No. 17-637

IN THE

Supreme Court of the United States

FTS USA, LLC AND UNITEK USA, LLC,
Petitioners,

v.

EDWARD MONROE, FABIAN MOORE, AND TIMOTHY WILLIAMS, INDIVIDUALLY AND ON BEHALF OF ALL OTHER SIMILARLY SITUATED INDIVIDUALS,
Respondents.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Respondents are a group of cable technicians who brought a Fair Labor Standards Act ("FLSA") suit against their employer for improperly denying them overtime pay. The district court certified the case as a collective action, finding the technicians similarly situated. Based on that finding and the parties' agreed-upon "trial plan based on representative proof," the case proceeded to trial. At trial, common proof in the form of testimony from corporate officials, managers, and technicians—including technicians originally selected as representative witnesses by both parties—established that the company enforced an unlawful company-wide policy requiring technicians to underreport their hours worked. The jury found a willful class-wide FLSA violation, and the district court entered judgment in accordance with the jury's factual findings.

The questions presented are:

1. Whether the district court abused its discretion in declining to decertify the collective action post-trial in light of the substantial evidence of a company-wide policy requiring the underreporting of overtime hours and the parties' agreement to present representative proof at trial; or whether the district court violated FTS's due process right to present a defense despite not limiting FTS's ability to present evidence in any way; and

2. Whether, after FTS rebuffed an offer to impanel a second jury on damages, the district court violated FTS's right to trial by jury by entering a damages award based on stipulated payroll records and the jury's factual findings regarding hours worked; and, whether the Sixth Circuit correctly concluded that FTS waived its Seventh Amendment argument.

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INTRODUCTION

This case involves nothing more than the straightforward application of well-settled FLSA principles. Based on a fully developed factual record, the district court determined that a class of cable technicians was "similarly situated" because the technicians all performed the same job, received wages under a single compensation plan, and were subject to a uniform corporate policy of systematically requiring technicians to underreport their hours worked.

Petitioners' submission is shot through with the premise that no company-wide policy of underreporting overtime existed. The proof in this case tells a different story. The evidence presented at trial showed that corporate executives *required* managers—regardless of location—to direct technicians to report fewer hours than actually worked and to manipulate time records. Every technician who testified confirmed that large-scale and systematic underreporting occurred. The technicians' case-in-chief also included testimony from company administrators, managers, and executives, all of whom confirmed the existence of petitioners' unlawful policy—in many instances by directly attributing the policy to "corporate" and explaining in detail how the policy was communicated and carried out. Petitioners, for their part, could not summon a single technician to testify that he was paid lawfully.

The jury rendered a verdict of a willful, class-wide FLSA violation, finding that the technicians had met their burden of proving uncompensated time, whereupon the court entered a damages award consistent with the jury's factual findings and the employer's uncontroverted payroll records.

The Sixth Circuit's decision, applying proper standards of review to sustain the certification, verdict, and judgment, was correct and does not warrant this Court's review.

Petitioners' contrary claim, centered on an allegedly "square[]" conflict between the Sixth and Seventh Circuits, Pet. 15, rests on a misreading of a single opinion: *Espenscheid v. DirectSat USA LLC*, 705 F.3d 770 (7th Cir. 2013). Like the decision below, *Espenscheid* affirmed a district court's discretionary certification-stage decision based on the particular facts before it. Insofar as petitioners fault the Sixth Circuit for declining to import Rule 23 certification requirements into the FLSA's collective action mechanism based on *Espenscheid*, their complaint is misplaced. *Espenscheid* never endorsed that approach, and courts in the Seventh Circuit continue to apply the same criteria as courts in other circuits in evaluating FLSA collective actions.

Petitioners' serial claims of further "egregious" errors, Pet. 27, and "multiple" additional conflicts, *id.* 15, distort settled law and present no genuine conflict in the circuits. In cases like this one, courts in every circuit follow the burden-shifting regime established by this Court over seventy years ago in *Anderson v. Mount Clemens Pottery Co.*, 328 U.S. 680 (1946), and reaffirmed just last year in *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036 (2016). These cases permit plaintiffs, relying on modes of common proof and the testimony of a subset of employees, to "show the amount and extent of [their] work as a matter of just and reasonable inference." *Mt. Clemens*, 328 U.S. at 687; *Tyson*, 136 S. Ct. at 1047. These same authorities safeguard the rights of defendants by affording them the opportunity to "come forward with evidence of the precise amount of work performed" or negate "the reasonableness of the

inference to be drawn" from the plaintiffs' evidence. *Mt. Clemens*, 328 U.S. at 687; *Tyson*, 136 S. Ct. at 1047.

Petitioners' contention that the Sixth Circuit misapplied these principles also lands wide of the mark. The trial record contained "ample evidence of a company-wide policy of requiring technicians to underreport hours" sufficient to support both liability and damages for all plaintiffs, including those who did not testify. Pet. App. 21a. No court has adopted petitioners' argument that plaintiffs traveling together under the FLSA *must* employ statistical modeling to proceed collectively at trial. As the Sixth Circuit correctly summarized, plaintiffs may prove their claims with any "legally sufficient evidence—representative, direct, circumstantial, in-person, by deposition, or otherwise—[which] produce[s] a reliable and just verdict." *Id.* 19a. The plaintiffs did so here. And petitioners received due process: they were given a full opportunity to present any relevant evidence supporting their defense without limitation. *Id.*

Nor have petitioners shown a credible conflict or error on their Seventh Amendment claim. The jury made all the factual findings required to support an award of damages. And, as the Sixth Circuit concluded, petitioners waived their Seventh Amendment argument by rebuffing the district court's offer to convene a jury to perform the arithmetic on damages.

This case would make an exceptionally poor vehicle for addressing the questions petitioners seek to raise. Petitioners *never asked* the district court to apply Rule 23 standards in its certification decision. To the contrary, petitioners *agreed* to a plan for discovery and trial based on representative proof,

and the district court proceeded accordingly. It would be extraordinary to decide whether Section 216(b) incorporates Rule 23's requirements in a case where no party sought to apply those requirements below. Or to compel witness selection through random sampling in a case where nobody asked for sampling, and the parties instead *agreed* to a plan providing for the mutual selection of representative witnesses. Or to find a due process violation where the court placed no limits on the defendant's ability to mount a defense. Or to find a right-to-jury-trial violation where the complaining party refused to agree to a jury.

At bottom, petitioners ask this Court to do exactly what it said it would not in *Tyson*: promulgate sweeping categorical rules for representative evidence in aggregate litigation. *Tyson*, 136 S. Ct. at 1046. Doing so would upend a long line of precedent dating back to *Mount Clemens* and grant petitioners a do-over to avail themselves of legal rules they expressly rejected below. This Court should decline their invitation.

STATEMENT OF THE CASE

Although petitioners seek to overturn a decision sustaining a jury verdict, they do not state the facts or litigation history in a manner sufficient to evaluate their contentions. A reader of the petition would be unaware, for example, that: (1) petitioners agreed to the method of selecting the subset of technicians who ultimately testified at trial; (2) petitioners never argued that Rule 23's standards should apply or asked for random sampling; (3) half of the technicians selected by petitioners testified at trial, and the technicians who testified—including those selected by petitioners—consistently described receiving underreporting instructions from corporate

officials and managers; (4) the jury heard technicians' testimony together with other common evidence from corporate officials, managers, and administrators describing a top-down, company-wide underreporting policy; and (5) the district court imposed no limitations on petitioners' ability to present evidence, yet petitioners never sought to introduce testimony from any technicians.

1. In 2008, cable technicians Edward Monroe, Fabian Moore, and Timothy Williams brought this FLSA collective action against their employers, FTS USA, LLC and its parent company UniTek USA, LLC,[1] complaining that FTS denied them overtime compensation. They alleged that FTS "required technicians to systematically underreport their overtime hours" pursuant to "a company-wide time-shaving policy." Pet. App. 4a.

2. The FLSA generally requires employers to pay employees a premium for any hours worked in excess of forty per week. 29 U.S.C. § 207(a). The FLSA also requires employers to "make, keep, and preserve" adequate records of hours their employees worked. 29 U.S.C. § 211(c).

Since its enactment, the FLSA has authorized employees to bring collective actions on "behalf of … themselves and other employees similarly situated." 29 U.S.C. § 216(b). In 1947, Congress added an opt-in requirement: "[n]o employee shall be a party plaintiff … unless he gives his consent in writing to become such a party." *Id.*

Courts typically follow a two-stage process in certifying a collective action. At the first stage, the

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[1] Petitioners are jointly referred to as "FTS."

court decides whether a group of employees is sufficiently "similarly situated" to warrant notifying employees who are not yet parties of their right to join the action. At the second stage, the court considers certification again with the benefit of the discovery record. If the court reaffirms that the plaintiffs are similarly situated, "the action proceeds to trial on a representative basis." 7B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1807 (3d ed. 2005); *see also Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, 171 (1989).

FLSA plaintiffs bear the burden of proving that they "performed work for which [they were] improperly compensated" and producing "sufficient evidence to show the amount and extent of that work." *Mt. Clemens*, 328 U.S. at 687. But in cases where the employer fails to keep accurate time records as the law requires, courts employ a burden-shifting framework. Once plaintiffs establish the fact of uncompensated work and the amount of such work "as a matter of just and reasonable inference," the burden "shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference." *Id.* at 687–88. "If the employer fails to produce such evidence, the court may then award damages to the employee[s], even though the result be only approximate." *Id.* at 688. *Mount Clemens*'s burden-shifting regime reinforces the "'remedial nature of [the FLSA] and the great public policy which it embodies'" and "'militate[s] against making' the burden of proving uncompensated work 'an impossible hurdle for the employee.'" *Tyson*, 136 S. Ct. at 1047 (quoting *Mt. Clemens*, 328 U.S. at 687).

3. The district court granted conditional certification of the collective action. Pet. App. 83a.

Two hundred ninety-six technicians ultimately joined the action. *Id.* 5a.

The parties jointly moved the court to proceed on a representative basis through discovery and trial. The parties agreed to limit discovery "to a representative sample of fifty" plaintiffs. Stipulation, ECF 162, PageID.1793. The parties agreed to identify "fifty (50) Plaintiffs they believe are representative" of the class. *Id.* The parties agreed that respondents' counsel would select forty technicians and petitioners' counsel would select ten technicians who together would make up the representative group. Affidavit, ECF 249-1, PageID.5583-84. The parties agreed to adopt "a trial plan based on representative proof" which would propose "a certain number of Plaintiffs from the pool of fifty (50) representative sample Plaintiffs that may be called as trial witnesses." Stipulation, ECF 162, PageID.1794. The court adopted the parties' plan.

4. Following discovery, the court denied FTS's motion for decertification. Pet. App. 85a.

The court found that all technicians in the suit were "similarly situated" because their "claims rel[ied] on a series of common methods by which [FTS] allegedly deprived technicians proper overtime pay regardless of location or supervisor." *Id.* 113a. As the court recognized, "[p]laintiffs across the class allege[d] these same practices." *Id.* These practices, the court observed, were born out of "a pervasive policy within the ranks of Defendants' management to deny pay for compensable overtime." *Id.* 107a.

The district court also considered the fairness and efficiency of proceeding collectively and the possibility of impairing FTS's ability to effectively litigate its defenses. *See id.* 114a–116a. The court rejected FTS's argument that "the finder of fact must

assess each plaintiff's credibility," explaining that "the FLSA contemplates that representative testimony may be used to adjudicate the claims of non-testifying plaintiffs and thereby arrive at an approximation of damages." *Id.* 115a. The court noted that FTS remained free to explore its defenses through cross-examination and by calling its own witnesses. *Id.* Finally, the court observed that the parties' earlier agreement to limit discovery to fifty representative plaintiffs "manifest[ed] Defendants' acquiescence to a process by which the remaining members of the class would not have to produce evidence." *Id.* 103a.

5. At trial, respondents called seventeen technicians from the jointly-selected pool of fifty. *Id.* 7a. Five of the seventeen technicians were originally designated as representative plaintiffs by FTS. Affidavit, ECF 249-1, PageID.5584. Respondents also called seven FTS managers, administrators, and executives and introduced payroll and timekeeping records for all plaintiffs. Exhibit and Witness List, ECF 366, PageID.7323.

The evidence presented at trial demonstrated that FTS operates a highly-centralized organization based out of its headquarters in Madison, Tennessee. Resp. 6th Cir. Br. 4. FTS maintains 31 locations principally located in Tennessee, Texas, Alabama, Mississippi, Florida, and Arkansas. *Id.* at 4–5. Each location has a single manager responsible for implementing FTS's policies. *Id.* at 5. FTS maintains the same job description, compensation plan, and timekeeping system for technicians regardless of manager or location. *Id.* at 6–9.

The trial evidence also demonstrated that FTS executives maintained a de facto policy requiring underreporting of technician time. FTS managers

made it widely known to technicians that "you just couldn't report all your hours." *Id.* at 16. Managers enforced the underreporting policy by threatening punishment or even termination. *Id.* To comply with FTS's underreporting directive, technicians "either began working before their recorded start times, recorded lunch breaks they did not take, or continued working after their recorded end time." Pet. App. 4a; Resp. 6th Cir. Br. 10–14. When technicians failed to underreport enough time to satisfy their managers, managers altered technicians' timesheets themselves to reflect fewer hours. *Id.* at 16–17. Such alteration was part and parcel of FTS's underreporting policy. As one manager explained to a group of technicians, either "you put it on there or I'll put it on there." *Id.* at 15.

The same evidence demonstrated that the underreporting policy came directly from FTS's executives and applied regardless of manager or location. Managers consistently attributed the time-shaving policy to "corporate." *Id.* at 17–18. FTS's executives visited work sites and personally instructed technicians to underreport hours. *Id.* at 18. Other trial witnesses participated in FTS's weekly management conference calls and testified that FTS executives directed them to order technicians to underreport time. *Id.* Technicians consistently testified that managers made it clear that FTS's underreporting policy applied to everyone—not just to some. *Id.* at 21. Many technicians worked at multiple FTS locations and under multiple managers—reporting consistent timekeeping practices across the board. *Id.* at 22. Technicians testified to having complained repeatedly to managers, human resources personnel, and executives about the underreporting policy, but to no effect. *Id.* at 18–19. Despite these frequent

complaints, no FTS manager ever faced discipline for underreporting time. *Id.* at 19. FTS never engaged in any audit or attempted to pay back wages in response to these numerous complaints. *Id.* at 19–20.

FTS, for its part, called only four witnesses at trial—all company executives, Pet. App. 7a—who categorically denied that technicians were underpaid for any overtime work. Resp. 6th Cir. Br. 23–25. FTS did not call any technicians—not even any of the ten they had originally selected as representative plaintiffs—or any managers as witnesses. *Id.* at 25.

6. The jury returned a verdict finding petitioners liable for a willful, class-wide violation of the FLSA. Pet. App. 289a, 291a. The jury also determined the average number of unrecorded hours worked per week by each testifying technician. *Id.* 291a. The jury found that the testifying technicians averaged 13.3 unrecorded hours per week. *Id.* The twelve technicians originally selected by respondents averaged 12.5 weekly unrecorded hours; the five technicians chosen by FTS averaged even more: 15.8. *Id.*

7. Post-trial, FTS argued that the verdict was legally insufficient because the jury had not determined a dollar amount for damages. *Id.* 295a–296a. In response, the district court repeatedly offered to convene a second jury "on the issue of damages." *Id.* Petitioners refused, claiming that such a course was "not appropriate" and that the jury's verdict must be read as awarding "zero damages." *Id.*

Respondents moved the district court to enter final judgment and award the technicians overtime pay. *Id.* 125a. The amount of overtime pay would be mathematically calculated by first determining each employee's unrecorded overtime hours (weekly hours recorded in the stipulated payroll records, plus the

average weekly unrecorded hours determined by the jury, minus all weekly non-overtime hours and overtime hours already paid), multiplying the unrecorded overtime hours by the regular hourly rate of pay (weekly compensation divided by the total weekly hours worked), and then applying the FLSA overtime premium multiplier. *See* 29 C.F.R. § 778.111(a). The court, adopting that approach, entered final judgment. Pet. App. 126a.

FTS sought judgment as a matter of law and renewed its motion for decertification. The district court denied these motions. *Id.* 127a.

8. The Sixth Circuit affirmed the district court's decision denying decertification and upholding the jury verdict. *Id.* 180a.

a. The Sixth Circuit concluded that the district court had not abused its discretion in declining to decertify the case post-trial. The Sixth Circuit observed that the "[t]echnicians' claims are unified by common theories: that FTS executives implemented a single, company-wide time-shaving policy to force all technicians … to underreport overtime …." *Id.* 156a.

The court of appeals rejected FTS's contention that the evidence showed "multiple policies." *Id.* 154a. Instead, the court explained, the fact "[t]hat an employer uses more than one *method* to implement a company-wide work 'off the clock' *policy* does not prevent employees from being similarly situated for purposes of FLSA protection." *Id.* 155a (emphasis added). The court relied on "documentary evidence and testimony from technicians, managers, and an executive showing that FTS's time-shaving policy originated with FTS's corporate office[,]" *id.* 141a, and "applied to FTS Technicians regardless of [location] or supervisor," *id.* 153a. Accepting FTS's

argument, the court reasoned, would "compel employees [subject to a company-wide policy of underreporting overtime] to bring a separate collective action (or worse, separate individual actions) for unreported work required by an employer before clocking in, and another for work required after clocking out, and another for work required during lunch, and yet another for the employer's alteration of its employees' timesheets." *Id.* 155a. "Such a narrow interpretation[,]" the court held, "snubs the purpose of [the] FLSA[.]" *Id.*

The Sixth Circuit concluded that FTS received a full and fair opportunity to present its defenses. *Id.* 156a–158a. The court correctly observed that the trial format permitted FTS to cross-examine respondents' witnesses; and FTS "had every opportunity to submit witnesses and evidence" of its own. *Id.* 158a.

The court also rejected FTS's argument that the Seventh Circuit's decision in *Espenscheid* required reversal. The Sixth Circuit noted that its precedent rejected the notion FTS claimed *Espenscheid* embraced: that Rule 23 and Section 216(b) are precisely coextensive. *Id.* 159a. But the court also identified a number of "factual[] and procedural differences" between this case and *Espenscheid* that "controll[ed]" the court's decision. *Id.* 161a. Both *Espenscheid* and this case affirmed certification decisions under the abuse of discretion standard. *Id.* 160a. In *Espenscheid*, the plaintiffs' counsel "'truculently' refused to accept" the trial plan proposed by the district court for litigating a hybrid class-collective action with more than 2,300 members, leaving the court "with little choice but to hold as it did." *Id.* 160a (quotation marks omitted). Here, by contrast, FTS "s[ought] a determination that the district court *abused its discretion* in

declining to decertify" the case after the parties had "agreed to a representative trial plan, completed discovery on that basis, and jointly selected the representative members." *Id.* 161a. *Espenscheid*, unlike this case, contained several proposed state law Rule 23 classes, involved nearly *ten times* as many employees, and mentioned "no evidence similar to that supporting the time-shaving policy here." *Id.*

b. The court of appeals held that the evidence was sufficient to support the verdict. As the Sixth Circuit observed, "*Mt. Clemens*'s burden-shifting framework … functioned here as envisioned." *Id.* 174a. Respondents "prove[d] that FTS implemented a company-wide time-shaving policy that required employees to systematically underreport their overtime hours," shifting the burden to FTS to negate the reasonableness of the inference to be drawn from respondents' evidence. *Id.* 139a, 173a. FTS made no meaningful attempt to meet that burden: it "had the opportunity at trial to present additional evidence to rebut … Technicians' evidence but failed to do so." *Id.*

c. Finally, the court of appeals rejected petitioners' Seventh Amendment challenge to the damages award. *Id.* 176a–177a. The court concluded that FTS had "abandoned and waived any right to a jury trial on damages that they may have had" by rejecting the district court's offer to impanel a jury to award damages. *Id.* 177a–178a. Even if there had been no waiver, the court held, the Seventh Amendment had not been violated because the jury had made "factual findings necessary for the court to complete the remaining arithmetic." *Id.* 176a.

d. Judge Sutton dissented, but he rejected FTS's primary contention that a "collective action was not an option." *Id.* 185a. Rather, he concluded that

respondents' claims should have been adjudicated in a collective action "with two or three sub-classes" tailored to the "multiple policies, each one corresponding to a different type of statutory violation" he believed existed in this case. *Id.* 186a.

9. FTS petitioned for rehearing en banc.

While that petition was pending, this Court decided *Tyson*. *Tyson* reaffirmed the substantive framework announced in *Mount Clemens*, including *Mount Clemens*'s methodology for establishing class-wide liability and awarding class-wide damages based on the estimated average amount of uncompensated time worked by a subset of employees. *Tyson*, 136 S. Ct. at 1047. Applying Rule 23(b)(3)'s predominance requirement, this Court rejected the defendant's invitation to "announce a broad rule against the use in class actions of … representative evidence." *Id.* at 1046. As the Court explained, "[a] representative or statistical sample, *like all evidence*, is a means to establish or defend against liability." *Id.* (emphasis added). "Its permissibility turns … on the degree to which the evidence is reliable in proving or disproving the elements of the relevant cause of action." *Id.*

The court of appeals denied rehearing. Pet. App. 198a.

10. Petitioners sought this Court's review, and this Court granted, vacated, and remanded for reconsideration in light of *Tyson*. *Id.* 200a. On remand, the Sixth Circuit reaffirmed its prior decision, holding that "*Tyson*'s ratification of the *Mt. Clemens* legal framework and validation of the use of representative evidence support [the panel's] original decision." *Id.* 3a.

11. Petitioners again petitioned for certiorari.

REASONS FOR DENYING THE WRIT

The Sixth Circuit's decision does not warrant further review. This case does not implicate any genuine disagreement in the circuits. Rather, the Sixth Circuit, after carefully reviewing a lengthy and fully developed trial record, correctly applied well-established legal principles to the particular facts before it. Moreover, the issues raised by petitioners are entirely waived through their own litigation conduct below.

I. THE SIXTH CIRCUIT'S DECISION UPHOLDING CERTIFICATION AND THE JURY VERDICT DOES NOT CONFLICT WITH THE DECISION OF ANY OTHER COURT.

Petitioners attempt to manufacture a conflict of authority over (1) the proper standard for certifying an FLSA collective action and (2) due process limitations on representative proof in "aggregate litigation." Pet. 15. Neither claim withstands scrutiny.

A. There Is No Conflict Between the Sixth and Seventh Circuits Over the Standard for Certifying an FLSA Collective Action.

The centerpiece of petitioners' request for this Court's review is the supposed "direct[] conflict" between the law of the Sixth and Seventh Circuits. *Id.* No such conflict exists.

Petitioners argue that the Sixth Circuit applies different standards to class and collective actions, whereas the Seventh Circuit has held that the same standard applies to each. *Id.* This misstates the law: both courts recognize that Rule 23 class actions are "fundamentally different from collective actions under the FLSA." *See McMahon v. LVNV Funding,*

LLC, 744 F.3d 1010, 1017 (7th Cir. 2014). At issue is petitioners' overbroad reading of Judge Posner's passing statement in *Espenscheid* that "there isn't a good reason to have different standards for the certification of" collective and class actions. *Espenscheid*, 705 F.3d at 772. But *Espenscheid* did not proceed to "appl[y]" any Rule 23 requirement to the collective action certification decision, Pet. 15, or cite any Rule 23 precedent.

In decisions before and after *Espenscheid*, the Seventh Circuit has held that, irrespective of whether there was a "good reason" for Congress to draft Section 216(b) as it did, the "opt-in" collective action under Section 216(b) and the "opt-out" class action of Rule 23 are distinct. *See, e.g.*, *Alvarez v. City of Chi.*, 605 F.3d 445, 448 (7th Cir. 2010) ("A collective action is similar to, but distinct from, the typical class action brought pursuant to [Rule 23]."); *McMahon*, 744 F.3d at 1017 (Rule 23 class actions are "fundamentally different" from FLSA collective actions).

Nor do the "result[s]," Pet. 2, in this case and *Espenscheid* conflict. Both opinions upheld district court certification decisions under the abuse of discretion standard of review and in light of the particular facts and procedural posture of the two cases.

In *Espenscheid*, the district court was confronted with a hybrid action involving more than 2,300 satellite technicians and alleging violations of multiple states' laws. 705 F.3d at 771. The district court initially certified the case as a class and collective action, but later ruled that the trial should be bifurcated and proceed using subclasses. *Id.* at 775. The plaintiffs' attorneys responded "truculently" and "refus[ed] to suggest a feasible alternative" trial

plan. *Id.* at 775–76. The district court then decertified the classes prior to trial, citing this ongoing failure to cooperate. *Id.* at 773. *Espenscheid* mentioned no evidence suggesting the existence of a singular, centralized policy requiring underreporting time. *Id.* The Seventh Circuit concluded that, under the circumstances, the district court's decision was well within its discretion. *Id.* at 777.

In contrast, the final ruling on certification here was rendered after a full trial. The technicians' attorneys complied with the district court's orders and presented and followed a feasible trial plan. And unlike in *Espenscheid*, where the plaintiffs refused to propose a trial plan within the parameters outlined by the court, *id.* at 774, respondents here did so. Indeed, FTS *agreed* to the method by which testifying technicians would be selected and jointly proposed "a trial plan based on representative proof[.]" Stipulation, ECF 162, PageID.1794.

These factual and procedural differences—rather than irreconcilably different legal rules—explain why the Seventh Circuit held that decertification in *Espenscheid* was not an abuse of discretion and the Sixth Circuit found no abuse of discretion in denying decertification here. Petitioners have recognized the same point. In its presentation to the Seventh Circuit, petitioner UniTek[2] stated that it was "reasonable to believe" that *in this case*—(but not in *Espenscheid*)—"the testifying witnesses' experiences [we]re *sufficiently similar* to those of the rest of the non-testifying plaintiffs" to warrant collective

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[2] UniTek, which provides human resources and payroll functions to its subsidiary companies, including FTS, was also a party in *Espenscheid*. Resp. 6th Cir. Br. 4.

treatment, and that this case and *Espenscheid* were "distinguishable on precisely this basis." Br. for Defendants-Appellees at 20, *Espenscheid,* 705 F.3d 770 (No. 12-1943), 2012 WL 5231578 (quotation marks omitted) (citing *Monroe v. FTS USA, LLC*, 763 F. Supp. 2d 979 (W.D. Tenn. 2011)). In other words, the very factual differences petitioners deride here as "halfhearted[] attempt[s] to distinguish *Espenscheid*," Pet. 18 n.4, were ones petitioners themselves identified as critical before the Seventh Circuit.

Broadening the focus beyond *Espenscheid* reinforces the absence of any conflict between the Sixth and Seventh Circuits.

In the Sixth Circuit, courts look to three non-exhaustive factors in deciding whether a case should proceed as a collective action: (1) the "factual and employment settings" of the plaintiffs; (2) the "different defenses to which the plaintiffs may be subject on an individual basis"; and (3) the "degree of fairness and procedural impact" of proceeding collectively. Pet. App. 11a. Courts in the Seventh Circuit examine these exact same factors, even after *Espenscheid*. *See, e.g.*, *Nicks v. Koch Meat Co., Inc.*, No. 16-cv-6446, 2017 WL 4122743, at *9–10 (N.D. Ill. Sept. 18, 2017); *Meetz v. Wis. Hosp. Grp. LLC*, No. 16-C-1313, 2017 WL 3736776, at *5 (E.D. Wis. Aug. 29, 2017); *Weil v. Metal Techs., Inc.*, 260 F. Supp. 3d 1002, 1020 (S.D. Ind. 2017); *Osterholt v. Corepower Yoga, LLC*, No. 16 CV 5089, 2017 WL 2180483, at *1 (N.D. Ill. May 18, 2017); *Kramer v. Am. Bank and Tr. Co., N.A.*, No. 11-C-8758, 2017 WL 1196965, at *11 (N.D. Ill. Mar. 31, 2017); *Dekeyser v. Thyssenkrupp Waupaca, Inc.*, 314 F.R.D. 449, 456 (E.D. Wis. 2016). Petitioners' argument suggests that *Espenscheid* requires courts in the Seventh Circuit to reject the Sixth Circuit's standard and fully import Rule 23's

requirements. But courts charged with applying Seventh Circuit precedent do not read *Espenscheid* that way.

Indeed, there is every reason to conclude that the Seventh Circuit would sustain a certification decision like the one made here. In *Alvarez*, a 2010 decision, the Seventh Circuit *reversed* a district court decertification order in an FLSA collective action alleging that the employer systematically miscalculated plaintiffs' overtime in *ten* distinct ways. 605 F.3d at 446–47, 451. The Seventh Circuit reasoned that a collective action would enable "the most efficient judicial resolution of this matter." *Id.* at 451. The court emphasized that "the plaintiffs may be similarly situated even though the recovery of any given plaintiff may be determined by only a subset" of the "common questions" affecting the proposed class. *Id.* at 449.

Similarly, in *Bell v. PNC Bank, National Ass'n*, 800 F.3d 360 (7th Cir. 2015), decided two years after *Espenscheid*, the Seventh Circuit affirmed a class and collective certification order, reasoning that collective treatment was appropriate to determine whether the employer had an "unofficial policy or practice that required employees class-wide to work off-the-clock overtime hours." *Id.* at 374. As here, the employees worked at over twenty locations and described more than one means by which their overtime was underpaid. *Id.* at 367–71. But certification was appropriate, the Seventh Circuit concluded, because the employees "offered evidence that the denial of overtime pay came from a broader company policy and not from the discretionary decisions of individual managers." *Id.* at 375.

B. There Is No Conflict Between the Sixth Circuit and "Multiple Federal and State Courts' Decisions" Either.

Petitioners' effort to conjure a conflict between the decision here and a grab-bag of state and federal cases addressing due process limitations in "aggregate litigation," Pet. 18, also fails. None of the cases petitioners cite involved an FLSA collective action. In fact, they point to only one federal decision—the Fifth Circuit's twenty-year-old opinion in *In re Chevron U.S.A., Inc.,* 109 F.3d 1016 (5th Cir. 1997)—that even found a constitutional violation, but there is no conflict between the decision here and *Chevron*. That case was a mass tort action involving thousands of personal injury, wrongful death, and property contamination claims with extraordinarily complex and individualized causation issues. *Id.* at 1017–18. The district court proceeded to a representative trial without making any Rule 23 findings. *Id.* at 1018. The Fifth Circuit held that the district court improperly bound 3,000 other individual claimants to the judgment without first "find[ing] that the [bellwether] cases … [we]re representative of the larger group of cases or claims." *Id.* at 1020. In contrast, the district court here made just such a determination, and proceeded within the familiar bounds established by seventy years of case law applying the FLSA's congressionally created collective action mechanism.

Duran v. U.S. Bank National Ass'n, 325 P.3d 916 (Cal. 2014), Pet. 19, was not an FLSA collective action, either. Instead, it was brought under a state-law analog to Rule 23, alleging violations of California wage-and-hour law. *Duran*, 325 P.3d at 920. The facts giving rise to the due process violation in *Duran* were fundamentally different from those here. There, a group of loan officers claimed they

were misclassified as exempt outside sales employees under the California Labor Code. *Id.* The trial court ruled, on the basis of testimony from twenty-two plaintiffs, that the entire class had been misclassified. *Id.* at 922, 926. The employer had tried to introduce testimony from seventy-five other class members who averred they met the exemption's requirements. *Id.* at 921–22. But the trial court refused to admit the evidence. *Id.* at 923–24. By contrast, here, the district court placed no limitation at all on FTS's ability to call witnesses or present evidence.

The absence of any broader split is reinforced by the circuits' uniform treatment of similar *FLSA* cases. Petitioners argue, for example, that the trial plan in this case violated the due process principles articulated by the Ninth Circuit in *Hilao v. Estate of Marcos*, 103 F.3d 767 (9th Cir. 1996). Pet. 19. But in *McLaughlin v. Ho Fat Seto*, 850 F.2d 586 (9th Cir. 1988), an FLSA case, the Ninth Circuit affirmed a verdict in favor of a group of employees who relied on the same trial plan employed here. *Id.* at 588. Similar examples can be found across the circuits. *See e.g.*, *Donovan v. Burger King Corp.*, 672 F.2d 221, 224–25 (1st Cir. 1982) (testimony from a subset of non-random employees, together with other common evidence, held sufficient to support a backpay award to the entire class of employees); *Reich v. S. New England Telecomm.*, 121 F.3d 58, 67 (2d Cir. 1997) (same); *Reich v. Gateway Press, Inc.*, 13 F.3d 685, 701 (3d Cir. 1994) (same); *Donovan v. Bel–Loc Diner Inc.*, 780 F.2d 1113, 1116 (4th Cir. 1985) (same); *Beliz v. W.H. McLeod & Sons Packing Co.*, 765 F.2d 1317, 1321, 1331 (5th Cir. 1985) (same); *U.S. Dep't of Labor v. Cole Enters., Inc.*, 62 F.3d 775, 781 (6th Cir. 1995) (same); *Martin v. Tony and Susan Alamo Found.*, 952 F.2d 1050, 1052 (8th Cir. 1992) (same);

Donovan v. Simmons Petroleum Corp., 725 F.2d 83, 86 (10th Cir. 1983) (same); *Morgan v. Family Dollar Stores, Inc.*, 551 F.3d 1233, 1263–65 (11th Cir. 2008) (same).

II. THE COURT OF APPEALS CORRECTLY CONCLUDED THAT THE CERTIFICATION RULING WAS WITHIN THE DISTRICT COURT'S DISCRETION AND THE TRIAL PROCEDURE WAS FAITHFUL TO DUE PROCESS AND THE FLSA.

The Sixth Circuit did not, as petitioners assert, "contravene" the FLSA or this Court's case law in affirming the district court's orders. Pet. 3. The district court properly certified this collective action based on the particular facts before it, and the subsequent trial did not violate due process or the FLSA.

A. The District Court Did Not Abuse Its Discretion in Certifying the Collective Action.

The Sixth Circuit correctly identified and applied the appropriate standard in reviewing the district court's decertification decisions in light of FTS's company-wide overtime violations.

Petitioners argue that the Sixth Circuit should have applied Rule 23's requirements to evaluate the district court's Section 216(b) certification decision. But the Sixth Circuit was plainly correct to distinguish the two provisions.

"Rule 23 actions are fundamentally different from FLSA collective actions," *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1525 (2013), and Section 216(b) and Rule 23 have readily distinguishable textual requirements. *Compare, e.g.*, Fed. R. Civ. P. 23(a)(3) (requiring determinations of numerosity, commonality, typicality, and adequacy),

with 29 U.S.C. § 216(b) (specifying only that plaintiffs be "similarly situated"). Had Congress meant for Section 216(b) to mirror Rule 23, it is inconceivable that their terms and structure would have remained so distinct over time. *Cf. Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, 173 (1989) (noting that while Congress has amended other FLSA provisions, it "left intact the 'similarly situated' language providing for collective actions").

The difference in requirements makes sense. Rule 23 is strictly a procedural device subject to the Rules Enabling Act's prohibition against "abridg[ing], enlarg[ing] or modify[ing] any substantive right." 28 U.S.C. § 2072(b). Section 216(b) works hand-in-glove with the FLSA's minimum wage and overtime provisions to advance the statute's "broad remedial" policy objectives. *Tyson*, 136 S. Ct. at 1047 (quoting *Hoffmann-La Roche*, 493 U.S. at 173). The provision operates to remove "impossible hurdle[s] for the employee," lest the employer be permitted "to keep the benefits of [his] labors without paying due compensation." *Mt. Clemens*, 328 U.S. at 687.

The different standards reflect another important distinction between the two provisions. Section 216(b) collective actions cannot bind potential class members unless they consent in writing to be parties to the action. 29 U.S.C. § 216(b). Under Rule 23(b)(3), putative class members must opt *out* in order to *not* be bound. *See* Fed. R. Civ. P. 23(c)(2)(B)(v)–(vi). Rule 23's more stringent requirements ensure adequate representation for those who will be bound by a judgment without affirmatively joining a case. *See, e.g.*, *Hansberry v. Lee*, 311 U.S. 32, 42–43 (1940); *cf. Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809–10 (1985).

Petitioners' suggestion that Rule 23's full cadre of requirements must be imported into Section 216(b) to protect defendants, Pet. 22, misunderstands the teachings of their cited cases, which center on the rights of absent *plaintiffs*. *See, e.g.*, *Taylor v. Sturgell*, 553 U.S. 880, 891–93 (2008) (addressing "due process limitations" on precluding successive litigation by nonparty plaintiffs); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623, 629 (1997) (affirming the decertification of a class action that failed to protect "the interests of absent class members"). Section 216(b)'s requirement that only individuals who provide written consent to be parties be bound by the judgment greatly mitigates any need to protect the rights of absent class members.

The fact that due process also requires fairness to *defendants*, including allowing them to pursue defenses, does not support merging the provisions' standards. Indeed, the Sixth Circuit's test for certifying Section 216(b) collective actions requires district courts to consider "the different defenses to which the plaintiffs may be subject on an individual basis" and "the degree of fairness and procedural impact of certifying the collective action." Pet. App. 11a. The district court applied that test, *id.* 102a, specifically addressing whether the use of representative testimony would impair FTS's ability to raise its defenses.

Nor is FTS correct in asserting that the Sixth Circuit misapplied its own standard. The issue that actually "divided," Pet. 2, the panel below was whether the district court correctly determined that the technicians' claims were sufficiently similar to proceed as a single collective action versus a collective action with two or three subclasses. Petitioners cannot seriously claim that this dispute warrants this Court's review. That determination

was quintessentially fact-intensive, as the opinions below make clear. It is universally accepted that Section 216(b) requires plaintiffs to be similarly, not *identically*, situated. *See, e.g.*, *Tyson*, 136 S. Ct. at 1043, 1048 (holding both Section 216(b) and Rule 23 certification were appropriate for overtime claims of employees who held different jobs, worked in different departments, and spent varying times donning and doffing protective gear).

And while Judge Sutton faulted the district court for applying the Sixth Circuit's test at too high a "level of generality," Pet. App. 56a, he conceded that this case was appropriate for collective litigation; only that, on his view, subclasses were required. *Id.*

In any event, petitioners' contention that the technicians' "multiple distinct 'theories'" should have precluded a "similarly situated" finding, Pet. 7, ignores the theory of liability underlying the jury's verdict and the supporting evidence showing a pattern and practice of FLSA violations. Using common proof, the technicians established a unitary corporate policy articulated and enforced by FTS corporate officers and implemented by FTS managers through two different means (underreporting of time and manipulation of records). Respondents, who worked "in the same position," with "the same job description," performing "the same job duties," were "similarly situated" under that company-wide policy. Pet. App. 21a.

Petitioners try to distract from the actual trial record with repeated references to what *Espenscheid* euphemistically termed "benign underreporting"—technicians "voluntarily underreport[ing] their own time … because they wanted to impress the company with their efficiency." Pet. 11 (quotation marks omitted). That is a red herring.

There was nothing "benign"—or lawful—about the underreporting in this case. The testimony petitioners have pointed to as evidence of purely self-directed underreporting shows no such thing. For example, technician Matthew Dyke, Pet. 6th Cir. Br. 28 n.14, testified that he was told he "need[ed] to keep [his] hours written down to a minimum." *See* Mot. For Decertification, Ex. 4, ECF 441-5, PageID.9859. These instructions "came from corporate." *Id.* PageID.9861. Dyke "wanted to keep [his] job," and so he complied. *Id.* PageID.9859. This allegedly "voluntary" underreporting is nothing but a form of corporate coercion. Every other testifying technician gave a similar account.

Even if voluntary underreporting had occurred here, it still would not be legally "benign," as petitioners assume. When an employee underreports his work hours for his own reasons and the employer encourages that behavior, failure to pay overtime still violates the FLSA if the employer "kn[ew] or ha[d] reason to believe" off-the-clock work was occurring. 29 C.F.R. § 785.11. The jury was so instructed, and therefore presumably excluded any work time unknown to FTS or its agents—"benign" or otherwise. Jury Instructions, ECF 463, PageID.12277.

B. The Trial Did Not Deny Petitioners Due Process.

Petitioners suggest that the Due Process Clause entitled them to examine each technician plaintiff individually. *See* Pet. 23. Or, as a fallback, they ask the Court to announce a novel constitutional rule requiring that slates of witnesses testifying in "aggregate litigation" be selected through formal, randomized statistical sampling. *Id.* 19–20. Both contentions lack merit.

Petitioners' insistence that due process requires each technician plaintiff to participate at trial contradicts decades of precedent and indeed attacks the entire enterprise of representative litigation. As this Court has explained, "[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." *Cafeteria and Rest. Workers Union, Local 473 v. McElroy*, 367 U.S. 886, 895 (1961).

Tyson broadly reaffirmed the appropriateness of representative proof in a wide range of legal settings, including to establish liability in FLSA actions. *Tyson*, 136 S. Ct. at 1048. In so doing, the Court's starting point was *Mount Clemens*, in which the testimony of seven employees established the number of overtime hours worked by 300 plaintiffs. *Id.* at 1047. Petitioners are wrong to suggest that these authorities endorsed an unconstitutional trial design.

At trial, petitioners retained the most important protection the Constitution affords litigants: the right to call witnesses and introduce any relevant evidence to bolster their defense. *Mount Clemens*, of course, expressly contemplates that employers can defend themselves by "com[ing] forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the [employees'] inference." *Mt. Clemens*, 328 U.S. at 687–88. And as this Court recognized in *Tyson*, the *Mount Clemens* regime does not "deprive [the employer] of its ability to litigate individual defenses" because the argument that the employees' evidence is "unrepresentative or inaccurate … is itself common to the claims made by all class members." *Tyson*, 136 S. Ct. at 1046.

Representative proof is so unexceptional in FLSA collective actions that petitioners themselves entered into an agreement limiting discovery to a subgroup of technicians and expressly contemplating that trial testimony would be drawn from this "representative sample." Pet. App. 6a.

Petitioners' ostensible fallback position—a categorical, constitutional rule requiring formal random statistical sampling for selecting testifying witnesses, *see* Pet. 19–20—is equally unsupported.

Petitioners' proposed rule misapprehends the nature of proof in any action. Suppose a class of plaintiffs seeks to prove that 100 people were robbed. If three of those people (not selected randomly) testify that a gang of thieves entered a room, lined up all 100 victims, and stole their belongings, that testimony would be sufficient to prove liability class-wide. The same conclusion holds if the ultimate facts are proved inferentially. It would be strange to suggest that the *only* way to prove the class claims is through random selection of witnesses and statistical modeling. Yet this is exactly what petitioners suggest is constitutionally required. Courts have rejected this suggestion time and again: "It is axiomatic that the weight to be accorded evidence is a function not of quantity but of quality." *Reich*, 121 F.3d at 63. Petitioners' suggestion that random sampling is the only means to mount a defense or prevent plaintiffs from "magnify[ing] the damages," Pet. 17, is equally wrong. Defendants can defend themselves against unrepresentative plaintiffs with *proof*. They can cross-examine witnesses, testing perceptions, memory, and credibility. And most importantly, defendants can put on their own evidence, including calling witnesses to attack the plaintiffs' evidence as unrepresentative (for example, in the above hypothetical, by testifying that no robbery occurred

or that the group affected was smaller than the plaintiffs suggest).

Tyson's emphatic rejection of "general rules" that would "reach too far," *Tyson*, 136 S. Ct. at 1046, surely applies to petitioners' proposed constitutional rule. *Tyson*, after all, held out the representative testimony in *Mount Clemens* as permissible, and *Mount Clemens* did not require witness selection through statistical sampling—just adequate proof to establish the plaintiffs' claims "as a matter of just and reasonable inference." *Mt. Clemens*, 328 U.S. at 687.

Nor, contrary to petitioners' repeated assertions of unfairness and "bias," Pet. 20, do the facts of this case give rise to a colorable as-applied due process claim.

Petitioners did not ask the district court to apply random sampling in discovery, let alone argue that due process required it. On the contrary, they agreed to the witness selection process and actively participated in it. That alone should be fatal.

Furthermore, petitioners' arguments mischaracterize the case the technicians actually presented to the jury and the defense petitioners could have presented. To establish FTS's unlawful policy, respondents relied on common proof of technician testimony together with direct evidence and testimony from managers, administrators, and corporate executives. Petitioners remained free to call any other technicians—including thirty-two others on their own witness list, five of whom they had "handpicked," *id.*, as well as nonparty technicians. In fact, the district court placed no limitations whatsoever on the proof petitioners could present at trial. This case is thus the polar opposite of *Duran*, 325 P.3d 916, where the employer came

forward with exonerating employee witnesses, but the court prohibited them from testifying. Due process does not entitle petitioners to relief from the consequences of their strategic litigation choices.

Petitioners' claims ring especially hollow in light of the facts their own originally selected witnesses established at trial. Not only do petitioners omit that they jointly selected technicians for the representative witness pool, but they ignore that half the witnesses they originally chose testified at trial. These witnesses all testified to being required to underreport their hours worked. And the jury found these technicians—theoretically those most likely to provide evidence favorable to the defense—worked slightly *more* unrecorded hours than the technicians who had been originally designated as witnesses by respondents.

C. The Verdict Did Not Violate the FLSA.

Petitioners claim that the verdict violated the FLSA because respondents did not present sufficient evidence to support a finding of liability and damages for the class. Not so.

In light of the evidence presented at trial, "each class member could have relied on [the evidence presented] to establish liability had each brought an individual action." *Tyson*, 136 S. Ct. at 1040. Certainly here, a hypothetical non-testifying technician could have relied on the evidence presented in this case, "showing that FTS's time-shaving policy originated with FTS's corporate office[,]" Pet. App. 141a, and "applied to FTS Technicians regardless of [location] or supervisor," *id.* 153a, to "show the amount and extent of [his] work as a matter of just and reasonable inference." *Mt. Clemens*, 328 U.S. at 687.

III. FTS'S SEVENTH AMENDMENT CLAIM DOES NOT WARRANT THIS COURT'S REVIEW.

Having failed to provide a credible due process challenge to the Sixth Circuit's damages rulings, petitioners attempt to raise the same objections as Seventh Amendment violations. They insist this repackaged claim of error "independently warrants this Court's intervention." Pet. 27. It does not.

A. The Decision Below Does Not Implicate Any Split Among the Circuits.

Petitioners cite two decisions which they say "squarely conflict[]," *Id.* 28, with the decision below. There is no conflict whatsoever.

Grochowski v. Phoenix Construction, 318 F.3d 80 (2d Cir. 2003) addressed neither damages nor the Seventh Amendment. There, nine construction workers brought an FLSA action but did not seek collective action certification and therefore were never determined to be similarly situated. The issue was whether the five testifying plaintiffs provided sufficient evidence to prove the claims of the other four plaintiffs who did not appear at trial. *Id.* at 87. The district court entered judgment against the absent workers. *Id.* at 89. In affirming, the Second Circuit did not rely on the Seventh Amendment but on ordinary principles of sufficiency of the evidence. *Id.* at 87–89.

The Fifth Circuit's decision in *Cimino v. Raymark Industries, Inc.*, 151 F.3d 297 (5th Cir. 1998), did involve the Seventh Amendment—but not the FLSA. In *Cimino*, a mass tort class action, the Fifth Circuit placed special emphasis on the underlying substantive law. The court explained that Texas product liability law categorically requires individual proof of causation and damages. *Id.* at 313

& n.32. Thus, fidelity to the Rules Enabling Act and *Erie* required the court to apply Texas's rule. *Id.* at 321.

Neither decision remotely supports petitioners' claim that the circuits are divided over the proper methodology for awarding damages in FLSA cases.

B. The Court of Appeals Was Correct To Reject Petitioners' Seventh Amendment Claim.

Petitioners assert that their Seventh Amendment rights were violated when the "district court *itself* determined damages" (supposedly overriding a jury determination of "zero"). Pet. 31. This argument is both waived and meritless.

The Sixth Circuit correctly held that petitioners failed to preserve their Seventh Amendment objection. In a post-trial status conference, petitioners claimed that the jury, which found "*unrecorded hours*" but not "*damages*," *id.* 32, had not made the necessary determinations to support an award. The district court offered to convene a second jury on damages. Petitioners rejected the offer. The district court ultimately entered judgment based on a formulaic calculation derived from the stipulated payroll records and the jury's factual findings. Pet. App. 117a.

Petitioners raise the argument (for the first time before this Court) that a new trial on damages "would have independently violated the Seventh Amendment." Pet. 33–35. Petitioners have it wrong. Courts commonly convene new juries to decide damages without raising any Seventh Amendment concern, and doing so here would not have required any reexamination of the original verdict. *See* 9A Charles Alan Wright & Arthur R. Miller, *Federal*

Practice & Procedure § 2391 (3d ed. 2008) ("[I]t is now quite settled that there may be a new trial before a second jury limited to [a] single issue.").

On the merits, the district court's judgment and damages award was consistent with the Seventh Amendment. Petitioners insist that the jury's findings were constitutionally inadequate because the determinations of unrecorded hours "are not the same as damages." Pet. 32–33. The premise of that argument is that the jury's verdict should be treated as equivalent to a damages award of "zero" and that the district court's judgment consequently "increas[ed] the damages award." *Id.* 32. But it is inconceivable to read the verdict this way. The jury, after all, found a willful class-wide violation of the FLSA, meaning technicians were owed overtime pay.

Nor did the court "substitute" a "figure" it found "persuasive" for the jury's findings. *Id.* 30, 32. Here, all genuinely disputed questions of fact were properly decided by the jury. *See Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525, 537 (1958). The court entered an award of damages based on petitioners' stipulated payroll records showing recorded hours, the jury's specific factual findings on unrecorded hours worked, and the statutory formula for calculating unpaid overtime compensation.

IV. THIS CASE IS A POOR CANDIDATE FOR FURTHER REVIEW.

This case is a singularly flawed vehicle for deciding any of the questions raised by petitioners.

In the main, petitioners forfeited or affirmatively relinquished the protections they claim to have been denied. *See Genesis*, 133 S. Ct. at 1529 (waiver of issues in the lower courts "prevent[s] [this Court] from reaching [those issues]"). Petitioners

relinquished any claim that Rule 23 should apply when they failed to ask the lower courts to apply Rule 23. They abandoned any argument that due process requires a random sample of plaintiffs when they did not seek a random sample at trial. They forfeited their objection to representative proof when they agreed to a trial plan based on representative proof. They passed up the opportunity to dispute the representativeness of witnesses called by respondents when they failed to call other technicians. They waived any due process argument when they failed to avail themselves of the opportunity to call technicians as witnesses in their defense. They surrendered their jury trial right when they refused to submit damages to a jury and waived their newly-minted Reexamination Clause defense by failing to raise it below.

The same issues petitioners raise are unripe for review. Both *Espenscheid* and this case were litigated before *Tyson*. The Sixth Circuit's latest opinion is among the first cases to apply *Tyson*. To the extent the issues presented here are frequently "recurring," Pet. 35, this Court presumably will have ample opportunity to address them once lower courts have decided a greater number of cases with the benefit of *Tyson*. As always, this Court "speaks most wisely when it speaks last." *Maslenjak v. United States*, 137 S. Ct. 1918, 1932 (2017) (Gorsuch, J., concurring).

Finally, petitioners imply a special need for this Court's immediate intervention because petitioner UniTek was a party to cases in the Sixth and Seventh Circuits. Pet. 15. But petitioners ignore the fact that this case and *Espenscheid* involved different principal employers sharing only a parent company that played little to no role in day-to-day operations. In any event, petitioner UniTek cannot credibly

claim to be subjected to conflicting standards of primary conduct in the Sixth and Seventh circuits. All petitioners must do to comply with the FLSA—in any circuit—is properly pay their employees for their overtime work.

CONCLUSION

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

Respectfully submitted,

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