "[n]o employee shall be a party plaintiff . . . unless he gives his consent in writing . . . ."[98] This can be read to mean that filing a consent form confers party plaintiff status. Indeed, several courts have reached this very conclusion.[99] However, this can be interpreted as a necessary but not sufficient condition.[100] Another necessary condition may be contained in the prior sentence, allowing an action to be brought on behalf of similarly situated employees.

98. 29 U.S.C. § 216(b) (2006).

99. *E.g.*, Kaiser v. At The Beach, Inc., No. 08-CV-586-TCK-FHM, 2009 WL 4506152, at *6 (N.D. Okla. Nov. 24, 2009) ("With this statutory procedure in place [filing the consent form], Plaintiffs were not required to seek formal amendment . . . to add opt-in plaintiffs."); Barefield v. Rob Noojin Roofing, Inc., No. 8:07-cv-1610-T-27TBM, 2009 WL 51278, at *5 n.6 (M.D. Fla. Jan. 27, 2009) ("[Opt-in plaintiff] was a party-plaintiff upon the filing of his consent-to-join.").

100. *Cf.* Jordan Steiker, *United States:* Roper v. Simmons, 4 INT'L J. CONST. L. 163, 166–67 (2006) (articulating the concept of a necessary but not sufficient condition in the context of Eighth Amendment jurisprudence).

Thus another interpretation could hold that to gain full party status: (1) an employee must be similarly situated; and (2) the employee must file their consent with the court. Many courts have interpreted § 216(b) as imposing these two requirements upon potential plaintiffs.[101]

Section 256 is also relevant, stating that "in the case of a collective or class action," the lawsuit "shall be considered to be commenced in the case of any individual claimant [not named in the complaint] . . . on the subsequent date on which such written consent is filed . . . ."[102] However, the general applicability of § 256 may be limited by its opening sentence, stating that the section is to be used "[i]n determining when an action is commenced for the purposes of section 255," which governs the statute of limitations period.[103]

Even if § 256 is interpreted as applying to contexts other than the tolling of the statute of limitations, an alternative interpretation is possible. The phrase "[i]n the case of a class or collective action" can be read as creating a condition precedent to joining the suit.[104] This reading permits three additional interpretations. First, it could be interpreted to mean that the date the consent form is filed becomes the date on which the opt-in plaintiff's action commenced if and only if conditional certification is eventually (or already has been) granted. Second, it could be seen as a requirement that the action be conditionally certified before a consent form may be filed. Under this interpretation, to join the action prior to conditional certification, the complaint would have to be amended to add potential

101. *E.g.*, Pereira v. Foot Locker, Inc., 261 F.R.D. 60, 62 (E.D. Pa. 2009) ("Pursuant to the FLSA, there are two requirements for potential plaintiffs to be included in the collective action: plaintiffs must (1) be 'similarly situated' and (2) give written consent."). *But see* Myers v. Hertz Corp., 624 F.3d 537, 555 n.10 (2d Cir. 2010) (explaining that conditional certification is not a prerequisite for opt-in plaintiffs to join a suit "so long as such plaintiffs are 'similarly situated' to the named individual plaintiff," and therefore "'certification' is neither necessary nor sufficient for the existence of a representative action under FLSA"). This argument, made in dicta, begs the question of how plaintiffs can be required to be "similarly situated" as a condition for joining the action if conditional certification isn't a prerequisite for joining the action.

102. 29 U.S.C. § 256.

103. *Id.* §§ 255–56. There is case law supporting the application of § 256 to contexts other than the statute of limitations. *See Kaiser*, 2009 WL 4506152, at *6 (using § 256(b) to argue that opt-in plaintiffs join the suit when their consent form is filed); Adams v. Sch. Bd., No. 3:05CV310, 2008 WL 5070454, at *17–18 (E.D. Va. Nov. 26, 2008) (citing § 256 to argue that an opt-in plaintiff becomes a party plaintiff upon filing a consent form).

104. 29 U.S.C. § 256.

plaintiffs as named plaintiffs.[105] Finally, it could be used to support the idea that an action becomes a collective action when additional plaintiffs file consent forms to join the suit.

Having hashed out different readings of Sections 216 and 256, three viable interpretations emerge. Under the first interpretation, potential plaintiffs may join the suit at any time, and become party plaintiffs by filing a consent form regardless of whether conditional certification is granted.

Under the second interpretation, § 216(b) requires that opt-in plaintiffs file a consent form and be judicially certified as "similarly situated" to become party plaintiffs. Thus, under the second interpretation, potential plaintiffs may not join the suit until conditional certification is granted unless the complaint is amended to add them as named plaintiffs.

Under the third interpretation, becoming a party plaintiff requires a consent form to be filed, and a judicial determination that the opt-in plaintiffs are "similarly situated." Under the third interpretation, potential plaintiffs may file their consent forms any time after the suit is filed, but are merely conditional plaintiffs until the collective action is conditionally certified. Until this occurs, these PreCOIs are not parties to the suit and are not bound by the outcome. Having identified three possible readings of the statute, each of which would resolve the procedural questions that are currently unsettled, Part III seeks to identify the superior interpretation.

III. IDENTIFYING THE SUPERIOR INTERPRETATION TO RESOLVE PROCEDURAL QUESTIONS SURROUNDING PRECOIS

Having determined the potentially viable interpretations, the next task will be to identify the best interpretation. Four criteria will be used to aid in this determination: (1) whether the interpretation is consistent with statutory language and legislative history; (2) whether it finds support within case law; (3) how it fits within the existing procedural framework of the FLSA; and (4) what implications the interpretation would have for the procedural issues previously identified, and for public policy as a whole.[106] The first criterion must be met to some degree for the interpretation to be employed by courts and upheld

105. *See* Whalen v. United States, 85 Fed. Cl. 380, 384 n.2 (2009) (requiring plaintiffs to amend their complaint and add additional party plaintiffs for opt-in plaintiffs to join the suit prior to conditional certification).

106. *See supra* Part II.A.

upon review.[107] Given the role that influential cases have played in shaping the certification process, the second criterion must be satisfied for an interpretation to be adopted by district courts.[108] The third criterion must be satisfied for the interpretation to function effectively in practice.[109] Assuming that the first three criteria are satisfied, the fourth criterion will identify the superior interpretation.[110]

A. THE FIRST INTERPRETATION: PLAINTIFFS OPT IN AT ANY TIME AND IMMEDIATELY HAVE PARTY STATUS

The first interpretation allows potential plaintiffs to join the suit at any time, and gain full party status by filing a consent form, regardless of whether certification is granted. This interpretation, while acknowledging § 216(b)'s "similarly situated" requirement, would view it as grounds to later remove the plaintiffs from the suit, not as a prerequisite for party status. To the extent that § 256 is read as requiring the suit to be a collective action for opt-in plaintiffs to join, courts would hold that the action becomes a collective action when the action is filed, and one additional plaintiff has opted in by filing a consent form.

1. Consistency with Statutory Language and Legislative History

This approach has the advantage of being most consistent with Congressional intent when the Portal-to-Portal Act was enacted. The first interpretation satisfies two of the primary goals of Congress in passing the Act: to require plaintiffs to join

107. *See* Hoffmann-La Roche Inc. v. Sperling, 493 U.S. 165, 170–73 (1989) (granting courts the authority to create procedural devices so long as they are not contrary to statutory provisions while authorizing court involvement in providing notice to potential plaintiffs because it is consistent with Congressional intent in implementing the Portal-to-Portal Act).

108. A January 25, 2012 Westlaw search for federal case citations to the Eleventh Circuit's influential 2008 opinion in *Morgan v. Family Dollar Stores, Inc.* revealed that the decision has been cited by six circuits outside the Eleventh Circuit and has been cited by federal district courts in thirty different states and the District of Columbia. Westlaw search on January 25, 2012 of "ALLFEDS" database using term: ["Morgan v. Family Dollar Stores"] and cross-checking with case citation 551 F.3d 1233 (11th Cir. 2008).

109. *See supra* Part I.

110. *Cf.* Becker & Strauss, *supra* note 18, at 1346 (noting the great importance of the public policy goals of the FLSA).

the suit early in the action and to be bound by its result upon joining the action.[111]

It could be argued that this interpretation fails to give adequate weight to the similarly situated requirement by allowing employees to join the suit and be bound absent a finding that they are similarly situated. This argument ignores the fact that unlike the requirement for consent, § 216(b) does not clearly state that being similarly situated is a prerequisite for being considered a party plaintiff.[112] The first interpretation does not ignore the "similarly situated" requirement, it simply refuses to read the requirement as creating a prerequisite to joining the suit.[113] So long as conditional certification remains standard practice and occurs early in the course of litigation, Congressional intent is honored.

2. Support Within Existing Case Law

The first interpretation is consistent with the line of cases that have interpreted § 216(b) and § 256(b) to mean that an opt-in becomes a party plaintiff once consent has been filed.[114] Wright, Miller & Kane's Federal Practice and Procedure states that "every plaintiff who opts in to a collective action has party status," and thus is "bound by the results of the litigation."[115] Yet these sources either do not address the distinction between PreCOIs and those who opt in after conditional certification is granted, or simply presume that the consent forms were submitted after notice was sent pursuant to conditional certification of the collective action.[116]

Further support for this interpretation can be found among cases which require plaintiffs to demonstrate interest among potential plaintiffs before the court will conditionally certify the collective action.[117] However, this approach is not widely fol-

111. *See supra* notes 28–30 and accompanying text.

112. 29 U.S.C. § 216(b) (2006).

113. *See supra* note 59 and accompanying text.

114. *See supra* Part II.B.

115. WRIGHT ET AL., *supra* note 1; *see also* McElmurry v. U.S. Bank Nat'l Ass'n, 495 F.3d 1136, 1139 (9th Cir. 2007) ("[U]nlike a class action, only those plaintiffs who expressly join the collective action are bound by its results.").

116. *See supra* notes 114–15.

117. *See, e.g.*, Dybach v. Fl. Dep't of Corr., 942 F.2d 1562, 1567–68 (11th Cir. 1991) ("Before determining to exercise such power on application by Dybach upon remand of this case, the district court should satisfy itself that there are other employees of the department-employer who desire to 'opt-in' and who are 'similarly situated' with respect to their job requirements and

lowed.[118] In other cases, while the failure to show additional interested plaintiffs was not viewed as cause to reject conditional certification, the existence of employees who had already opted into the suit was used as evidence to support conditional certification of the collective.[119]

Also supporting this interpretation are cases that have held that designation of a suit as a collective action occurs either when the suit is commenced,[120] or requires merely one employee to bring a claim on behalf of other employees, and an additional employee who opts into the action.[121] While this interpretation finds support within existing case law, by no means does it constitute the prevailing view. Not only do other circuits view a collective action to have commenced when it is conditionally certified, one can find contradictory holdings within the same circuits that earlier argued that a collective action commences when a plaintiff opts into the suit.[122] Overall,

with regard to their pay provisions."); Parker v. Rowland Express, Inc., 492 F. Supp. 2d 1159, 1164–65 (D. Minn. 2007) ("[B]efore a conditional-certification motion may be granted, a named plaintiff (or plaintiffs) must proffer some evidence that other similarly situated individuals desire to opt in to the litigation.").

118. *See* McCaffrey v. Mortg. Sources, Corp., No. 08-2660-KHV, 2009 WL 2778085, at *4 (D. Kan. Aug. 27, 2009) (explaining that only the Eleventh Circuit and a few district courts require a showing that other potential plaintiffs are interested in joining the suit).

119. *See* Hoffman v. Securitas Sec. Servs., No. CV07-502-S-EJL, 2008 WL 5054664, at *5–10 (D. Idaho Aug. 27, 2008) (rejecting argument that plaintiffs must demonstrate that others seek to join the suit, while noting several arguments that certification would be better supported were the class of potentially interested plaintiffs greater); Poreda v. Boise Cascade, LLC, 532 F. Supp. 2d 234, 238–40 (D. Mass. 2008) (holding that filing of twenty-four consent forms is sufficient to show that a class of similarly situated employees exists).

120. *See* Bonilla v. Las Vegas Cigar Co., 61 F. Supp. 2d 1129, 1138 (D. Nev. 1999) (concluding "that an action is a collective action under § 216(b) where plaintiffs, on the face of their complaint, purport to sue on behalf of themselves and 'others similarly situated'" (quoting 29 U.S.C. § 216(b) (2006))).

121. *See* Cameron-Grant v. Maxim Healthcare Servs., Inc., 347 F.3d 1240, 1249 (11th Cir. 2003) (rejecting the right of the named plaintiff to represent other plaintiffs before any employee had opted into the suit because the action "does not become a 'collective' action unless other plaintiffs affirmatively opt into the class by giving written and filed consent"); Rollins v. Sys. Integration, Inc., No: 4:05-CV-408-Y, 2006 WL 3486781, at *5 (N.D. Tex. Dec. 4, 2006) (holding that plaintiffs purporting to bring action on behalf of similarly situated employees is insufficient; collective action designation requires an additional employee to opt into the suit).

122. *See* Morgan v. Family Dollar Stores, 551 F.3d 1233, 1259 (11th Cir. 2008) (arguing that "the importance of certification, at the initial stage, is that it authorizes . . . notice of the action to similarly situated employees . . . . The key to starting the motors of a collective action is a showing that there is a similarly situated group of employees" (citations omitted)).

while case law can be found to support every element of the first interpretation, these cases tend to be anomalous and do not represent majority viewpoint.

3. Compatibility With Existing Procedural Framework

The first interpretation fits within the existing procedural framework for FLSA actions. It would not undermine, or alter in any fashion, the two-stage certification process that has become the norm in FLSA collective actions.[123] It would also allow potential plaintiffs to opt in prior to certification, thus facilitating the practice of those jurisdictions that require a showing of potential plaintiffs interested in joining the suit[124] without forcing the practice on those jurisdictions that do not.[125] The only meaningful change would be for those jurisdictions that hold that plaintiffs must be found to be similarly situated in order to opt into the suit.[126] Yet the procedural changes imposed upon those courts would not be great; they would simply file consent forms from opt-in plaintiffs throughout the action, a process that already occurs after conditional certification is granted.[127]

4. Implications for Unresolved Procedural Issues and Public Policy

The first interpretation implicates a number of FLSA procedural issues. First, it would bar opt-in plaintiffs from bringing their own suit should an adverse judgment happen in the original suit.[128] This is somewhat troublesome. Application of claim preclusion should require more than consent on behalf of putative class members; also important is a finding that opt-in plaintiffs are adequately represented by the named plaintiffs.[129] Conditional certification satisfies this need.[130] This assurance is

123. *See* Kristin M. Stastny, Note, *Eleventh Circuit Treatment of Certification of Collective Actions Under the Fair Labor Standards Act: A Remedial Statute Without a Remedy?*, 62 U. MIAMI L. REV. 1191, 1209 (2008).

124. *See supra* note 117 and accompanying text.

125. *See* McCaffrey v. Mortg. Servs., Corp., No. 08-2660-KHV, 2009 WL 2778085, at *4 (D. Kan. Aug. 27, 2009).

126. *See, e.g.*, Whalen v. United States, 85 Fed. Cl. 380, 384 n.2 (2009).

127. *See id.*

128. *See supra* Part II.A.5.

129. *See supra* note 89 and accompanying text.

130. Bonilla v. Las Vegas Cigar Co., 61 F. Supp. 2d 1129, 1136 (D. Nev. 1999); *see also* Shushan v. Univ. of Colo. at Boulder, 132 F.R.D. 263, 267 (D. Colo. 1990) (arguing that opt-in plaintiffs may not be aware of conflicts within the putative class prior to certification); Bassett, *supra* note 93, at 1090–92 (discussing the role of class certification in ensuring adequacy of representation).

important in the FLSA context, where potential plaintiffs may feel obligated to join the action at a very early stage to toll the statute of limitations.[131] Absent conditional certification, it is difficult to say that PreCOIs have had their day in court, the ideal underlying due process rights.[132]

Second, by holding that PreCOIs are already parties to the suit, the first interpretation would permit, if not compel, PreCOIs to be deposed prior to conditional certification.[133] However, where PreCOIs are seen as conditional plaintiffs, the burden is upon the named plaintiffs to demonstrate that they are part of a similarly situated group of employees, and courts need not stay consideration of conditional certification to allow the defense to depose or conduct other discovery regarding other opt-in plaintiffs.[134] The likely outcome would be what was observed in *Morgan v. Family Dollar Stores*, where conditional certification was granted twenty-two months after the complaint was filed, largely because the court delayed deciding the motion until the defense had had an adequate opportunity to depose opt-in plaintiffs.[135] Such delays significantly reduce, if not outright eliminate, the ability of opt-in plaintiffs to recover.[136] This would also have the effect of making delay the ideal strategy for defendants, a result that seems certain to have ruinous effects on judicial economy and the effectiveness of the statute.[137]

Given the potential for delays, plaintiffs' counsel would be forced at the beginning of the case to either proceed with only the named plaintiffs until conditional certification is granted or solicit as many opt-in plaintiffs as possible, knowing that this will likely undermine the value of the court-provided notice process.

Third, the first interpretation fails to account for the role of the two-stage certification process in the adjudication of FLSA claims. While the process started as a "case management tool"

131. *See supra* Part II.A.4.

132. For a discussion of factors necessary to satisfy the day in court ideal underlying due process rights, see Redish & Katt, *supra* note 88, at 1877–78.

133. *See* Green v. Harbor Freight Tools USA, Inc., No. 09-2380-JAR, 2010 WL 686263, at *1–2 (D. Kan. Feb. 23, 2010).

134. *See* Purnamasidi v. Ichiban Japanese Rest., No. 10cv1549 (DMC)(JAD), 2010 WL 3825707, at *3 (D.N.J. Sept. 24, 2010).

135. *See* Morgan v. Family Dollar Stores, Inc., 551 F.3d 1233, 1241–43 (11th Cir. 2008).

136. *See* Becker & Strauss, *supra* note 18, at 1330–31.

137. *See id.*

authorized by the Supreme Court's decision in *Hoffmann-La Roche*,[138] it has become the framework through which representative actions under the FLSA are understood.[139] Beyond merely facilitating the provision of notice, conditional certification is used to effectuate many of the values found in the class action device such as protecting potential plaintiffs' due process rights,[140] while preserving the court's resources and protecting defendants by ensuring that adjudication of common questions can fairly determine defendant's liability for the claims of the collective.[141] If the two-stage certification process is to preserve these values, we must view it as more than just a case management tool, as it would function under the first interpretation, and instead infuse the certification process with statutory significance and impart upon each stage the procedural significance to effectuate those values.

B. THE SECOND INTERPRETATION: CONDITIONAL CERTIFICATION IS REQUIRED FOR OPT-IN PLAINTIFFS TO BECOME PARTY PLAINTIFFS—PLAINTIFFS MAY ONLY JOIN ACTION PRIOR TO THIS STAGE THROUGH AMENDMENT TO ADD THEM AS NAMED PLAINTIFFS

The second interpretation reads § 216(b) as creating two prerequisites before potential plaintiffs may join the suit—filing a consent form and being similarly situated to the named plaintiff(s). The second interpretation would therefore require the court to grant conditional certification, thereby certifying that potential plaintiffs are similarly situated to the named plaintiffs, before potential plaintiffs could join the suit.

1. Consistency with Statutory Language and Legislative History

One criticism that can be levied against the second interpretation is that by codifying the significance of conditional certification, it effectively converts the FLSA procedural mechanism into a class device that was never authorized by statute,

138. Hoffmann-La Roche Inc. v. Sperling, 493 U.S. 165, 174 (1989).

139. *See* WRIGHT ET AL., *supra* note 1.

140. *See* Shushan v. Univ. of Colo. at Boulder, 132 F.R.D. 263, 267 (D. Colo. 1990) (arguing that the opt-in requirement does not absolve courts of the responsibility to protect the due process rights of opt-in plaintiffs).

141. *See* Fraser, *supra* note 10, at 117–19 (contending that the certification process should seek to preserve court resources and protect defendants' rights through the commonality and predominance requirements of Rule 23).

and in fact flies in the face of congressional intent in enacting the Portal-to-Portal Act.[142] This argument ignores the fact that Congress was silent on the vast majority of procedural issues, delegating that work to the courts.[143] Furthermore, the Supreme Court has held that § 216(b) was intended to facilitate multi-party suits while imposing an additional opt-in requirement.[144] The second interpretation therefore remains faithful to the purpose of the statute by requiring plaintiffs to affirmatively opt into the suit while making them bound by every decision of the court from the time they join the action.[145] Furthermore, arguments regarding the lack of Congressional authorization for procedural mechanisms ignore the "considerable authority" granted to the courts by Rule 83 to impose procedural rules to manage multiparty suits,[146] so long as the rules are "not otherwise contrary to statutory commands."[147]

A second criticism is that the second interpretation exacerbates the tension between the conditional certification device and the statute of limitations. According to its terms, § 256 provides potential plaintiffs two years to join the suit after it is filed.[148] But under the second interpretation, potential plaintiffs may not join the suit until conditional certification, which provides them far less time to join the suit while shortening the statute of limitations in practice. Thus while the second interpretation is consistent with the language of the statute, in practice it is somewhat at odds with legislative intent.[149]

142. *See* Allan G. King & Camille C. Ozumba, *Strange Fiction: The "Class Certification" Decision in FLSA Collective Actions*, 24 LAB. LAW. 267, 268 (2009) (arguing that while "the terms 'conditional certification,' 'decertification,' 'opt-in class action,' and 'conditional notice' are ubiquitous" in FLSA suits, "none appears in the statute, the pertinent regulations, or any Supreme Court opinion regarding the FLSA").

143. *See Hoffmann-La Roche*, 493 U.S. at 170 (finding that § 216(b), by authorizing collective actions without detailing procedural rules, grants courts "the requisite procedural authority" to promulgate procedural rules so long as they are "not otherwise contrary to statutory commands").

144. *See id.* at 173.

145. *See supra* notes 28–30 and accompanying text.

146. *Hoffmann-La Roche*, 493 U.S. at 172–73.

147. *Id.* at 170 (citing FED. R. CIV. P. 83).

148. 29 U.S.C. §§ 216(b), 256 (2006); *see supra* Part II.A.4.

149. *See Hoffmann-La Roche*, 493 U.S. at 170 (noting that "through incorporation of § 216(b), . . . Congress has stated its policy that ADEA plaintiffs should have the opportunity to proceed collectively").

2. Support Within Existing Case Law

The second interpretation is consistent with three lines of cases. First, it is consistent with cases holding that opt-in plaintiffs become party plaintiffs and are bound by the action once they file consent forms with the court.[150] The second interpretation is also consistent with the line of cases holding that a collective action does not commence until the court has made a finding that a class of "similarly situated" employees exist by conditionally certifying the action.[151] Finally, the second interpretation is consistent with those courts that have rejected efforts by plaintiffs' counsel to contact potential plaintiffs prior to conditional certification.[152] On the whole, therefore, the second interpretation finds much support within existing case law.

However, the second interpretation represents a radical departure from existing case law in one important way. While the second interpretation is consistent with prevailing practice, it is in conflict with the nearly uniform view that the two-stage certification process is merely a case management tool, and its use is at the discretion of the district court.[153] Like the third interpretation, therefore, the second interpretation requires courts to acknowledge that the two-stage certification process has become accepted practice and should be viewed as an integral part of the procedural framework for FLSA cases.

3. Compatibility with Existing Procedural Framework

The second interpretation deviates from the existing procedural framework in two ways. First, the prohibition upon opt-in plaintiffs joining the action until the action has been certified represents a major departure from existing case law. The U.S. Court of Federal Claims is the only jurisdiction that has explicitly held that plaintiffs must either join the case as

150. *See* Myers v. Hertz Corp., 624 F.3d 537, 542 (2d Cir. 2010); Kaiser v. At The Beach, No. 08-CV-586-TCK-FHM, 2009 WL 4506152, at *6 (N.D. Okla. Nov. 24, 2009); *see also* Barefield v. Rob Noojin Roofing, Inc., No. 8:07-cv-1610-T-27TBM, 2009 WL 51278, at *5 n.6 (M.D. Fla. Jan. 7, 2009); WRIGHT, ET AL., *supra* note 1.

151. *See, e.g.*, Morgan v. Family Dollar Stores, Inc., 551 F.3d 1233, 1259 (11th Cir. 2008).

152. *See, e.g.*, Melendez Cintron v. Hershey P.R., Inc., 363 F. Supp. 2d 10, 17 (D.P.R. 2005); Letter Order, *supra* note 1, at 15–18.

153. *Myers*, 624 F.3d at 554–55; *Morgan*, 551 F.3d at 1260–61; Hipp v. Liberty Nat'l Life Ins. Co., 252 F.3d 1208, 1218–19 (11th Cir. 2001); Mooney v. Aramco, 54 F.3d 1207, 1216 (5th Cir. 1995), *overruled in part on other grounds by* Desert Palace, Inc. v. Costa, 539 U.S. 90, 101–02 (2003).

named plaintiffs prior or wait for the action to be conditionally certified.[154] Not only would this represent a procedural change for most courts, it would also undermine the standard that many jurisdictions use at the conditional certification stage. The second interpretation is plainly incompatible with the requirement imposed by the Eleventh Circuit and several district courts that plaintiffs must demonstrate interest in the suit from opt-in plaintiffs to grant conditional certification.[155]

4. Implications for Unresolved Procedural Questions and Public Policy

The second interpretation implicates several unresolved procedural questions. First, plaintiffs will be forced to choose to either amend the complaint to add potential plaintiffs or force the interested employees to wait until certification is granted. Neither option is particularly appealing. On the one hand, if opt-in plaintiffs are forced to wait until certification to join the suit, they face a major risk of having their claims precluded by the statute of limitations, given the two year statute of limitations period.[156] Plaintiffs may also need to add additional named plaintiffs to demonstrate interest in the suit, as required by some jurisdictions, such as the court in *Wombles*, before conditional certification will be granted.[157]

Yet having to amend the complaint to add all potential plaintiffs as named plaintiffs creates its own set of procedural difficulties. Having to amend the complaint every time an opt-in plaintiff seeks to join the suit would create an administrative burden upon both plaintiffs' counsel and the court.[158] Aside from the administrative burden, the second interpretation would also force plaintiffs to overcome a new procedural hurdle—satisfying the requirements for permissive joinder under Rule

154. Whalen v. United States, 85 Fed. Cl. 380, 384 n.2 (2009).

155. *See supra* notes 117–18 and accompanying text.

156. *See* 29 U.S.C. § 255 (2006).

157. *See supra* notes 117–19 and accompanying text (reviewing jurisdictions requiring a demonstration that potential plaintiffs are interested in joining the suit); *see also* Wombles v. Title Max of Ala., Inc., No. 303-CV-1158CWO, 2005 WL 3312670, at *3 (M.D. Ala. Dec. 7, 2005).

158. *Cf.* Lucken Family Ltd. P'ship v. Ultra Res., Inc., No. 09-cv-01543-REB-KMT, 2010 WL 2650037, at *2 (D. Colo. June 30, 2010) (arguing that joinder creates an excessive administrative burden where over one hundred plaintiffs seek to join the suit).

20.[159] Many courts have found that the permissive joinder requirement under Rule 20 is in fact more stringent than that imposed by conditional certification.[160] The result would be to replace conditional certification with a series of Rule 20 motions every time plaintiffs attempt to add additional plaintiffs. Even if this were manageable for a small group of plaintiffs, it is widely recognized that joinder is impracticable for groups nearing one-hundred plaintiffs.[161]

If joinder proves to be impracticable under the second interpretation, there would be three likely effects. First, as mentioned earlier, many claims would be barred by the statute of limitations, or at the very least awards will be lessened so as to reducing the effectiveness of the FLSA and minimize its deterrent effect.[162]

Second, because no potential plaintiffs may join the suit before conditional certification is granted without delaying the certification process (through the need to file an amended complaint and satisfy Rule 20 joinder requirements), defendants would be further incentivized to delay conditional certification as much as possible.[163] Indeed, by effectively making conditional certification become the sole means by which potential plaintiffs may join an action, the second interpretation would make delay the superior defense tactic in FLSA litigation. It is hard to imagine this being a positive development.

Third, because of these complexities, to preserve their cause of action plaintiffs would be far more likely to bring suit on their own under the second interpretation. This would undermine the entire purpose of representative actions in general and the FLSA collective device specifically—the consolidation of claims into one action for purposes of both efficiency and fi-

159. To join new plaintiffs, it must be shown that the claim arises out of the same transaction or occurrence as the parties to the suit, while involving a common question of fact or law. FED. R. CIV. P. 20.

160. *See, e.g.*, Shushan v. Univ. of Colo. at Boulder, 132 F.R.D. 263, 264 (D. Colo. 1990).

161. *E.g.*, *Lucken Family*, 2010 WL 2650037, at *2 ("The classes include more than one hundred people, making joinder of the individual claims impracticable.").

162. *See* Becker & Strauss, *supra* note 18, at 1330–32 (arguing that where defendants are able to delay sending notice, damage awards are typically low, and the statute no longer deters employers from violating the FLSA).

163. *See id.* at 1330–31 (outlining many ways that defendants may delay conditional certification).

nality.[164] The potential downsides of the second interpretation seem too great to consider implementing it solely to address the need for a coherent doctrine regarding the party status of opt-in plaintiffs, especially when a superior interpretation exists.

C. THE THIRD INTERPRETATION: ALLOW OPT-INS AT ANY TIME AS POTENTIAL PLAINTIFFS YET REQUIRE CONDITIONAL CERTIFICATION TO CONFER PARTY PLAINTIFF STATUS

The third interpretation differs from the second interpretation in that it would read § 256 as allowing employees to file their consent forms at any time; the date the consent is filed becomes the date their action was commenced if, and only if, the collective action is conditionally certified, i.e. "in the case of collective action."[165] Thus prior to certification, PreCOIs have a provisional status and would not be bound by the outcome of the case.

1. Consistency with Statutory Language and Legislative History

At first glance, the third interpretation adopts a somewhat strained reading of "in the case of collective action." The phrase would appear to relate to the statute of limitations in collective actions, not make the certification of a collective a condition precedent for PreCOIs to gain party status.[166] There is some validity to this criticism. On the other hand, this reading can be seen as effectuating the similarly situated requirement of § 216(b) while preserving the meaning of § 256 by allowing plaintiffs' suits to commence, for statute of limitations purposes, on the date that written consent is filed with the court.[167] In this sense, the third interpretation does the best job of integrating the language of the statute with the two-stage certification process.

The third interpretation also appears to be inconsistent with the legislative history of the Portal-to-Portal Act. The par-

164. The Supreme Court's purpose in tolling the claims of all class members in *American Pipe* was to prevent putative class members from filing duplicative suits to help preserve their right to recovery. Am. Pipe & Constr. Co. v. Utah, 414 U.S. 538, 550 (1974). Similarly, the collective action mechanism created by the Portal-to-Portal Act was aimed at reducing the number of suits that employers would face under the FLSA. *See* Prickett v. DeKalb Cnty., 349 F.3d 1294, 1297 (11th Cir. 2003).

165. 29 U.S.C. § 256 (2006).

166. *See id.*

167. *Id.* §§ 216(b), 256.

ty plaintiff language in § 216 was inserted to bind any party who sought to benefit from the suit from the time they entered the suit.[168] The third interpretation, on the other hand, would allow PreCOIs to join the suit without immediately being bound by the outcome.[169] Despite this tension, the third interpretation is consistent with legislative intent in enacting the Portal-to-Portal Act. Congress was concerned about the unfairness of plaintiffs being able to sit on the sidelines until a positive outcome seemed likely.[170] Such opportunism is not possible under the third interpretation. By submitting consent forms, PreCOIs will have already consented to being bound; their provisional status stems from a statutory need to be similarly situated to the named plaintiffs, not an attempt to take a wait and see approach to the litigation. The third interpretation is also consistent in that it provides employers with notice early in the action of the potential number and size of the claims against them.[171] The third interpretation in fact aids employers in this sense, by providing them with notice early in the action of the amount of employee participation they could face. Thus, while the third interpretation creates a condition to gaining party status not envisioned by Congress, this device is allowable under Rule 83, because it is not contrary to the statute itself or in direct conflict with Congressional intent.[172]

2. Consistency with Existing Case Law

While no court has explicitly identified PreCOIs as provisional plaintiffs, or forwarded the statutory interpretation supporting this view, the third interpretation fits well within existing case law. The third interpretation is consistent with case law requiring a finding that plaintiffs be similarly situated to become party plaintiffs.[173] Similarly, it is consistent with the line of cases holding that a claim under the FLSA is not a col-

168. *See* Linder, *supra* note 24, at 169, 173.

169. This would only be the group of opt-in plaintiffs this Note is addressing. Those who join after receiving notice of the suit following conditional certification, and subsequently file it with the court, would be bound by the result upon entering the suit.

170. *See* Linder, *supra* note 24, at 173.

171. *See supra* note 29 and accompanying text. For further discussion of Congressional motives in enacting the Portal-to-Portal Act, see *supra* notes 26–30 and accompanying text.

172. *See* FED. R. CIV. P. 83; *see also supra* notes 146–47 and accompanying text.

173. *See supra* notes 52–55, 91–92 and accompanying text.

lective action until it is conditionally certified.[174] Finally, it gains implicit support from those cases that have treated opt-in plaintiffs as potential plaintiffs prior to certification, without necessarily intending this to describe their status in the case.[175]

3. Consistency with Existing Procedural Framework

The biggest divergence from the existing procedural framework is that the third interpretation is in direct conflict with cases holding that party status is conferred upon filing of the consent form. In theory, this is a vast departure, given that this is a common interpretation of § 216(b).[176] Yet in practice, the difference is slight. The majority of instances when this argument is invoked occur after conditional certification has occurred, at which point opt-in plaintiffs *would* become party plaintiffs when consent is filed.[177] On the whole, while courts might reach different results on a number of issues under the third interpretation, the procedural framework itself would function much as it does now.

4. Implications for Unresolved Procedural Issues and Public Policy

The third interpretation would have several procedural implications. First, the third interpretation transforms conditional certification from a case management tool, to be used at the court's discretion, into a formalized device with statutory meaning.[178] This may create some procedural complexity, as courts would have less flexibility in the certification process. However, this transition is not likely to be overly difficult, given that two-stage certification has become the norm.[179] For example, if sufficient discovery has taken place, courts will often

174. *See, e.g.*, Morgan v. Family Dollar Stores, Inc., 551 F.3d 1233, 1259 (11th Cir. 2008).

175. *See, e.g.*, Adams v. Sch. Bd., No. 3:05CV310, 2008 WL 5070454, at *17–18 (E.D. Va. Nov. 26, 2008).

176. *See supra* note 60 and accompanying text.

177. *See supra* notes 114–16 and accompanying text (discussing the presumption within this line of cases that conditional certification has already been granted).

178. This approach was best captured by the Second Circuit, which recently pointed out that "it is important to stress that the 'certification' we refer to here is only the district court's exercise of the discretionary power, upheld in *Hoffmann-La Roche* to facilitate the sending of notice to potential class members." Myers v. Hertz Corp., 624 F.3d 537, 555 n.10 (2d Cir. 2010) (citing Hoffmann-La Roche Inc. v. Sperling, 493 U.S. 165, 169 (1989)).

179. *See supra* note 51 and accompanying text.

bypass the conditional certification process, and analyze a motion for conditional certification under the standard typically applied at the decertification stage.[180] Yet these courts are implicitly still using the two-stage certification process. Under the third interpretation, this additional discovery would most likely occur at a later stage of the litigation.

This increased formality has advantages as well. The third interpretation provides a more complete understanding of the role of each stage of the certification process beyond mere case management issues. While the opt-in and statute of limitations provisions of the FLSA alter the due process concerns that need to be considered, they still exist. By viewing the second stage of certification as an ad hoc, case-by-case consideration of whether plaintiffs are similarly situated, we ignore the real purposes behind decertification, many of which can be understood through Rule 23.[181] By formalizing these stages, we can better conceptualize the interests of each party that are protected at each stage of certification, and thereby develop a more cogent, and predictable, standard for certifying a collective action.

There is neither a statutory requirement nor a Supreme Court mandate requiring courts to take an ad hoc, discretionary approach to effectuate the collective action mechanism created by Portal-to-Portal Act. As the Supreme Court made clear in *Hoffmann-La Roche*, courts have "the requisite procedural authority" to promulgate procedural rules so long as they are "not otherwise contrary to statutory commands."[182] While this authorizes discretionary use of certification as a case management tool, it also allows courts to embrace the certification process as a procedural framework, grounded in statutory language, to provide consistent adjudication of procedural issues in a fashion that best promotes the remedial purposes of the FLSA.[183]

180. *See supra* note 51 and accompanying text.

181. Considering the ways in which the decertification stage should mirror Rule 23 is beyond the purview of this Note. This Note points out that decertification is no longer a mere case management tool—the standards that have evolved are meant to accomplish goals such as judicial efficiency while also protecting defendants against undue burden. Formalizing the two-stage certification process should provoke courts to understand how each stage of the certification process should work to accomplish these goals.

182. *Hoffmann-La Roche*, 493 U.S. at 170.

183. *See id.* at 173 ("The broad remedial goal of the [FLSA] should be enforced to the full extent of its terms.").

The third interpretation would not only allow employees to join the suit as provisional plaintiffs, it would encourage plaintiffs' counsel to solicit employees prior to conditional certification. One might object that plaintiffs' counsel may provide misleading information; this can easily be addressed once the action is conditionally certified. The court could, for example, require that all PreCOIs also submit the court-approved consent form in the event that the original consent form did not contain disclosures the court feels are necessary.

Allowing plaintiffs to join the suit immediately after it is filed as conditional plaintiffs, while also allowing solicitation of plaintiffs at this stage, best promotes "the broad remedial goal" of the FLSA.[184] The certification process did not exist when Congress established a two-year statute of limitations period for FLSA claims.[185] Restricting employees' ability to join the suit prior to conditional certification is to effectively shorten the statutory limitations period. If conditional certification is granted over two years after the complaint is filed,[186] employees may have lost entirely their right to recover.[187] By giving the certification process statutory meaning, while acknowledging the impact that the device may have on the statutory rights of employees, the third interpretation best promotes the purposes of the statute, while preserving congressional intent in enacting the Portal-to-Portal Act.

The third interpretation would protect the due process rights of PreCOIs by requiring the collective action to be conditionally certified before PreCOIs can be bound by a decision in the case. This recognizes that role conditional certification plays in ensuring that plaintiffs will be adequately represented by the named plaintiffs. One might object that this provides PreCOIs "another bite of the apple" should things begin to go awry. This ignores the role that stare decisis plays, and the strength with which it is applied, in cases where the preclusion doctrine cannot be applied.[188] Unless the PreCOIs were not actually similarly situated to the named plaintiffs, stare decisis will likely make their second bite of the apple a bitter one.

184. *Id.*

185. *See supra* Part II.A.4.

186. *See* cases cited *supra* note 14.

187. *See supra* note 61 and accompanying text.

188. *See* Premier Elec. Constr. Co. v. Nat'l Elec. Contractors Ass'n, Inc., 814 F.2d 358, 367 (7th Cir. 1987) (Easterbrook, J.) (advocating rigid application of stare decisis where former class members attempt to re-litigate a claim).

The third interpretation also provides adequate protection to defendants while promoting judicial economy. At the conditional certification stage, the court's finding should seek to determine, without looking at the underlying merits, that plaintiffs have adequately identified a cause of action that purportedly exists among the plaintiffs, and a common legal or factual question that, if proven, would entitle the plaintiffs to relief. This lenient standard is appropriate. "The burden in this preliminary certification is light because the risk of error is insignificant: should further discovery reveal that the named positions, or corresponding claims, are not substantially similar the defendants will challenge the certification."[189] By identifying that the primary purpose of conditional certification is to preserve the due process rights of putative class members, while the primary purpose of decertification is to protect the rights of defendants, the third interpretation makes the time-consuming practice of deposing PreCOIs unnecessary.

CONCLUSION

Courts have failed to define the status of employees seeking to opt into an FLSA collective action before conditional certification has been granted. While the certification process is designed to facilitate notice of the action to potential plaintiffs and allow them to join the action, this is not the exclusive mechanism by which potential plaintiffs can join a suit. In fact, there are very good reasons why potential plaintiffs should want to submit consent forms before conditional certification has been considered. A number of procedural questions often arise regarding such plaintiffs, referred to in this Note as PreCOIs, and the case law on these questions is wildly inconsistent. This Note argues that addressing this procedural uncertainty requires a statutory definition of the exact status of PreCOIs in terms of when they can join the suit and what their legal status is prior to conditional certification. This Note offers an interpretation of statutory language under which employees may opt into the suit at any time after the complaint is filed, yet are only provisional plaintiffs until conditional certification is granted. This interpretation is consistent with the language of the statute, legislative history, existing case law, and the existing procedural framework for FLSA cases. Most importantly,

189. Craig v. Rite Aid Corp., No. 08-cv-2317, 2009 WL 4723286, at *2 (M.D. Pa. Dec. 9, 2009).

it best promotes the purposes of the FLSA while protecting the statutory and constitutional rights of opt-in plaintiffs by allowing them to preserve their right to recover without prematurely compromising their due process rights.