No.

In the Supreme Court of the United States

CHIPOTLE MEXICAN GRILL, INC.,
AND CHIPOTLE SERVICES, LLC, PETITIONERS

v.

MAXCIMO SCOTT, ET AL.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Fair Labor Standards Act creates a private right of action under which employees may bring suit for certain violations not just on their own behalf, but also collectively on behalf of "other employees similarly situated." 29 U.S.C. 216(b). The question presented is:

Whether a district court may consider factors other than the presence of a single material question of law or fact common to a group of employees when assessing whether the employees are "similarly situated" for purposes of the collective-action provision of the Fair Labor Standards Act.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioners are Chipotle Mexican Grill, Inc., and Chipotle Services, LLC. Petitioner Chipotle Mexican Grill, Inc., has no parent corporation, and no publicly held company owns 10% or more of its stock.

Petitioner Chipotle Services, LLC, is a wholly owned subsidiary of petitioner Chipotle Mexican Grill, Inc.

Respondents, the named plaintiffs below, are Maxcimo Scott, Jay Frances Ensor, Christina Jewell Gateley, Stacy Higgs, Eufemia Jimenez, Matthew A. Medina, and Krystal Parker. The 516 additional persons who joined the case as opt-in plaintiffs under 29 U.S.C. 216(b) are listed in an appendix to the petition (App., *infra*, 62a-67a).

RELATED PROCEEDINGS

United States District Court (S.D.N.Y.):

Scott v. *Chipotle Mexican Grill, Inc.*, Civ. No. 12-8333 (June 20, 2013) (order conditionally certifying collective action under the Fair Labor Standards Act)

Scott v. *Chipotle Mexican Grill, Inc.*, Civ. No. 12-8333 (Mar. 29, 2017) (order denying class certification and decertifying collective action under the Fair Labor Standards Act)

United States Court of Appeals (2d Cir.):

Scott v. *Chipotle Mexican Grill, Inc.*, Nos. 17-2208 & 18-359 (Apr. 1, 2020)

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Chipotle Mexican Grill, Inc., and Chipotle Services, LLC, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-39a) is reported at 954 F.3d 502. The opinion of the district court (App., *infra*, 40a-60a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 1, 2020. A petition for rehearing was denied on June 1, 2020 (App., *infra*, 61a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 216(b) of Title 29 of the United States Code provides, in relevant part:

> Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages or their unpaid overtime compensation, as the case may be, and in any additional equal amount as liquidated damages. * * * An action to recover the liability prescribed * * * may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated.

STATEMENT

This case presents an exceptionally important question of statutory interpretation that has somehow evaded this Court's review for decades, resulting in intractable conflict—indeed, chaos and confusion—in the courts of appeals. The Fair Labor Standards Act (FLSA) creates a private right of action under which employees may bring suit not just on their own behalf, but also collectively on behalf of "other employees similarly situated," for certain violations (including violations of the FLSA's minimum-wage and overtime-pay provisions). 29 U.S.C. 216(b).

By allowing an employee to file suit on behalf of "similarly situated" employees, the FLSA authorizes a unique form of representative litigation that has become known as a "collective action." See, *e.g.*, *Genesis HealthCare Corp.* v. *Symczyk*, 569 U.S. 66, 69 (2013). But the FLSA does not define the phrase "similarly situated," and this Court has never provided guidance either. As a result, the lower courts have developed a number of competing

standards to determine whether employees meet the "similarly situated" requirement.

In the decision below, a divided court of appeals held that employees are "similarly situated" under the FLSA as long as "they share a similar issue of law or fact material to the disposition of their FLSA claims." App., *infra*, 22a. If one such issue is identified, the court stated, "dissimilarities in other respects should not defeat collective treatment." *Ibid.* (citation omitted).

That holding deepens a conflict among the courts of appeals: the majority of courts of appeals to have analyzed the issue have adopted a flexible, multifactor approach that allows courts to consider dissimilarities among employees and fairness and procedural considerations; one court of appeals has imported requirements from Federal Rule of Civil Procedure 23 into the FLSA; and still another court of appeals has largely agreed with the approach employed in the decision below. The question presented is whether a district court may consider factors other than the presence of a material question of law or fact common to a group of employees when assessing whether the employees are "similarly situated" under the FLSA's collective-action provision.

This case cries out for the Court's review. Numerous courts and commentators have recognized the divergent standards among the lower courts. The conflict is longstanding, and it has only grown worse in recent years with the drastic increase in FLSA litigation. What is more, the approach adopted by the court of appeals below cannot be correct. As Judge Sullivan recognized in dissenting from that approach, a test that allows employees to proceed collectively under the FLSA as long as they share a single common material issue has "no basis in the text of the statute" and would reduce the requirement for

collective-action certification to a "mere formality." App., *infra*, 34a, 35a.

The lower courts urgently need guidance on how to resolve disputes over certification in FLSA cases, and this case presents the Court with an ideal opportunity to provide it. The petition for a writ of certiorari should be granted.

A. Background

Enacted in 1938, the Fair Labor Standards Act establishes federal minimum-wage and overtime-pay requirements for employees who work in interstate commerce. See 29 U.S.C. 206, 207. As is relevant here, the FLSA requires employers to pay employees at a rate of one-and-a-half times their regular rate for any time worked in excess of 40 hours during a workweek. See 29 U.S.C. 207(a). But the FLSA contains a variety of exceptions to the overtime-pay requirement, including for employees that work in a "bona fide executive" capacity. 29 U.S.C. 213(a)(1). Whether that particular exception applies depends on whether an employee is paid on a salary basis above a minimum threshold; has the "primary duty" of "management of the enterprise"; supervises other employees; and has authority in making personnel decisions. 29 C.F.R. 541.100(a).

For an employee who believes that an employer has violated the FLSA's overtime-pay requirements, the FLSA provides a private right of action to recover unpaid overtime compensation. See 29 U.S.C. 216(b). Under the relevant provision, one or more employees may file suit against the employer "in behalf of * * * themselves and other employees similarly situated." *Ibid.* The provision further states that "[n]o employee shall be a party plain-

tiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought." *Ibid.*

A lawsuit filed on behalf of other employees "similarly situated" under the FLSA is known as a "collective action." *Genesis HealthCare*, 569 U.S. at 69. An FLSA collective action is a "unique species of group litigation." 7B Charles A. Wright et al., *Federal Practice & Procedure* § 1807, at 468 (3d ed. 2005) (Wright & Miller). Unlike a traditional class action under Federal Rule of Civil Procedure 23, absent employees who could but did not join an FLSA collective action are not bound by the actions of the named plaintiffs. See *id.* at 472-476. Instead, employees must affirmatively opt into the litigation by filing a written consent with the court. See 29 U.S.C. 216(b). Each opt-in plaintiff "has the right to be present in court to advance his or her own claim." 7B Wright & Miller § 1807, at 475.

The FLSA does not define the term "similarly situated" or provide guidance on how district courts should manage collective actions. Nor has this Court. In the more than 80 years since Congress enacted the FLSA, the Court's only decision specifically addressing the collective-action mechanism is *Hoffmann-La Roche Inc.* v. *Sperling*, 493 U.S. 165 (1989). There, the Court held only that district courts should "oversee the joinder of additional parties to assure that the task is accomplished in an efficient and proper way," including the sending of notice to potential opt-in plaintiffs. *Id.* at 171.

Most lower courts have adopted a two-step certification process for determining whether a collective action may proceed. See 7B Wright & Miller § 1807, at 487-488; 1 Joseph M. McLaughlin, *McLaughlin on Class Actions* § 2:16, at 155 (16th ed. 2019). At the first step—which typically comes at the pleading stage—the plaintiff moves for

"conditional certification." *Genesis HealthCare*, 569 U.S. at 75; see *Campbell* v. *City of Los Angeles*, 903 F.3d 1090, 1109 (9th Cir. 2018). At that stage, courts require only a "lenient" showing that the employees are "similarly situated," based on a review of the pleadings with limited supplementation from declarations or other evidence. *Campbell*, 903 F.3d at 1109; see 7B Wright & Miller § 1807, at 488-492. The "sole consequence" of conditional certification is the sending of written notice to the employees. *Genesis HealthCare*, 569 U.S. at 75. For employees who opt in, the action then "proceeds throughout discovery as a representative action." *Morgan* v. *Family Dollar Stores, Inc.*, 551 F.3d 1233, 1259 (11th Cir. 2008), cert. denied, 558 U.S. 816 (2009).

At the second stage—which typically comes "at or after the close of relevant discovery"—the defendant employer may move for "decertification" of the collective action. *Campbell*, 903 F.3d at 1109; 7B Wright & Miller § 1807, at 495-496 & n.62. The district court then makes a definitive determination, based on all of the evidence in the record, whether the plaintiff employees are in fact "similarly situated" within the meaning of the FLSA's collective-action mechanism. See 7B Wright & Miller § 1807, at 496-497. If the motion for decertification is granted, the opt-in plaintiffs are dismissed from the action; if the motion is denied, "the action proceeds to trial on a representative basis." *Id.* at 503; see *Campbell*, 903 F.3d at 1110. At trial, the plaintiffs will often attempt to substantiate their claims through representative proof. See, *e.g.*, *Tyson Foods, Inc.* v. *Bouaphakeo*, 136 S. Ct. 1036, 1046 (2016); *Morgan*, 551 F.3d at 1278-1279 (collecting cases).

B. Facts And Procedural History

1. Petitioners Chipotle Mexican Grill, Inc., and Chipotle Services, LLC, together with their affiliates, operate over 2,500 fast-casual restaurants across the United States. Uniquely for a restaurant company of its size, Chipotle owns and operates all of its restaurants. Respondents are current and former employees of Chipotle who have worked in the position of "apprentice." App., *infra*, 3a-6a.

At Chipotle, apprentices are salaried employees whose job comprises various managerial tasks, including leading day-to-day operations; creating employee schedules; assisting with payroll and inventory; participating in personnel decisionmaking; training employees; managing store budgets; pursuing marketing opportunities; and addressing customer complaints. The precise duties performed by an apprentice vary by location, management structure, and sales volume. In some locations, apprentices serve as the primary store managers; in others, apprentices work with "general managers" or "restaurateurs" (managers who rotate between multiple stores). Chipotle also employs hourly workers who are supervised by apprentices, including "service managers," "kitchen managers," and "crew members." For compensation purposes, Chipotle classifies all apprentices (except in California) as exempt from the overtime-pay requirements of the FLSA and similar state laws because their primary duties are managerial in nature. App., *infra*, 3a-5a, 43a; see 29 U.S.C. 213(a)(1).

2. In 2012, respondent Maxcimo Scott filed suit against petitioners in the United States District Court for the Southern District of New York, alleging that petitioners had misclassified apprentices as exempt employees under the FLSA and New York law and owed them overtime pay as a result. The complaint was later amended to

add six additional named plaintiffs (the other respondents here) and to assert claims under the laws of five additional States. App., *infra*, 5a-6a; D. Ct. Dkt. 872, at 1, 3-4.

a. The named plaintiffs then filed a motion for conditional certification of the case as a nationwide collective action under the FLSA, 29 U.S.C. 216(b). Pursuant to that request, the named plaintiffs asked the court to approve a notice to be sent to additional employees informing them of their right to join the litigation. The court granted the motion, set an opt-in period for the other employees to join the action, and allowed the parties to proceed to discovery. Ultimately, 582 persons opted into the action, and the claims of 516 of those persons remain pending. App., *infra*, 6a, 41a, 62-67a.

b. After discovery closed, respondents moved to certify several classes on their state-law claims under Federal Rule of Civil Procedure 23, and petitioners moved to decertify the collective action on the FLSA claim. The district court denied respondents' motion to certify the classes and granted petitioners' motion to decertify the collective action. App., *infra*, 40a-60a.

With respect to respondents' motion to certify the classes, the district court concluded that respondents had satisfied the commonality and typicality requirements of Rule 23(a) but could not satisfy the predominance or superiority requirements of Rule 23(b)(3): in other words, the court ruled that questions affecting individual class members predominated over questions common to the class and that a class action was not superior to other means of adjudicating the controversy. In particular, according to the court, "the record evidence show[ed] that the differences in the structures of Chipotle locations, sales volume, and managerial styles across the country affected the amount of time [a]pprentices[] spend perform-

ing managerial tasks." App., *infra*, 55a. As a result, apprentices had differing degrees of involvement in the hiring process, scheduling, employee supervision, and employee training. *Id.* at 49a-56a. Those differences "prove[d] fatal to the predominanc[e] inquiry," the district court concluded, because individualized proof would be necessary to determine whether each employee performed sufficient managerial functions to render him or her exempt from the overtime-pay requirement. *Id.* at 56a. For the same reason, the court also concluded, a class action was "not a superior method" for resolving respondents' claims. *Id.* at 57a.

As is relevant here, with respect to petitioners' motion to decertify the FLSA collective action, the district court analyzed whether the employees were "similarly situated" for purposes of Section 216(b) by considering three factors used by a number of courts: the "disparate factual and employment settings of the individual plaintiffs"; the availability of defenses "individual to each plaintiff"; and "fairness and procedural considerations." App., *infra*, 58a; see pp. 15-18, *infra*. The court added that, "the more opt-ins there are in the [collective action], the more the analysis under [the FLSA] will mirror the analysis under Rule 23." App., *infra*, 58a (citation omitted). Applying the foregoing factors and relying on the same evidence it analyzed when deciding the motion for class certification, the court determined that apprentices at Chipotle "had vastly different levels and amounts of authority in exercising managerial tasks." *Ibid.* The court also noted that it would be difficult for petitioners to use collective evidence to prove that some apprentices were exempt from the overtime-pay requirement under various FLSA exemptions. *Id.* at 60a. The court thus held that the plaintiffs were not "similarly situated" and decertified the collective action. *Ibid.*

3. The court of appeals granted respondents leave to appeal the district court's decision to deny class certification under Rule 23(f). See 17-2208 C.A. Dkt. 1; D. Ct. Dkt. 1154. In a separately captioned appeal, the court of appeals also granted respondents leave to appeal the district court's decision to decertify the FLSA collective action under 28 U.S.C. 1292(b). See 18-359 C.A. Dkt. 1; D. Ct. Dkt. 1162.

4. In a single opinion covering both appeals, a divided panel of the court of appeals affirmed the district court's denial of class certification but vacated the decertification of the FLSA collective action. App., *infra*, 1a-39a.

a. As to class certification, the court of appeals noted that "[t]he question whether employees are entitled to overtime under the FLSA" or instead are subject to statutory exemptions is a "complex, disputed issue" that a district court must resolve by "examining the employees' actual job characteristics and duties." App., *infra*, 15a (citation omitted). The court of appeals understood the district court to have ruled that "the *range* of tasks" performed by Chipotle apprentices "were largely the same" across putative class members but that their "*primary duty*"—"the dispositive question of the exemption inquiry"—"was not adequately similar" to satisfy the predominance requirement of Rule 23(b)(3). *Id.* at 16a. According to the court of appeals, the district court's "legal conclusion" was "based on a fair interpretation of the facts after thoroughly parsing the voluminous record in the case." *Id.* at 18a.

b. The court of appeals reached a different result with regard to the FLSA collective action. The court began its analysis by probing what it means for parties to be "similarly situated" within the meaning of 29 U.S.C. 216(b). Invoking this Court's statement that the collective-action

mechanism ensures the "efficient resolution in one proceeding of common issues of law and fact arising from the same alleged" violation, App., *infra*, 21a (quoting *Hoffmann-La Roche*, 493 U.S. at 170), the court of appeals concluded that "party plaintiffs are similarly situated, and may proceed in a collective, to the extent they share a similar issue of law or fact material to the disposition of their FLSA claims." *Id.* at 22a. "[D]issimilarities in other respects," the court reasoned, "should not defeat collective treatment." *Ibid.* (citation omitted). In reaching that conclusion, the court of appeals heavily relied on the Ninth Circuit's decision in *Campbell*, *supra*. See *id.* at 21a, 22a, 24a, 26a, 27a, 29a.

The court of appeals stated that its interpretation of the "similarly situated" requirement was "consistent" with the standards adopted by two other courts of appeals. App., *infra*, 21a-22a (citing *Halle* v. *West Penn Allegheny Health System, Inc.*, 842 F.3d 215 (3d Cir. 2016), and *Campbell*, *supra*); but see pp. 15-16, *infra* (discussing the Third Circuit's approval of the district court's approach). The court of appeals proceeded to reject two competing interpretations of that requirement. In so doing, the court noted the "absence of a clear standard" and the "need for clear guidance" for lower courts. App., *infra*, 23a n.6.

The court of appeals first addressed the "flexible approach" (sometimes called the "ad hoc" approach) used by the district court and other courts, which requires assessment of the differing employment settings of the individual employees; any individualized defenses the employer may have; and fairness and procedural considerations. App., *infra*, 23a-25a. According to the court of appeals, that approach focuses too heavily on differences between employees and allows courts to "import, through a back

door," the requirements of Rule 23 into the FLSA context—despite the suggestion of some courts that the "flexible approach" is appropriate precisely because it is not tied to Rule 23 standards. *Id.* at 24a-25a (citing *Thiessen* v. *General Electric Capital Corp.*, 267 F.3d 1095 (10th Cir. 2001), and *Morgan*, *supra*). The court of appeals also addressed, and rejected, the approach of other courts that expressly apply Rule 23 standards to FLSA collective actions. *Id.* at 25a-30a. In the court's view, "analogies to Rule 23 * * * are inconsistent with the language of [Section 216(b)]." *Id.* at 26a.

Applying its common-material-issue standard, the court of appeals determined that the district court had erred in decertifying the collective action. App., *infra*, 31a. The court of appeals reasoned that the district court had erroneously imported the Rule 23(b)(3) predominance inquiry into the FLSA context and had decertified the collective action on the improper ground that common questions did not predominate over individualized ones. *Id.* at 30a-32a. The court of appeals indicated that the district court should instead have considered only whether the plaintiffs shared any single common question of law or fact material to the disposition of their FLSA claims. *Id.* at 31a-32a.

The court of appeals therefore vacated the district court's decertification decision and remanded for further proceedings. App., *infra*, 32a. Despite its admonition that "courts may not import the requirements of Rule 23 into their application of [Section] 216(b)," the court of appeals instructed the district court on remand to "take into account [the district court's previous] conclusion with respect to commonality" under the Rule 23 rubric. *Ibid.* In so doing, the court of appeals expressly recognized the parallels between its adopted standard and the commonality requirement under Rule 23(a). *Id.* at 32a-33a & n.9.

c. Judge Sullivan dissented in relevant part. App., *infra*, 34a-39a. While he agreed with the majority that the district court had correctly denied class certification, he disagreed with the majority's decision to vacate the decertification of the FLSA collective action. *Id.* at 34a.

Judge Sullivan reasoned that the majority's interpretation of the phrase "similarly situated" had "no basis in the text of the statute." App., *infra*, 34a. In Judge Sullivan's view, "[c]ommon sense would suggest that 'similarly situated' often requires more than the sharing of a single fact or legal issue, and that the existence of multiple dissimilarities would be highly relevant to the inquiry." *Ibid.* By requiring only a single common material issue in order to certify a collective action, Judge Sullivan contended, the majority had "reduce[d] district courts to mere bystanders rather than gatekeepers." *Id.* at 35a.

Judge Sullivan viewed the standards under Rule 23 and 29 U.S.C. 216(b) as "wholly independent," but he explained that their purposes were not so "fundamentally different," or their differences "so substantial," as to require the "similarly situated" requirement to become a "mere formality." App., *infra*, 35a (internal quotation marks and citation omitted). Judge Sullivan added that "neither plaintiffs nor the court would be significantly benefitted if plaintiffs were allowed to proceed collectively despite having drastically different material facts." *Id.* at 35a-36a.

Judge Sullivan would have adopted the "flexible approach" used by the district court to assess whether the plaintiffs in a collective action are "similarly situated," leaving to district courts the task of "consider[ing] the myriad factors—including both similarities and dissimilarities—at play in a given case." App., *infra*, 37a. Applying that approach to the facts of the case, Judge Sullivan

would have held that the district court's decision to decertify the collective action was "wholly justified." *Id.* at 39a.

5. The court of appeals denied petitioners' petition for rehearing, App., *infra*, 61a, but subsequently granted a stay of the mandate pending the outcome of this petition for certiorari.

REASONS FOR GRANTING THE PETITION

The decision below deepens a conflict among the courts of appeals—and worsens the already widespread confusion in the lower courts—regarding the meaning of the phrase "similarly situated" in Section 216(b) of the FLSA. The court of appeals' answer to that question—that employees are "similarly situated" as long as they share a single common issue of law or fact material to the resolution of their FLSA claims—is incorrect and patently unworkable. The question presented is of extraordinary importance, and this case is an excellent vehicle for resolving it. It is difficult to imagine a question on which the lower courts more desperately need this Court's guidance. The petition for a writ of certiorari should be granted.

A. The Decision Below Deepens A Conflict Among The Courts of Appeals

The court of appeals' decision deepens an existing circuit conflict regarding the standard that a court should apply in determining whether employees are "similarly situated" under the FLSA. The disagreement among the lower courts on that question is longstanding and widely recognized. See, *e.g.*, *Campbell* v. *City of Los Angeles*, 903 F.3d 1090, 1111-1116 (9th Cir. 2018); *Monroe* v. *FTS USA, LLC*, 860 F.3d 389, 405-406 (6th Cir. 2017), cert. denied, 138 S. Ct. 980 (2018); *Espenscheid* v. *DirectSat USA, LLC*, 705 F.3d 770, 772 (7th Cir. 2013); *Mooney* v. *Aramco Services Co.*, 54 F.3d 1207, 1213-1214 (5th Cir. 1995); 7B

Charles A. Wright et al., *Federal Practice & Procedure* § 1807, at 477-485, 497-498 (3d ed. 2005) (Wright & Miller); 1 Joseph M. McLaughlin, *McLaughlin on Class Actions* § 2:16, at 168-172 (16th ed. 2019). Indeed, without any guidance to date from this Court, the lower courts are hopelessly confused, with one court suggesting just last year that "[f]ew areas of the law are less settled than the test for determining whether a collective action should be certified under [the FLSA]." *Swales* v. *KLLM Transport Services, LLC*, 410 F. Supp. 3d 786, 789 (S.D. Miss. 2019), appeal pending, No. 19-60847 (5th Cir.). This Court's review could not be more urgently needed.

1. A majority of the courts of appeals to have addressed the question have adopted a flexible, multifactor approach for determining whether employees are "similarly situated" under the FLSA. While there is some variation in their precise formulations, the courts that have adopted this approach generally require a court to weigh similarities and dissimilarities among the employees, as well as fairness and procedural considerations.

a. The Third Circuit was the first court of appeals to adopt the multifactor approach. In *Lockhart* v. *Westinghouse Credit Corp.*, 879 F.2d 43 (1989), the Third Circuit crafted a "similarly situated" standard out of two standards adopted by district courts within the circuit. The first standard, derived from *Plummer* v. *General Electric Co.*, 93 F.R.D. 311 (E.D. Pa. 1981), asked whether the employees were "(1) employed in the same corporate department, division[,] and location; (2) advanced similar claims * * * ; and (3) sought substantially the same form of relief." *Lockhart*, 879 F.2d at 51. The second standard, derived from *Lusardi* v. *Xerox Corp.*, 118 F.R.D. 351 (D.N.J. 1987), vacated in part, 855 F.2d 1062 (3d Cir. 1988), weighed "(1) the disparate factual and employment settings of the individual plaintiffs; (2) the various defenses

available to [the employer] which appear to be individual to each plaintiff; [and] (3) fairness and procedural considerations." *Id.* at 359; see *Lockhart*, 879 F.2d at 51. The Third Circuit "[b]alanc[ed] the factors as applied in *Plummer* and *Lusardi*" to determine whether the employees could proceed collectively. 879 F.2d at 52.

In later cases, the Third Circuit clarified the multifactor approach initially adopted in *Lockhart*. For example, in *Zavala* v. *Wal-Mart Stores Inc.*, 691 F.3d 527 (2012), the Third Circuit explained that, in the more than two decades since *Lockhart*, "[c]ourts ha[d] adopted three different approaches for determining" whether plaintiffs are "similarly situated" under the FLSA: the flexible multifactor approach and two approaches "derived from Rule 23" that at the time "ha[d] only been adopted by district courts." 691 F.3d at 536; but see p. 19, *infra*. The Third Circuit reiterated its approval of the multifactor approach, stating that the "[r]elevant factors include (but are not limited to): whether the plaintiffs are employed in the same corporate department, division, and location; whether they advance similar claims; whether they seek substantially the same form of relief; and whether they have similar salaries and circumstances of employment." 691 F.3d at 536-537; see *Halle* v. *West Penn Allegheny Health System Inc.*, 842 F.3d 215, 226 (3d Cir. 2016); *Symczyk* v. *Genesis HealthCare Corp.*, 656 F.3d 189, 193 n.6 (3d Cir. 2011), rev'd on other grounds, 569 U.S. 66 (2013). The court also indicated that the "existence of individualized defenses" is relevant to the analysis. *Zavala*, 691 F.3d at 537; see *Ruehl* v. *Viacom, Inc.*, 500 F.3d 375, 388-389 n.17 (3d Cir. 2007).

b. The Eleventh Circuit endorsed the multifactor approach in *Morgan* v. *Family Dollar Stores, Inc.*, 551 F.3d 1233 (2008), cert. denied, 558 U.S. 816 (2009). In deciding whether the district court had properly permitted an

FLSA collective action to proceed, the Eleventh Circuit considered the three factors articulated in *Lusardi*, *supra*: namely, "(1) disparate factual and employment settings of the individual plaintiffs; (2) the various defenses available to defendants that appear to be individual to each plaintiff; and (3) fairness and procedural considerations." *Morgan*, 551 F.3d at 1261 (alterations and citation omitted). The Eleventh Circuit proceeded to apply those factors to the facts before it and held that the district court properly denied the employer's motion to decertify. See *id.* at 1262-1265; see also *Anderson* v. *Cagle's, Inc.*, 488 F.3d 945, 953 (11th Cir. 2007) (citing the same three factors with approval), cert. denied, 553 U.S. 1093 (2008).

c. The Sixth Circuit soon adopted the same approach in *O'Brien* v. *Ed Donnelly Enterprises, Inc.*, 575 F.3d 567 (2009). The Sixth Circuit began by noting that it had never "define[d] 'similarly situated.'" *Id.* at 584. It then explained that district courts had relied on a "variety of factors" to determine whether the employees were similarly situated, including "the factual and employment settings of the individual plaintiffs, 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 action as a collective action." *Ibid.* (alterations and citations omitted). The Sixth Circuit concluded that, instead of properly applying those factors, the district court had improperly imported the Rule 23(b)(3) predominance requirement into the FLSA context. See *id.* at 584-585. Such a requirement, the court reasoned, would "undermine[] the remedial purpose of the collective action device." *Id.* at 586. Applying the multifactor approach instead, the Sixth Circuit affirmed the district court's decision to decertify. See *ibid.*; see also *Monroe*, 860 F.3d at

402 (holding that courts "must apply the 'similarly situated' standard governed by the three-factor test set out in *O'Brien*").

d. The Eighth Circuit followed suit in *Bouaphakeo* v. *Tyson Foods, Inc.*, 765 F.3d 791 (2014), aff'd on other grounds, 136 S. Ct. 1036 (2016), affirming the certification of an FLSA collective action. See *id.* at 797. In so doing, the court of appeals considered disparities among the employees; the employer's individualized defenses; and fairness and procedural considerations. See *id.* at 796.

e. In related fashion, the Tenth Circuit has approved of a district court's use of the multifactor approach without requiring courts to apply a particular standard. In *Thiessen* v. *General Electric Capital Corp.*, 267 F.3d 1095 (2001), cert. denied, 536 U.S. 934 (2002), the Tenth Circuit explained that, at the time, "[f]ederal district courts ha[d] adopted or discussed at least three approaches to determining whether plaintiffs are 'similarly situated' for purposes of [Section] 216(b)." *Id.* at 1102. One was the multifactor approach; the other two were derived from the requirements of Rule 23. See *id.* at 1102-1103. The Tenth Circuit viewed the multifactor approach as "[a]rguably * * * the best of the three approaches outlined because it is not tied to the Rule 23 standards." *Id.* at 1105. But the court declined to formally adopt any one of the approaches, instead simply "find[ing] no error" in the district court's multifactor approach. *Ibid.*; cf. *In re Chipotle Mexican Grill, Inc.*, No. 17-1028, 2017 WL 4054144, at *2 (10th Cir. Mar. 27, 2017) (denying a petition for a writ of mandamus directed to a district court that had *rejected* the multifactor approach).

2. The Seventh Circuit has departed from the majority approach by applying at least some of the requirements of Rule 23 in determining whether plaintiffs are "similarly situated" for purposes of Section 216(b). In

particular, the Seventh Circuit has considered both dissimilarities among plaintiffs and the procedural feasibility of the collective-action mechanism.

In *Espenscheid*, *supra*, a group of employees brought a state-law class action against their employer under Rule 23 and a collective action under the FLSA. 705 F.3d at 771. In affirming the district court's decisions to deny class certification and decertify the collective action, the Seventh Circuit concluded that there was no "good reason" to have "different standards for certification of the two different types of actions." *Id.* at 772. Accordingly, the court "treat[ed] the FLSA 'collective' and the Rule 23 classes as a single class," analyzing both of the district court's decisions under the standards of Rule 23. *Ibid.* Using that approach, the Seventh Circuit concluded that the plaintiffs had not proposed a feasible plan for resolving the case in a single proceeding, given individual differences regarding damages. See *id.* at 773-776; see also *Alvarez* v. *City of Chicago*, 605 F.3d 445, 449 (7th Cir. 2010) (suggesting that common questions must predominate for certification of a collective action to be appropriate). Notably, in a subsequent case, the Sixth Circuit expressly rejected the Seventh Circuit's application of the requirements of Rule 23 in *Espenscheid*. See *Monroe*, 860 F.3d at 405-406.

3. Finally, similar to the Second Circuit in the decision below, the Ninth Circuit has adopted a third approach, under which employees may proceed with an FLSA collective action if they share a common question of law or fact material to the disposition of their claims, regardless of other differences.

a. In *Campbell*, *supra*, the Ninth Circuit reviewed a district court's decision to decertify an FLSA collective action after applying the multifactor approach. See 903 F.3d at 1103-1104. The Ninth Circuit began its analysis

by observing that "[t]here is no established definition of the FLSA's 'similarly situated' requirement, nor is there an established test for enforcing it." *Id.* at 1111. The court found that "absence of authority * * * surprising, as being 'similarly situated' is the key condition for proceeding in a collective." *Ibid.*

The Ninth Circuit continued by explaining that, "broadly speaking, two approaches to the 'similarly situated' requirement have emerged." *Campbell*, 903 F.3d at 1111. The "minority approach," the court stated, was "to treat a collective action as an opt-in analogue to a Rule 23(b)(3) class." *Ibid.* While noting that "[n]o circuit court ha[d] adopted the minority approach in toto," the Ninth Circuit explained that the Seventh Circuit had applied at least some of the requirements of Rule 23. *Ibid.* (citing *Alvarez*, *supra*, and *Espenscheid*, *supra*). The Ninth Circuit ultimately rejected that approach, reasoning that Rule 23 and Section 216(b) are different in "language and structure." *Id.* at 1112, 1113.

The Ninth Circuit then turned to the "majority approach"—the multifactor standard. *Campbell*, 903 F.3d at 1113. The Ninth Circuit viewed that approach as a "significant improvement" over the Seventh Circuit's, but it criticized the multifactor approach as "offer[ing] no clue as to what *kinds* of 'similarity' matter under the FLSA." *Id.* at 1114. The court also questioned the role of fairness and procedural considerations in the multifactor approach, suggesting that they "invit[e] courts to import, through a back door, requirements with no application to the FLSA." *Id.* at 1115. Only if the collective-action mechanism is "truly infeasible," the court continued, would decertification based on procedural considerations be permissible. *Id.* at 1116.

Ultimately, the Ninth Circuit concluded that "[p]arty plaintiffs are similarly situated, and may proceed in a collective, to the extent they share a similar issue of law or fact material to the disposition of their FLSA claims." *Campbell*, 903 F.3d at 1117. According to the court, "dissimilarities in other respects should not defeat collective treatment." *Id.* at 1114. The court adopted that approach because it believed it best comports with the "goal" of the collective-action mechanism: to "allow[] * * * plaintiffs the advantage of lower individual costs to vindicate rights by the pooling of resources." *Ibid.* (citation omitted). The Ninth Circuit stated that it was not foreclosing district courts from applying a "differently titled or structured test," but such a test must "give[] full effect" to the court's interpretation of the "similarly situated" standard. *Id.* at 1117 n.21.

b. While the court of appeals in the decision below heavily relied on the Ninth Circuit's decision in *Campbell*, see p. 11, *supra*, it arguably adopted an even more expansive interpretation of the "similarly situated" requirement. In *Campbell*, the court indicated that, in extreme cases, procedural considerations could warrant decertification of a collective action. See 903 F.3d at 1116. The decision below, however, contains no such qualification. The Ninth Circuit also suggested that district courts have at least some modicum of flexibility to structure the test for decertification, even if the test must ultimately comport with the Ninth Circuit's interpretation of Section 216(b) (including its rejection of the tests of other circuits). See *id.* at 1117 n.21. Again, the decision below affords no such flexibility.

* * * * *

All told, the courts of appeals are in an unsustainable state of disarray on the question presented. Courts have repeatedly acknowledged the competing approaches for determining whether employees are "similarly situated" under the FLSA's collective-action provision. As matters currently stand, the Third, Sixth, Eighth, and Eleventh Circuits have approved of a flexible, multifactor approach that permits district courts to weigh dissimilarities among employees and fairness and procedural considerations; the Tenth Circuit has approved of that same approach while still allowing the use of competing approaches; the Seventh Circuit has applied at least some of the requirements that govern class certification under Rule 23; and the Second and Ninth Circuits have focused on whether the employees have a common material issue of law or fact. In fact, the Second Circuit's standard is the most permissive in the Nation. In light of the depth, breadth, and duration of the conflict, there is no realistic prospect that it will resolve itself without this Court's intervention. With such an extensive conflict on an exceptionally important question of statutory interpretation, this is a paradigmatic case requiring the Court's review.

B. The Decision Below Is Incorrect

In the decision below, the Second Circuit held that employees are "similarly situated" for purposes of the FLSA's collective-action provision, and thus can litigate their claims collectively, as long as "they share a similar issue of law or fact material to the disposition of their FLSA claims." App., *infra*, 22a. "[D]issimilarities in other respects," the court added, "should not defeat collective treatment." *Ibid.* (citation omitted). That interpretation is plainly incorrect. As Judge Sullivan recognized, that interpretation has "no basis in the text of the

statute" and reduces the "similarly situated" requirement to "a mere formality." *Id.* at 34a.

1. The FLSA does not define the phrase "similarly situated." But the very nature of that phrase raises the question: "similarly situated" for what purpose? See, *e.g.*, *Alabama Department of Revenue* v. *CSX Transport, Inc.*, 135 S. Ct. 1136, 1143 (2015) ("'similarly situated' for purposes of discrimination in taxation"); *General Motors Corp.* v. *Tracy*, 519 U.S. 278, 310 (1997) ("'similarly situated' for purposes of a claim of facial discrimination under the Commerce Clause"); *Rostker* v. *Goldberg*, 453 U.S. 57, 78 (1981) ("similarly situated for purposes of a [military] draft"); *Kirchberg* v. *Feenstra*, 450 U.S. 455, 463 (1981) (Stewart, J., concurring) ("similarly situated for all relevant purposes with respect to the management and disposition of community property").

When the phrase "similarly situated" is read in the context of Section 216(b), the answer is clear: employees must be "similarly situated" for the purpose of litigating their claims on a collective basis in a single proceeding. As this Court has explained, Congress created the FLSA's collective-action mechanism to afford plaintiffs the "advantage of lower individual costs to vindicate rights by the pooling of resources," thereby enabling "efficient resolution in one proceeding." *Hoffmann-La Roche*, 493 U.S. at 170. Accordingly, the "core inquiry" for a court in determining whether to certify a collective action under the FLSA is whether the employees are "similarly situated *such that* their claims of liability and damages can be tried on a class-wide and representative basis." *Monroe*, 860 F.3d at 417 (Sutton, J., concurring in part and dissenting in part).

In light of that understanding, it is "[c]ommon sense," as Judge Sullivan recognized, that the "existence of mul-

tiple dissimilarities" among employees is "highly relevant" to determining whether the employees can litigate their FLSA claims on a collective basis. App., *infra*, 34a-35a. "[N]either plaintiffs nor the court would be significantly benefitted if plaintiffs were allowed to proceed collectively despite having drastically different material facts or different legal claims simply because they share a single common fact or legal issue." *Id.* at 35a-36a. After all, such disparities may prevent the parties from resolving the litigation on a collective basis through representative or other proof. See *Tyson Foods, Inc.* v. *Bouaphakeo*, 136 S. Ct. 1036, 1048 (2016). That would defeat the goal of the collective-action mechanism.

This case provides a prime example. At a high level, the employees arguably share a "common" question material to the disposition of their FLSA claims: namely, whether Chipotle apprentices are exempt from the FLSA's overtime-pay requirements. In fact, nearly every putative collective action under the FLSA will share a common material question when viewed at that level of generality. But as the district court recognized—and as the court of appeals also recognized in affirming the denial of class certification—the significant variances in the type of work that Chipotle apprentices performed precluded resolution of that question on a collective basis. See App., *infra*, 17a-18a, 47a-56a. In this case and others like it, the "common links" between the plaintiffs are thus of "minimal utility in streamlining resolution of the[] cases." *Zavala*, 691 F.3d at 538.

Accordingly, as in the class-action context, "[w]hat matters" in determining whether plaintiffs are "similarly situated" under Section 216(b) "is not the raising of common 'questions'—even in droves—but rather, the capacity of a [collective] proceeding to generate common *answers* apt to drive the resolution of the litigation." *Wal-Mart*

Stores, Inc. v. *Dukes*, 564 U.S. 338, 350 (2011) (citation omitted). And that requires consideration of dissimilarities among the employees, as those dissimilarities "have the potential to impede the generation of common answers." *Ibid.*

It is also crucial that a court weighs procedural and fairness considerations when deciding whether to certify a collective action. This Court has long held that "[d]ue process requires" that a defendant have the "opportunity to present every available defense." *Lindsey* v. *Normet*, 405 U.S. 56, 66 (1972) (citation omitted). If the collective adjudication of FLSA claims would preclude an employer from asserting individualized defenses, the employees cannot proceed collectively. In addition, it "would hardly be consistent with the FLSA's remedial purpose" to permit employees to proceed collectively when, "as a practical matter, no material dispute truly could be heard on a collective basis." *Campbell*, 903 F.3d at 1116.

2. The court of appeals criticized other courts' reliance on the foregoing considerations as improperly importing requirements from the class-action context into the FLSA. See App., *infra*, 25a-30a. That criticism is misplaced.

While the FLSA does not incorporate the requirements for a Rule 23 class action into the collective-action mechanism, the similarities between the two procedural devices are obvious and inescapable. Both are forms of representative litigation in which the lead plaintiffs prosecute the claims of a number of additional plaintiffs in a single action. And both are designed to ensure the "efficient resolution of similar disputes where issues particular to individual plaintiffs do not outnumber the collective concerns of the group." 1 McLaughlin § 2:16, at 155; see 7B Wright & Miller § 1807, at 469. Indeed, courts and commentators have long referred to the absent plaintiffs

in a traditional class action as "similarly situated" parties—including in the days of equity practice predating the FLSA's enactment. See, *e.g.*, *Matthews* v. *Rodgers*, 284 U.S. 521, 523 (1932); *State Board of Tax Commissioners* v. *Jackson*, 283 U.S. 527, 530 (1931); *In re Engelhard & Sons Co.*, 231 U.S. 646, 647 (1914); 1 John N. Pomeroy, *Equity Jurisprudence* § 260, at 347 (2d ed. 1892); 2 Thomas A. Street, *Federal Equity Practice* § 1352, at 821 (1909); see also Fed. R. Civ. P. 23(b)(3) advisory committee note (1966).

Given those similarities, there is no reason to jettison established bodies of law developed to govern class actions to the extent they are informative in resolving the question of whether FLSA claims can be litigated on collective basis. After all, the Rules Committee drafted the modern version of Rule 23 to "describe[] in more *practical terms* the occasions" for allowing parties to litigate claims en masse. Fed. R. Civ. P. 23 advisory committee notes (1966) (emphasis added). Even if some aspects of class-action law are not pertinent in the context of an FLSA collective action—such as the opt-out requirement in a Rule 23(b)(3) class action—there is no principled basis for erecting an artificial wall between two areas of the law that so naturally overlap. Ironically, the court of appeals recognized that "the 'common question' requirement of Rule 23(a) and the 'similarly situated' requirement of [Section 216(b)] serve comparable ends," while at the same time criticizing the importation of *other* Rule 23 requirements. App., *infra*, 32a-33a.

3. Under the correct approach, the court of appeals' judgment cannot stand. With respect to respondents' motion for class certification on their state-law claims, the court of appeals upheld the district court's determination that differences in the actual activities performed by Chipotle apprentices precluded classwide determination

of whether the apprentices were exempt from the FLSA's overtime-pay requirements—the key question common to the class. See App., *infra*, 45a-46a. The same is true with respect to respondents' collective claims under the FLSA. Properly taking into account the differences among the employees' job responsibilities, as well as petitioners' ability to raise defenses particular to individual employees, the district court correctly held that the employees were not "similarly situated" and decertified respondents' collective action on that basis. The court of appeals' judgment should therefore be reversed.

C. The Question Presented Is Exceptionally Important And Warrants Review In This Case

The question presented is of enormous legal and practical importance. This case, which cleanly presents the question, is an optimal vehicle for the Court's review.

1. Whether plaintiffs are "similarly situated" within the meaning of 29 U.S.C. 216(b) is the dispositive legal question that determines whether plaintiffs may proceed with their FLSA claims on a collective basis. Yet the FLSA does not define the phrase "similarly situated," and in the more than 80 years since Congress created the collective-action mechanism, this Court has never provided guidance as to the substantive requirements for determining when such an action may proceed. See *Hoffmann-La Roche*, 493 U.S. at 169-173; see also, *e.g.*, *Epic Systems Corp.* v. *Lewis*, 138 S. Ct. 1612 (2018) (mentioning the collective-action mechanism); *Tyson Foods*, 136 S. Ct. 1036 (same); *Genesis HealthCare Corp.* v. *Symczyk*, 569 U.S. 66 (2013) (same). At the same time, "Congress has not acted to shed light" on the meaning of the phrase "similarly situated" in the FLSA, "[n]or have procedural rules been promulgated to guide courts and parties in processing collective actions." *Halle*, 842 F.3d at 223.

Yet the filing of collective actions is common—and increasingly so. Plaintiffs now file thousands of FLSA actions annually, and "virtually all FLSA lawsuits are filed and litigated as collective actions." Seyfarth Shaw LLP, *Annual Workplace Class Action Litigation Report: 2020 Edition* 25, 26 (2020). The number of FLSA collective actions has grown drastically over the past two decades. See Daniel C. Lopez, Note, *Collective Confusion: FLSA Collective Actions, Rule 23 Class Actions, and the Rules Enabling Act*, 61 Hastings L.J. 275, 276 & n.1 (2009).

The proliferation of FLSA collective actions, in combination with the lack of guidance on the standards for certifying those actions, has resulted in significant confusion in the lower courts. See pp. 14-28, *supra*. In one jurisdiction, courts are applying competing tests in deciding whether employees are similarly situated. Compare *Thiessen*, 267 F.3d at 1105 (approving of a district court's use of the flexible, multifactor approach), with *Chipotle Mexican Grill*, 2017 WL 4054144, at *2 (denying a petition for mandamus challenging a district court's rejection of the same approach). Courts have also reached divergent conclusions on collective-action certification in disputes involving the same industry, the same defendant, and even the same alleged policy. See *Monroe*, 860 F.3d at 417-418 (Sutton, J., dissenting) (contrasting the Sixth Circuit's decision in that case with the Seventh Circuit's decision in *Espenscheid*, *supra*).

The confused state of affairs increases the likelihood that the employees of nationwide or multistate employers will engage in forum shopping. As long as the organizing employees (or plaintiffs' attorneys) can persuade a single employee within a favorable circuit to serve as a named plaintiff, the action can be filed in that circuit, thus increasing the likelihood of certification. See 28 U.S.C. 1391(b)(2). While a multistate employer can move to

transfer the action to its principal place of business, see 28 U.S.C. 1404, such an effort will not always be successful. See, *e.g.*, *Salinas* v. *O'Reilly Automotive, Inc.*, 358 F. Supp. 2d 569, 571-572, 574 (N.D. Tex. 2005); *Seiffert* v. *Qwest Corp.*, Civ. No. 18-70, 2018 WL 6590836, at *4-*6 (D. Mont. Dec. 14, 2018); *McKee* v. *PetSmart, Inc.*, Civ. No. 12-1117, 2013 WL 1163770, at *3, *7 (D. Del. Mar. 20, 2013). Given the relaxed standard adopted in the decision below, it seems certain that the Second Circuit will become the forum of choice for FLSA plaintiffs if the decision below is allowed to stand.

The Court has had few recent opportunities squarely to address the meaning of the "similarly situated" standard, likely because "most collective actions settle" before they can reach the Court. 7B Wright & Miller § 1807, at 503. Just as class certification "can exert substantial pressure on a defendant to settle," *Amgen Inc.* v. *Connecticut Retirement Plans & Trust Funds*, 568 U.S. 455, 474 (2013) (internal quotation marks and citation omitted), so too does certification of a collective action place significant settlement pressure on an FLSA defendant. That pressure is particularly acute in nationwide collective actions involving hundreds of employees, such as this case.

2. This case is an excellent vehicle for resolution of the question presented. That question is a pure question of law that was fully briefed and passed upon below. The answer to the question presented is also dispositive of whether respondents can proceed with their claims on a collective basis: given the court of appeals' holding that the district court did not err in finding significant dissimilarities among Chipotle apprentices, see App., *infra*, 19a, it is clear that, under an appropriate legal standard, the district court's decision to decertify the collective action must be affirmed. In addition, numerous courts have analyzed the arguments concerning the meaning of the

phrase "similarly situated" in the FLSA, and those courts have reached differing conclusions after substantial analyses of the question. Further percolation would serve no valid purpose.

The confusion regarding the standard for certifying a collective action under the FLSA has festered for far too long. This case provides the Court with an ideal opportunity to address that question for the first time, providing much needed guidance for lower courts that have been floundering in its absence. The Court should grant certiorari in this case and reverse the court of appeals' deeply flawed judgment.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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