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

REPLY BRIEF FOR PETITIONERS

COLIN D. DOUGHERTY
JONATHAN D. CHRISTMAN
FOX ROTHSCHILD LLP
10 Sentry Parkway
P.O. Box 3001
Blue Bell, PA 19422
(610) 397-6500

MIGUEL A. ESTRADA
Counsel of Record
MATTHEW S. ROZEN
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
mestrada@gibsondunn.com

Counsel for Petitioners FTS USA, LLC and UniTek USA, LLC

RULE 29.6 STATEMENT

The corporate disclosure statement included in the petition for writ of certiorari remains accurate.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

RULES

CONSTITUTIONAL PROVISIONS

REPLY BRIEF FOR PETITIONERS

The decision below expressly cemented a recognized circuit conflict on the legal standard governing FLSA collective actions—reaching the opposite result as the Seventh Circuit in a nearly identical suit involving the same defendant—and said explicitly that its disagreement with the Seventh Circuit over that standard was the "controlling" factor explaining the divergent outcomes. App. 28a-29a. That conflict—on an undeniably important, undisputedly recurring, legal issue that the court of appeals explained drove its decision—suffices by itself to merit review.

Respondents implausibly deny that stark, explicit split and its significance here, but offer no credible way to reconcile the circuits' view of the *legal* standards that both circuits, the district court below, and even respondents themselves previously acknowledged were in conflict. Respondents likewise proffer no way to square the approach the Sixth Circuit approved—in which representativeness is *assumed* based solely on counsel's *assertion* rather than proven by any reliable methodology—with other federal and state-court cases recognizing due-process limits on proof-by-proxy. Respondents write off these other cases because they did not involve the same *statute*, but never confront the *constitutional* strictures these other courts enforced but the panel majority here disregarded.

Unable to refute these direct conflicts, respondents hide behind spurious assertions of forfeiture that not even the Sixth Circuit credited. Their contentions that petitioners failed to preserve their objections are pure fiction: Petitioners opposed certification of a collective action and trial by representa-

tive proof at every turn, as the district court itself acknowledged: It expressly rejected "any inference that [petitioners] have at anytime waived anything." App. 263a.

Respondents' attempt to evade review or summary reversal of the Sixth Circuit's abridgment of petitioners' Seventh Amendment rights is equally misguided. Respondents offer no substantive defense of the panel's independent error of approving the trial judge's unilateral determination of damages. Critically, they fail to explain how the judge's calculation was possible without the error that Judge Sutton condemned: improperly assuming additional facts that a jury never found. Respondents deny the lower-court conflict because the other cases involved different causes of action, but elide the *constitutional* principle applicable in each one. They ultimately urge the Court to overlook the Sixth Circuit's error as supposedly invited, when in reality petitioners merely opposed a belatedly offered procedure that would have independently violated the Seventh Amendment.

This Court should accordingly grant certiorari as to both issues presented.

I. THIS COURT SHOULD RESOLVE THE CONFLICT THE DECISION BELOW CREATES WITH LOWER-COURT RULINGS ON REPRESENTATIVE PROOF.

The Sixth Circuit explicitly acknowledged that the legal standard it applied conflicts with Seventh Circuit precedent regarding the standard for certifying FLSA collective actions. The decision below also departs from other precedents delineating the due-process limits on collective litigation. Respondents' effort to refute these conflicts is unavailing.

A. Respondents are alone in refusing now to recognize the direct conflict between the legal standards applied by the Sixth Circuit below and the Seventh Circuit in *Espenscheid v. DirectSat USA, LLC*, 705 F.3d 770 (7th Cir. 2013). Opp. 15-18. The Sixth Circuit expressly recognized and cemented an already-existing circuit conflict on the "standard for collective actions" and found it "controlling" here. App. 28a-29a. *Espenscheid* had acknowledged the same conflict, citing the precedent (*O'Brien v. Ed Donnelly Enters., Inc.*, 575 F.3d 567 (6th Cir. 2009)) on which the Sixth Circuit here relied. 705 F.3d at 772. Indeed, so did respondents, who argued below that *Espenscheid* was "contrary" to Sixth Circuit precedent. Resp. C.A. Br. 50. Having succeeded in that contention, respondents cannot claim the opposite now. *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001).

Respondents also try to obscure the explicit conflict in legal standards by quibbling over whether the *Espenscheid* standard is really identical to Rule 23. But that rearranging of deck chairs misses the point: *Espenscheid* expressly held that would-be FLSA plaintiffs *cannot proceed* based on putatively representative proof without any reliable method that accounts for divergences in their theories of liability and wide variation in damages. Judge Posner described this test as mirroring Rule 23 because there is no "good reason to have different standards." 705 F.3d at 772. *That* is the test the Sixth Circuit rejected.

Espenscheid holds, moreover, that to "get around … variance" by using "'representative'" testimony, plaintiffs must show that the representatives "were chosen" in a manner that makes the sample "genuinely representative" of the class—which generally

requires using "sampling methods used in statistical analysis" to "create a random sample." 705 F.3d at 774-75. Respondents consistently rejected any obligation to make a comparable showing, and the Sixth Circuit agreed with them. Indeed, respondents *still* have never explained how they selected 17 testifying plaintiffs from the already unrepresentative 50-plaintiff sample used for representative discovery.

Respondents are left to speculate that the Seventh Circuit did not mean what it said in *Espenscheid* (and what the Sixth Circuit understood it to mean here), Opp. 15-16, but that conjecture is unfounded. As *Espenscheid* recognized, 705 F.3d at 772, *Alvarez v. City of Chicago*, actually *applied Rule 23(b)(3)'s predominance requirement* to an FLSA collection action, concluding that plaintiffs "may be similarly situated" "[i]f common questions predominate." 605 F.3d 445, 449 (7th Cir. 2010). The one "princip[al] difference" *Alvarez* noted between the FLSA and Rule 23—that FLSA collective actions are "opt-in," *id.* at 448—does not implicate certification, as *Espenscheid* explained, 705 F.3d at 771-72. *McMahon v. LVNV Funding, LLC*, is even further afield: It addressed mootness, not the standard for certification. 744 F.3d 1010, 1017 (7th Cir. 2014). Neither remotely supports respondents' self-serving prediction (at 19) that the Seventh Circuit would abandon *Espenscheid*'s explicit holding in some hypothetical future case.

Having failed to refute the legal conflicts that both the Sixth and Seventh Circuits expressly acknowledged, respondents change the subject, resorting to purported factual distinctions from *Espenscheid*. Opp. 16-18. Those distinctions are irrelevant to the explicit conflict as to the applicable *legal*

standard. In any event, they are illusory. Like the Sixth Circuit, respondents cite the number of claimants—though class size "had no bearing on the Seventh Circuit's analysis," App. 62a (Sutton, J. dissenting). But they disregard the key commonalities that lead Judge Sutton to conclude that the panel could simply "adopt the Seventh Circuit's opinion as [its] own in this case" (App. 185a): technicians in the same industry and paid through the same piece-rate system alleging the same hodge-podge of theories based on the divergent practices of different managers in different field offices, with no method proffered to overcome those differences. The *Espenscheid* plaintiffs' "'truculen[ce]'" (Opp. 16) is present here as well: Respondents disclaimed any duty to show representativeness through any of the methods the Seventh Circuit identified. D.C. Dkt. 249, at 16. The only difference is that the Sixth Circuit allowed them to do that.[1]

B. Respondents likewise fail (at 20-21) to refute the Sixth Circuit's broader split with *In re Chevron U.S.A., Inc.*, 109 F.3d 1016 (5th Cir. 1997), and *Duran v. U.S. Bank National Association*, 325 P.3d 916 (Cal. 2014), on the fundamental due-process limits on representative proof that apply even where it is "appropriate" to try "common issues … through … selected individuals' cases." *Chevron*, 109 F.3d at 1020-21.

---

[1] Respondents also note (at 17) that the majority here affirmed certification, while *Espenscheid* affirmed decertification, but they are wrong that the abuse of discretion standard reconciles those outcomes. *Espenscheid*'s categorical premise—that "[n]othing like [representative proof] is possible" given the variations among technicians, 705 F.3d at 773—compels the same result in either posture.

Contrary to respondents' characterization, petitioners do not contend that these cases impose a "categorical rul[e]" that would require random sampling in *all* FLSA collective actions. Opp. 4, 27-29. As in respondents' cases (Opp. 21-22) and *Tyson Foods, Inc. v. Bouaphakeo*, employees alleging identical theories might plausibly testify to shared experiences in "the same facility," 136 S. Ct. 1036, 1048 (2016), under shared managers, *e.g.*, *U.S. Dep't of Labor v. Cole Enters., Inc.*, 62 F.3d 775, 779 (6th Cir. 1995), or as percipient witnesses of others' experiences, *e.g.*, *McLaughlin v. Ho Fat Seto*, 850 F.2d 586, 588 (9th Cir. 1988). Plaintiffs' "similar work" might also support reliance on representative proof when it suggests similar donning and doffing times, *e.g.*, *Tyson*, 136 S. Ct. at 1048, or similar job classifications, *e.g.*, *Donovan v. Burger King Corp.*, 672 F.2d 221, 223 (1st Cir. 1982).

But petitioners were not in a single workshop or plant, able to testify that they saw their co-workers being subjected to the same standard practice as they. They worked autonomously in the field out of 30 offices in 11 different states. Pet. C.A. Br. 9, 25. Where, as here, essential aspects of the plaintiffs' experiences indisputably differ and individual plaintiffs testify as representatives rather than percipient witnesses of other plaintiffs' experiences, *Duran* and *Chevron* both hold that "the sample must be … randomly selected" to meet the "minimal level of reliability" required by due process. *Chevron*, 109 F.3d at 1020-21; *Duran*, 325 P.3d at 941 (sample "must be randomly selected" for "results to be fairly extrapolated"). Otherwise, as this Court reaffirmed in *Tyson*, "statistically inadequate" sampling must be rejected. 136 S. Ct. at 1048. The Sixth Circuit did not pretend that respondents' proof satisfied this re-

quirement, but concluded instead that the requirement does not exist.

Respondents dismiss those cases as not involving FLSA actions, Opp. 20, but these courts applied *constitutional* limits derived from due process; the particular *statutes* underlying the claims in each case are irrelevant. Respondents further try to diminish those decisions by noting that the trial courts there failed in other respects, but those additional shortcomings cast no doubt on *Chevron* and *Duran*'s unqualified holding that when plaintiffs' experiences vary, reliable sampling is a prerequisite for representativeness.

C. Respondents' merits arguments do nothing to diminish the need for this Court's review. Both the FLSA properly construed and due process precluded letting respondents try the case based on the testimony of a handful of hand-picked "representative" witnesses without any showing or jury finding that their claims and relevant circumstances were representative of the class—whether based on evidence showing that they are in fact representative or were chosen by some reliable method that allows drawing that kind of inference. Neither the Sixth Circuit nor respondents offer any authority permitting a court to presume that a hand-picked sample of plaintiffs is representative and extrapolate findings about those plaintiffs to the rest of a class without any proof or jury finding on that issue.

Respondents double down on the Sixth Circuit's meritless conclusion that the FLSA standard is less stringent than Rule 23, but the reasons they offer—that FLSA collective actions are "opt-in" and the provision authorizing them "'modif[ies] [individual plaintiffs'] substantive right[s],'" Opp. 23—are insub-

stantial. *Tyson* rejects any suggestion that the evidentiary burden in FLSA collective actions should differ "merely because the claim is brought on behalf of a class." 136 S. Ct. at 1046. And the opt-in mechanism has nothing to do with whether proof is sufficiently representative to meet that burden.

Respondents also claim that the bare allegation of "a unitary corporate policy" obviates any showing of representativeness. Opp. 25. But the point, again, is that the trial court and Sixth Circuit lowered the standard for certification, because respondents never were required to prove a unified policy that affected the representatives and the absent class members in the same way. The supposed "policy" was simply "the theory—at a vertigo-inducing height of generality—that the defendants violated the overtime provisions of the FLSA." App. 56a (Sutton, J. dissenting). Citing their appellate briefs, respondents claim to have "evidence" attributing this vague policy to "corporate," Opp. 9, but those briefs mischaracterize corporate efforts to reduce overtime *worked* ("get the overtime hours down," D.C. Dkt. 453, at 186) as instructions to falsify timesheets. Resp. C.A. Br. 17. It is perfectly legal for a company to manage assignments so as to reduce or eliminate overtime, as Sutton noted, App. 52a, so that this "evidence" faults petitioners for doing something they were privileged to do. The district court neither found that corporate directed managers to time-shave, nor required such a finding by the jury, but instead held that respondents were "not required to show a 'unified policy.'" App. 112a. Nor did respondents justify the use of representative proof as to other elements required by respondents' own cases: "which class members were actually adversely affected by the policy" and "what loss each class member sustained." *Bell v. PNC*

Bank, Nat'l Ass'n, 800 F.3d 360, 379-80 (7th Cir. 2015).

Respondents' remaining arguments are side shows with no bearing on the central legal dispute over the applicable legal standard. They claim that any problems with representative proof could have been solved through "subclasses," Opp. 25, but subclasses were not used and respondents never proposed a way to use them. And they contend that petitioners could have called their own "exonerating employee witnesses," Opp. 29-30, but fail to explain how that excuses respondents' own failure of proof as to representativeness.

D. Unable to defend the panel's decision on certification and representative proof, respondents argue that petitioners "forfeited" those issues in their "trial plan" and by agreeing to representative "discovery." Opp. 3, 34. That contention ignores petitioners' *repeated* objections to certification and representative proof at every stage, Pet. C.A. Reply 21-23, *including* in the parties' joint trial plan, D.C. Dkt. 241, at 2. Moreover, as Judge Sutton pointed out, the purpose of representative discovery was to ascertain *whether* the witnesses were representative, which petitioners could not have done without discovery. App. 62a (Sutton, J. dissenting). The district court's finding expressly rejecting "any inference that [petitioners] have at anytime waived anything" is thus beyond question, App. 263a, as the panel evidently agreed: Rather than find those issues waived, it addressed them on their merits.

Petitioners' objections fully encompassed the issues presented here. Petitioners sought decertification based on *Espenscheid*, D.C. Dkt. 441, arguing explicitly that "Rule 23 considerations may apply in

certain FLSA collective actions," D.C. Dkt. 443-1, at 5. Petitioners similarly challenged respondents' reliance on a "hand-picked" sample, arguing that the sample was not "'scientifically or statistically appropriate,'" so representative proof would "offend … due process." D.C. Dkt. 246-1, at 8, 12. On appeal, petitioners reasserted these arguments, invoking "the commonality, typicality, and representativeness requirements of Rule 23(a)," Pet C.A. Reply 13-14, and challenging respondents' reliance on a "hand-picked, non-random" sample as "in contravention of settled due-process principles." Pet. C.A. Br. 1-3. Without blinding themselves to this record, respondents cannot seriously deny that petitioners preserved these issues.

II. THE CIRCUIT CONFLICT ON THE SEVENTH AMENDMENT INDEPENDENTLY WARRANTS THIS COURT'S REVIEW.

Respondents also offer no good reason to withhold review or summary reversal of the Sixth Circuit's independent Seventh Amendment error in letting the district court determine damages.

A. Respondents' cursory argument (at 31) that "[t]here is no conflict" with *Cimino v. Raymark Industries, Inc.*, 151 F.3d 297 (5th Cir. 1998) and *Grochowski v. Phoenix Construction*, 318 F.3d 80 (2d Cir. 2003), lacks merit.

Respondents claim to distinguish *Cimino* because it involved claims under state tort law, "not the FLSA." Opp. 31. But the issue here is *constitutional*, and the FLSA claims at issue are undisputedly covered by the Seventh Amendment, so the specific statute is irrelevant. The court invoked state law only in addressing *other*, independent flaws in the

trial court's methodology; by straining to conflate the issues, respondents only prove that *Cimino*'s Seventh Amendment holding is not distinguishable.

Respondents similarly miss the point on *Grochowski*: The key predicate to damages—"the number of hours worked by the non-testifying employees"—is "for a jury to determine," not, as the Sixth Circuit held, for the judge to calculate. 318 F.3d at 88. A failure of proof on this element compels a directed verdict, *id.* at 89, not, per the decision below, a judicial workaround in which the court averages testifying employees' hours.

B. On the merits, respondents principally assert that the jury decided "all genuine disputed questions," Opp. 33, but that is impossible to square with the trial record. The jury's *only* findings addressed each *testifying plaintiff's unrecorded hours* (not damages) in an *average week*. That finding alone would not permit the court to calculate damages as to *anyone*, let alone as to the *nontestifying plaintiffs*, about whom the jury made *no* findings. Calculating damages would require not *averages*, but the actual, week-to-week breakdown of each plaintiff's unrecorded hours. The district court assumed those hours were constant each week, ignoring inevitable fluctuations that would have altered the damages for each unrecorded hour. To calculate the *nontestifying* plaintiffs' damages, moreover, the district court averaged the testifying plaintiffs' unrecorded hours, based on the court's own assumption that *all* plaintiffs' unrecorded hours were comparable—an assumption that petitioners repeatedly challenged and the jury never found justified, but rather *rejected* by making unrecorded hours findings for the testifying

plaintiffs that varied by up to 300 percent from one plaintiff to another. App. 291a.

C. Respondents fall back on the panel's attempt to insulate its decision from review by holding that petitioners waived their jury-trial right when they refused a partial retrial on damages. Opp. 32-33. Like the Sixth Circuit, however, respondents fail to explain how petitioners could have waived their Seventh Amendment objection by rejecting a proposal that would have independently violated that Amendment. This is not a circumstance where the district court could have "convene[d] [a] new jur[y] to decide damages" alone. Opp. 32. Respondents do not dispute that damages depended on—and the verdict form did not disclose—*which* of respondents' multiple theories of liability the jury credited. Damages and liability were thus far too "interwoven" to retry damages separately "without confusion and uncertainty," *Gasoline Prods Co. v. Champlin Ref. Co.*, 283 U.S. 494, 500 (1931), and potentially inconsistent verdicts. While respondents dismiss respondents' objection under *Gasoline Products* as "newly-minted," Opp. 34, petitioners expressly raised it below, Pet C.A. Br. 62. Petitioners waived nothing by opposing that unconstitutional approach.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

COLIN D. DOUGHERTY
JONATHAN D. CHRISTMAN
FOX ROTHSCHILD LLP
10 Sentry Parkway
P.O. Box 3001
Blue Bell, PA 19422
(610) 397-6500

MIGUEL A. ESTRADA
Counsel of Record
MATTHEW S. ROZEN
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
mestrada@gibsondunn.com

Counsel for Petitioners FTS USA, LLC and UniTek USA, LLC

January 16, 2017