No. 18-1419

IN THE

Supreme Court of the United States

ANDREA HIRST, ET AL.,

Petitioners,

—v.—

SKYWEST, INC., ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF IN SUPPORT OF CERTIORARI

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SkyWest, in opposing this Court's review of pleading requirements under the Fair Labor Standard Act ("FLSA"), perpetuates the myth of its "well-paid" flight attendants, focusing on flight attendants' seemingly flush pay rates of about $20.00 per block hour (BIO 1), and ignoring—but never refuting—the pairing example in which California plaintiff Sarah Hudson worked 36 hours, 54 minutes of compensable work at a block wage rate of $17.50, but her straight-time wages fell to a mere $5.62 per hour. Pet. 7-8. To further its illusion of fair pay, SkyWest claims that "A flight attendant's block time (or credit time) *may be less than her 'duty day*[,]'" BIO 1, when in reality, block time is *always* significantly less than the duty time. Block time wages are stretched so thin that during some pairings (the functional equivalent of other occupations' workweek) the flight attendants' straight-time wage rates plummet far below federal minimum wage, like the $5.62 per hour wages of Sarah Hudson. Pet. 3-5.

In its opinion, the Seventh Circuit raised the pleading standard far beyond *Twombly* and *Iqbal* and strayed away from Federal Rule of Civil Procedure 8(a) requirements into the heightened pleading territory of Rule 9(b). By requiring employees to plead a given underpaid workweek, the Seventh Circuit joins several other circuits that close the courthouse doors to employees in occupations with complex scheduling and payroll systems. Here, pleading a 7-day workweek requires splitting flights and pairings into unequal halves, changing time zones, and calculating straight-time wages that vary every workday of every workweek. And because SkyWest refuses to designate a day and time when the workweek begins (as required by the

Department of Labor), all calculations must be done on a rolling workweek basis.

The complexity of this case provides the perfect vehicle to unify the circuits' disparate FLSA pleading requirements in the post-*Twombly* and *Iqbal* era, in a manner that adapts and is accessible to every employee group not just those with the simplest and most common payroll schemes. This Court should grant certiorari on this issue of nationwide importance for the benefit of all occupations.

I. The circuit split is clear and growing.

Contrary to SkyWest's argument (BIO 4-12), a clear split in pleading requirements exists between circuits. At some level of abstraction, the differing standards have similarities and virtually all opinions overlap in their citations, yet a well-pleaded complaint that is dismissed in some circuits will not be in others. Analysis of the flight attendants' allegations demonstrates this circuit split.

The flight attendants pleaded that SkyWest calculates wages hourly based on "block time," a subset of compensable work, and provides no compensation for other hours worked (C.A. App. 148-49, ¶¶ 40-48); that daily the hours compensated are far below the hours worked (*id.* at 150-56 ¶¶ 49-70; *id.* at 158-67 ¶¶ 76-104); that SkyWest does not provide information necessary to calculate straight-time wages (*id.* at 157-58 ¶¶ 71-75); and that information could be developed through discovery that would demonstrate periods when compensation does fall below minimum wage (*id.*; *see also id.* at 145, 159 ¶¶ 32, 78). Nevertheless, the district

court dismissed their claims as not meeting plausibility requirements. App. 39a.

The Seventh Circuit affirmed the district court's dismissal of flight attendants' claims, which opined that plaintiffs *must* identify a particular workweek in which they were paid below minimum wage for plausibility. App. 7a-8a; *see also* App. 31a, 34a, 66a. Circuits, like the Seventh, that demand pleading a "specific workweek" leads courts to prematurely dismiss FLSA complaints in the Second, Sixth, and Ninth Circuits. Pet. 21-25.

By contrast, the flight attendants' complaint would have been sustained in the First, Third, Fourth, and Eleventh Circuits. In *Pruell v. Caritas Christi*, 678 F.3d 10 (1st Cir. 2012), the First Circuit in reversed a district court's dismissal of a complaint that failed to allege precise periods for which plaintiffs were entitled to overtime compensation, and permitted the plaintiffs to amend in order to plead "what sort of work they performed and . . . how much they were paid as wages; but precisely how their pay was computed and based upon what specific number of hour for particular time periods may depend on records they do not have. . . . [S]ome latitude has to be allowed where a claim looks plausible based on what is known." *Id.* at 15.

Similarly, the Third Circuit would have sustained this complaint. *Davis v. Abington Mem. Hosp.,* 765 F.3d 236, 242-43 (3d Cir. 2014) ("[W]e do not hold that a plaintiff must identify the exact dates and times that she worked overtime."). The Fourth Circuit sustained a complaint where the plaintiff could not prove which periods he was underpaid at the pleading stage, but he "estimate[d]" the typical number of compensable and uncompensable hours worked and the amount

compensation was "typically" reduced by unreimbursed business expenses. *Hall v. DIRECTV, LLC,* 846 F.3d 757, 778-79 (4th Cir. 2017), cert. denied, 138 S. Ct. 635 (2018). Likewise, the Eleventh Circuit sustained a complaint where plaintiffs pleaded that they "routinely" worked more than 40 hours per week because they were not paid for lunch periods but were required to remain available for work. Pleading the nature of their work or precise number of minutes lost during each lunch period was not required. *Cooley v. HMR of Ala., Inc.,* 747 F. App'x 805, 807 (11th Cir. 2018).[1]

A clean, uniform standard is critically important for nationwide uniformity in pleading federal minimum wage and overtime claims.

II. FLSA pleading standards post-*Twombly* and *Iqbal* are frequently debated by federal courts.

SkyWest asserts that there is no disagreement among the circuits regarding FLSA pleading post-*Twombly* and *Iqbal* (BIO 4), yet federal courts routinely highlight this disagreement in their opinions. "Although the circuit courts are in harmony on what is not required by *Twombly* and *Iqbal*, there is no consensus on what facts must be affirmatively pleaded to state a viable FLSA claim post-*Twombly* and *Iqbal*." *Landers v. Quality Communs., Inc*., 771 F.3d 638, 642 (9th Cir. 2015). The circuit conflict regarding FLSA pleading standards filters down to district courts as

[1] Unpublished circuit opinions are salient to circuit splits. *E.g.*, *Hall St. Assoc. v. Mattel, Inc.*, 552 U.S. 576, 583 n.5 (2008) (relying on an unpublished circuit opinion in granting certiorari).

they address Rule 12 motions. *E.g.*, *Simpson v. Baskin*, No. 3:17-cv-01077, 2018 U.S. Dist. LEXIS 30555, at *15 (M.D. Tenn. Feb. 26, 2018) ("Federal courts have 'diverged somewhat' as to the degree of specificity required to plausibly allege FLSA minimum wage or overtime violations.") (collecting cases); *Perez v. Team Envtl. LLC*, No. 2:16-3491, 2016 U.S. Dist. LEXIS 175560, at *10 (S.D. W. Va. Dec. 20, 2016) ("Courts that have addressed FLSA pleading requirements post-*Twombly* are split over the factual allegations that must be pled in order to state a viable claim."); *Butler v. DirectSat USA, LLC*, 800 F. Supp. 2d 662, 667-668 (D. Md. 2011) ("In the wake of *Iqbal* and *Twombly* decisions, courts across the country have expressed differing views as to the level of factual detail necessary to plead a claim for overtime compensation under FLSA.") (collecting cases).

Even cases cited by SkyWest discuss the lack of uniformity in FLSA pleading. *E.g., Davis*, 765 F.3d at 241-43 ("The level of detail necessary to plead a FLSA claim poses a more difficult question–one that has 'divided courts around the country.'") (citations omitted).

III. The post-*Twombly* and *Iqbal* circuit split in FLSA pleading standards leads to disparate results.

A. In district courts, a FLSA claim's likelihood of survival on the pleadings differs by circuit.

The circuit split on FLSA pleading standards is both fresh (*i.e.*, repeatedly appearing in recent cases)

and deep (*i.e.*, causing disparate outcomes depending on which side of the circuit split a matter is brought). *Compare Maclin v. Reliable Reports of Tex., Inc.*, 314 F. Supp. 3d 845, 851 (N.D. Ohio 2018) (declining to adopt a stricter pleading standard for FLSA claims and declining to dismiss plaintiff's claims) (collecting cases) *with Acosta v. Ararat Imp. & Exp. Co., LLC*, No. 5:18-CV-444-FL, 2019 U.S. Dist. LEXIS 75437 (E.D.N.C. May 3, 2019) (dismissing FLSA claims despite plaintiff Secretary of Labor's claim that he "employs such standard, similarly-worded complaints in FLSA matters to maintain consistency throughout the country").

The confusion regarding FLSA pleading standards is more clearly reflected in district courts when Rule 12 motions are decided. For example, in *Lundy v. Catholic Health System of Long Island, Inc.*, 711 F.3d 106 (2d Cir. 2013), the Second Circuit held that "a plaintiff must sufficiently allege 40 hours of work in a given workweek as well as some uncompensated time in excess of the 40 hours." *Id.* at 114. The Southern District of New York subsequently dismissed a plaintiff's FLSA overtime allegations because "the only allegations relating to overtime in the complaint are when the Plaintiff alleges that he 'routinely' worked a total of ten or more hours over forty hours per week. Yet at no point in the complaint does Plaintiff allege a single particular week he worked more than forty hours or attempt to estimate the number of hours he worked in any of the weeks employed." *Fridman v. GCS Computers. LLC*, No. 17-Civ.-6698, 2018 U.S. Dist. LEXIS 51163, at *8 (S.D.N.Y 2018).

Compare this outcome with the Fourth Circuit's opinion in *Hall*. 846 F.3d at 757. In that case, the

Fourth Circuit declined to adopt the "particular week" standard, instead "require[ing] plaintiffs to provide some factual context that will 'nudge' their claim 'from conceivable to plausible.'" *Id.* at 777 (quoting *Twombly*, 550 U.S. at 570). *Hall* held that plaintiffs "must provide sufficient detail about the length and frequency of their unpaid work to support a reasonable inference that they worked more than forty hours in a given week." *Id*. (citation omitted). District courts in the Fourth Circuit apply this slightly relaxed pleading standard, thus yielding different results from those of the Second Circuit, discussed above. In *Allen v. Express Courier International, Inc.*, the Western District of North Carolina found that plaintiff stated a claim when they alleged "that they worked more than 40 hours per week, the defendants knew of these hours, yet failed to pay plaintiffs overtime wages, and that plaintiff's vehicle expenses caused their pay to drop below minimum wage." No. 3:18-cv-00028, 2018 U.S. Dist. LEXIS 124581, at *5 (W.D.N.C. July 25, 2018). Similarly, in *Ra'Palo v. Lucas Designs, Inc.*, the District of South Carolina allowed plaintiffs' FLSA claims to survive dismissal on allegations that they worked six days a week and "sometimes" as much as 12 hours a day. No. 9:17-cv-00710, 2017 U.S. Dist. LEXIS 113672, at *6 (D.S.C. July 21, 2017). The court noted that plaintiffs did not plead how often they worked 12-hour days or the hours they worked otherwise, but if "plaintiffs were somehow working less than 6 hours for five days and then 12 for one day, their weekly hours would have exceeded 40 hours in any week they worked a 12 hour day. A plaintiff is not required to guard against such strange and unreasonable inferences." *Id.*

B. Nearly identical FLSA claims in DirecTV cases demonstrate dissimilar access to the courts.

As district courts uniformly apply the FLSA pleading standards of their circuit, cases with virtually identical allegations are dismissed in one court while surviving dismissal on the pleadings in another. Pet. 21; BIO 11-12. A striking example of this disparity is seen in a series of FLSA cases brought by the same attorneys between about 2010 and 2015 that alleged DirecTV misclassified its satellite television technicians, paid them on a piece-rate system (similar to that of the flight attendants in this case), and shorted the technicians of minimum wages and overtime.

Many of the DirecTV district courts grappled with post-*Twombly* and *Iqbal* pleading standards for FLSA wage claims. *E.g.*, *Comer v. DIRECTV, LLC*, No. 2:14-cv-1986, 2016 U.S. Dist. LEXIS 27842, at *27 (S.D. Ohio Mar. 4, 2016) ("The question presented here is how to apply the post-*Twombly* and *Iqbal* pleading standard to FLSA claims. The law is unsettled in this area, and the Sixth Circuit has yet to weigh in."); *Doucette v. DIRECTV, Inc.*, No. 2:14-cv-02800, 2015 U.S. Dist. LEXIS 64517, at *19-20 (W.D. Tenn. May 18, 2015) ("The Ninth Circuit analyzed existing case law and agreed with the rationale of the First, Second, and Third Circuits, determining that a plaintiff must allege a given workweek in which he worked over 40 hours. This allegation would normally lead to a mathematical calculation of unpaid overtime wages. . . . Other courts—including those within this circuit—have determined that a plaintiff need not state these specific facts to survive a motion to dismiss."); *Patrick v.*

DIRECTV, Inc., No. 3:14-cv-01661, 2015 U.S. Dist. LEXIS 51178, at *19 (D. Or. Mar. 6, 2015) ("[S]ince the *Landers* opinion was issued, several district courts have offered varying interpretations of the rigors imposed by the pleading standards set forth in that case.").

Due to the circuit split regarding FLSA pleading standards post-*Twombly* and *Iqbal*, the DirecTV cases, each of which allege nearly identical unlawful conduct over the same period with similar factual allegations, vary wildly in their outcomes. In some, FLSA minimum wage and overtime claims were dismissed on the pleadings. *E.g.*, *Hebron v. DIRECTV, LLC,* No. 14-cv-8155, 2015 U.S. Dist. LEXIS 142077, at *17 (N.D. Ill. Oct. 13, 2015) (dismissing overtime claims and holding that "Plaintiffs' mere assertions that Defendants' practices caused their hourly wage to fall below the minimum wage are insufficient to withstand a Rule 12(b)(6) motion."). In others, DirecTV's complex piece-rate minimum wage claims were dismissed but overtime claims survived. *E.g.*, *Chesley v. DIRECTV, Inc.*, No. 14-cv-468, 2015 U.S. Dist. LEXIS 73724, at *16 (D.N.H. June 8, 2015) (dismissing minimum wage claims but holding "despite the defendants' argument that the plaintiffs failed to allege a single specific week for which they were not compensated, that level of detail is unnecessary at this stage"). And in other cases, all FLSA wage claims survived dismissal on the pleadings. *E.g.*, *Buttita v. DIRECTV LLC,* No. 3:14cv566, 2015 U.S. Dist. LEXIS 177528, at *11-12 (N.D. Fla. Nov. 19, 2015) ("Plaintiffs allege only average numbers, not precise week-by-week earnings and expenses; such detailed weekly wages cannot yet be accurately calculated because the record is not fully developed, . . . Taking the allegations as a whole, the

Court finds that the Plaintiffs have stated sufficiently plausible FLSA minimum wage and overtime claims."); *Doucette*, 2015 U.S. Dist. LEXIS 64517, at *24-25 ("At this stage, . . . Plaintiffs have satisfied Rule 8's standards: they allege that they performed specific tasks in the weeks that they worked but were not paid for those tasks."); *Dowd v. DirecTV, LLC*, No. 14-cv-14018, 2016 U.S. Dist. LEXIS 36, at *20-22 (E.D. Mich. Jan. 4, 2016) ("[A]lthough the First, Second, Third, and Ninth Circuits have held that "a plaintiff must allege a given workweek in which he worked over 40 hours . . . [o]ther courts—*including those within this circuit*—have determined that a plaintiff need not state these specific facts to survive a motion to dismiss.") (emphasis added).

The DirecTV cases are the quintessential example of how a well-pleaded FLSA complaint will be dismissed in some circuits and not in others so long as this Court has not established a national pleading standard for FLSA wage claims, which is applicable to all employees, regardless of the complexity of their employers' payroll and scheduling structures.

IV. Wage and Hour Division compliance measures and FLSA pleading standards are logically dissimilar.

Averaging hourly wages across a workweek is reasonable and is permissible according to the Department of Labor Wage and Hour Division's rules. However, the Seventh Circuit and the other "specific workweek" circuits ignore that the Wage and Hour Division never suggested that a shorter period for wage averaging is *impermissible*:

> In our opinion the *longest* period of time over which wages may be averaged to determine whether the employer has paid wages at the rate of [the applicable FLSA minimum wage] an hour is a workweek and there may be no averaging of wages over two or more workweeks.
>
> . . . .
>
> There is no objection, of course, to a biweekly, semi-monthly or monthly pay period, but a single workweek is the *longest period* which may be taken as the standard for the purpose of computing the amount of compensation due at each pay period.

Portal-To-Portal Wages: Hearing before the Subcomm. on S. 70 of the S. Comm. on the Judiciary, 80th Cong. 329 (1947) (statement of Lee Pressman, General Counsel, Wage and Hour Division, United States Dep't of Labor) (emphases added).

SkyWest illogically argues that the Wage and Hour Division's utilization of a 7-day workweek for its own *compliance* must correlate with FLSA's *pleading* standards for minimum wage and overtime claims. *See* BIO 13-14. This, however, conflates two dissimilar purposes. Wage and Hour compliance evaluations must be consistent and determinative to give fair notice to *employers* of the Division's expectations and to assure consistency between evaluators in the field. In contrast, FLSA pleading standards must be sufficiently flexible to keep the doors to justice open for *employees*—who may lack access to full wage and time records—who

believe they are underpaid, yet settled enough to uniformly guide district courts as they evaluate Rule 12 motions.

Even if the Court were to take SkyWest's suggestion at face value, their assertions (BIO 13-14) highlight that certain courts apply one standard, while others do not. SkyWest's suggestion that FLSA pleading standards must match the Division's regulatory compliance standards (*id.*) frustrates the purpose of FLSA: to protect employees from substandard wages. *Dove v. Coupe*, 759 F.2d 167, 171 (D.D.C. 1985) (Ginsburg, J.).

CONCLUSION

The Court should grant certiorari to rein in the circuits' disparate FLSA pleading requirements, to establish national consistency, and to expound upon the application of *Twombly, Iqbal*, and Rule 8(a) in the context of FLSA claims.

Respectfully submitted,

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