# United States Court of Appeals

**For the Seventh Circuit**
**Chicago, Illinois 60604**



Submitted August 30, 2021
Decided September 1, 2021

**Before**

ILANA DIAMOND ROVNER, *Circuit Judge*

DAVID F. HAMILTON, *Circuit Judge*

AMY J. ST. EVE, *Circuit Judge*

No. 21-2577

IN RE: NEW ALBERTSONS, INC., *et al.*,
*Petitioners*,

Petition for Writ of Mandamus to the United States District Court for the Northern District of Illinois, Eastern Division.

No. 20-cv-03187

Mary M. Rowland,
*Judge*.

**O R D E R**

New Albertsons, Jewel Food Stores, and American Drug Stores petition for a writ of mandamus asking us to review the district court's conditional certification order and to determine what legal standard district courts should apply in determining whether to certify a collective action under the Fair Labor Standards Act. Because the petitioners cannot show a clear and indisputable right to mandamus relief, we deny their petition.

Lisa Piazza filed a putative collective action alleging that petitioners violated the FLSA by failing to provide appropriate compensation to Assistant Store Directors when they work more than 40 hours a week. She moved for conditional certification pursuant

to section 216(b) of the FLSA, which allows employees to bring claims on behalf of themselves and "other employees similarly situated." 29 U.S.C. § 216(b).

The district court employed a two-step process, regularly used in the Northern District of Illinois and other courts. At the first step, plaintiffs need only make a "modest factual showing sufficient to demonstrate that they and potential plaintiffs together were victims of a common policy or plan that violated the law." *See, e.g.*, *Ivery v. RMH Franchise Corp.*, 280 F. Supp. 3d 1121, 1132–33 (N.D. Ill. 2017). If plaintiffs make this showing, the court may conditionally certify the suit as a collective action and allow the plaintiffs to send notice of the case to similarly situated employees who may then opt in as plaintiffs. *Id.* At the more stringent second step, after employees have opted in and discovery is complete, the court must reevaluate the conditional certification and determine whether there is sufficient similarity between the named and opt-in plaintiffs. If there is sufficient similarity, it will allow the matter to proceed to trial on a collective basis; if there is not, the court may revoke conditional certification or divide the class into subclasses. *Id.* Because Piazza provided affidavits supporting her allegations that other similarly situated employees were subject to the same compensation policy, the district court conditionally certified the collective action. The petitioners asked the district court to certify its order for interlocutory appeal under 28 U.S.C. § 1292(b), but the court denied their motion.

Petitioners ask us to review the district court's order granting Piazza's motion for conditional certification without permitting discovery, declining to credit their evidence that Piazza is not similarly situated to most Assistant Store Directors, and declining their invitation to deviate from the two-step process in light of the Fifth Circuit's recent opinion in *Swales v. KLLM Transport Services, LLC*, 985 F.3d 430 (5th Cir. 2021) (rejecting lenient conditional certification process and holding that district courts must "rigorously scrutinize" whether workers are similarly situated). Petitioners argue that their mandamus petition is the only practical means to challenge widespread use of the two-step procedure to conditionally certify collective actions.

"[T]he remedy of mandamus is a drastic one, to be invoked only in extraordinary circumstances." *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 34 (1980). A writ of mandamus may issue only if the party seeking the writ demonstrates a clear right to the writ. *See Cheney v. U.S. Dist. Court for Dist. of Columbia,* 542 U.S. 367, 380 (2004); *Abelesz v. Erste Grp. Bank AG*, 695 F.3d 655, 662 (7th Cir. 2012). To do so, a litigant must show that the challenged order "so far exceed[s] the proper bounds of judicial discretion as to be legitimately considered usurpative in character, or in violation of a clear and

indisputable legal right, or, at the very least, patently erroneous." *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1295 (7th Cir. 1995). "Because mandamus is not a substitute for an appeal, the terms 'clear abuse of discretion' or 'patent error' are not synonymous with the type of ordinary error that would justify reversal in a direct appeal." *In re Ford Motor Co., Bridgestone/Firestone N. Am. Tire, LLC*, 344 F.3d 648, 651 (7th Cir. 2003).

Petitioners argue that they have a clear and indisputable due process right to present available defenses and challenge the validity of Piazza's evidence submitted in support of conditional certification, and that the district court's order to the contrary is patently erroneous and in violation of their rights. But in the next paragraph of their petition, they lament that neither Congress nor this court has specified the procedure courts should use to decide FLSA certification and notice issues, and as a result, district courts in this circuit have resorted to fluctuating versions of the two-step process for collective action certification. And they later assert that the absence of instruction in the statute and from the Supreme Court has created a circuit split regarding the proper procedure for determining whether an FLSA case should proceed as a collective action while we have remained silent on the issue. *See Bigger v. Facebook, Inc.*, 947 F.3d 1043, 1049 n.5 (explaining that we have not required the two-stage procedure for determining whether individuals are similarly situated).

Petitioners have not met their burden of showing that their right to a writ of mandamus is "clear and indisputable." *Cheney*, 542 U.S. at 381. We have repeatedly said that district courts have "wide discretion to manage collective actions." *Alvarez v. City of Chicago*, 605 F.3d 445, 449 (7th Cir. 2010) (citing *Hoffmann–La Roche v. Sperling*, 493 U.S. 165, 171 (1989)). And the two-step process followed by the district court is widely approved by other circuits and used in many district courts. In the absence of guidance or instruction from the Supreme Court, Congress, or this court on the proper procedure for certification of FLSA collective actions, we cannot say that the district court's decision to conditionally certify a collective action was patently erroneous or outside the bounds of judicial discretion. Further, conditional certification and authorization of notice to others who may be similarly situated is a preliminary, non-final step that does not adjudicate any party's rights. The merits of Piazza's and other employees' claims (and whether they are similarly situated) can be litigated later. And although petitioners say conditional certification will cause irreversible harm, the burdens on these defendants are not substantially different from discovery burdens or other incidental burdens of civil litigation. The power to review interlocutory orders is limited, and we decline to issue a writ of mandamus in the absence of a clear right to relief.