No. 20-257

IN THE

# Supreme Court of the United States

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

*Petitioners,*

*v.*

MAXIMO SCOTT, *et al.*,

*Respondents.*

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

## BRIEF *AMICUS CURIAE* OF THE WAGE & HOUR DEFENSE INSTITUTE IN SUPPORT OF PETITIONERS

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## TABLE OF CONTENTS

## TABLE OF CITED AUTHORITIES

*Page*

**CASES**

*Cited Authorities*

*Page*

*Page*



**STATUTES AND OTHER AUTHORITIES**

The Wage & Hour Defense Institute respectfully submits this brief *amicus curiae* in support of the Petition for Writ of Certiorari and of reversal.[1]

## INTEREST OF THE *AMICUS CURIAE*

The Wage & Hour Defense Institute (WHDI) of the Litigation Counsel of America is an unincorporated, voluntary association of experienced wage and hour defense attorneys from over two dozen law firms across the United States.[2] WHDI members are selected for their skill and experience defending litigation under the federal Fair Labor Standards Act (FLSA) and state wage and hour laws.[3]

WHDI members and their clients, including employers of all sizes in every industry, have a strong interest in addressing interpretations of the FLSA that deny due process to defendants, erroneously certify individual

1. Counsel of record for all parties received notice of the *amicus curiae*'s intention to file this brief at least 10 days prior to the due date. The parties have provided blanket consent to the filing of *amicus* briefs. Counsel for *amicus curiae* WHDI authored this brief in its entirety. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, WHDI, its members, or their counsel made a monetary contribution to its preparation or submission.

2. *See* Wage & Hour Defense Institute, *Home,* https://wagehourdefense.org/ (last visited Sept. 29, 2020).

3. *See* Wage & Hour Defense Institute, *Member Directory*, https://wagehourdefense.org/member-directory/ (last visited Sept. 29, 2020).

plaintiffs' claims for collective treatment, and give rise to increasingly burdensome litigation, such as the interpretation set forth in the Second Circuit's decision below. WHDI's members have perspectives and practical experience to assist the Court in assessing issues of law and public policy raised in this case beyond the immediate concerns of the parties.

## SUMMARY OF THE ARGUMENT

The standard for decertification of an FLSA collective action set forth in the Second Circuit's decision upends fundamental principles of due process, as courts within that circuit are effectively precluded from considering the merits of employers' defenses. In other words, the focus in *Scott* on whether any similarity exists "in law or fact," to the exclusion of other considerations, deprives employers defending FLSA collectives from a just determination of the claims against them. Beyond its immediate impact on the question of decertification, the test articulated in *Scott* has already inspired plaintiffs asserting similar claims to argue that the decision must have the ripple effect of lowering threshold for initial, conditional certification in the Second Circuit as well. In so doing, *Scott* not only deepens the existing split among courts as to the standard necessary for decertification, it also threatens to expand the divide as to the standard for conditional certification. Moreover, Scott's improperly low threshold for decertification will entice plaintiffs to "forum shop" when pursuing FLSA collective actions, resulting in the Second Circuit having a disproportionate, and inappropriate, impact on FLSA litigation nationwide. For these reasons, which are addressed in detail below, the Petition should be granted.

## ARGUMENT

### I. *Scott* Unreasonably Prevents Lower Courts from Balancing Multiple Factors to Achieve a Fair Result Consistent with Due Process and Deepens the Circuit Split Regarding FLSA Conditional Certification and Decertification

Evaluating whether a defendant has individualized defenses to the plaintiffs' claims or whether collective treatment is proper under a "multifactor" approach appropriately balances the parties' rights to a just, speedy, and inexpensive determination of their claims (*see Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, 170 (1989) ("The judicial system benefits by efficient resolution in one proceeding of common issues of law and fact ….")) and their rights to due process (*see Buehlman v. Ide Pontiac, Inc.*, 345 F. Supp. 3d 305, 313 (W.D.N.Y. 2018) (factors to consider include, *inter alia*, "fairness and procedural considerations counseling for or against collective action treatment.")). For plaintiffs, this means their clams are fairly considered on the merits; for defendants, this means their defenses, especially individualized defenses, may be fully presented to the fact finder and decided. Such an approach saves the parties time and money and conserves judicial resources. As a result, the Second Circuit's criticism of the "multifactor" approach to decertification applied in other circuits—specifically, that it provides a "back door" for courts to apply Rule 23(b)(3) requirements to collective certification questions—is misplaced. *See Scott v. Chipotle Mexican Grill, Inc.*, 954 F.3d 502, 520 (2nd Cir. 2020). Two of this Court's recent class and collective action cases illustrate how the *Scott* holding conflicts with well-established principles of due process and fundamental fairness.

First, *Scott* conflicts with principles articulated in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011): Addressing commonalties (or similarities) cannot be accomplished in a vacuum, and defendants must be able to present all available individual defenses to class members' claims, lest they be deprived of due process.[4] *See id.* at 366. In *Dukes*, the Court first analyzed Wal-Mart's policy that local supervisors may exercise discretion over employment matters and statistical evidence that pupported to show gender discrimination in the application of local supervisors' discretion. *Id.* at 356. The Court's rigorous analysis—looking beyond the black letter of the policy and its impact—revealed there were myriad reasons a local manager may exercise discretion and that "demonstrating the invalidity of one manager's use of discretion will do nothing to demonstrate the invalidity of another's." *Id.* at 355-56. Beyond that, the use of common, national statistics could not prove disparities between and among regions or individual stores. *Id.* at 357. *Scott*, of course, does not stand for the proposition that courts must perform such a rigorous analysis of the similarities issue and, on remand, the Second Circuit ordered the district court to consider Chipotle's uniform classification, expectations, and single job description without considering the evidence of what employees actually did.

*Scott* essentially charts the same path in the FLSA collective realm as the Ninth Circuit's decision did in *Dukes*. In reversing that decision, the Court explained the

4. *Dukes*, of course, is a Rule 23 class action case, not an FLSA collective action. But this Court's admonitions regarding the importance of individualized inquiries and allowing defendants to present particularized defenses apply with equal force in the collective action context.

practical dangers of certifying classes where individual issues will predominate at trial. *Dukes*, 564 U.S. at 352. If, on remand, the district court in *Scott* applies the Second Circuit's rule and finds collective treatment proper based simply on a uniform classification, Chipotle's expectations about core duties, and a single job description, the district court would still be forced to grapple with devising a trial—or more likely several trials—to address the chasm of differences among the named plaintiffs around their actual job duties, which the district court had already found were "internally inconsistent and distinguishable." *Scott*, 954 F.3d at 508 (quoting the district court). This is why courts across the country (even before *Dukes*) held that emphasizing uniform classification and a single job description as the keys to similarity improperly ignores meaningful factual differences that are critical to an FLSA exemption analysis. *See, e.g.*, *Benedict v. Hewlett-Packard Co.*, No. 13-cv-00119-BLF, 2016 WL 3742342, at *9 (N.D. Cal. July 13, 2016) ("The Court finds Plaintiffs' reliance on the uniform exemption policy … unpersuasive. 'The fact that an employer classifies all or most of a particular class of employees as exempt does not eliminate the need to make a factual determination as to whether class members are actually performing similar duties.'") (citation omitted); *Kelly v. Healthcare Servs. Grp., Inc.*, 106 F. Supp. 3d 808, 813 (E.D. Tex. 2015) ("[T]he decision to uniformly classify all employees as exempt is not, by itself, a sufficient justification to proceed as a class action."); *Lipnicki v. Meritage Homes Corp.*, No. 3:10-cv-605, 2014 WL 5620603, at *3 (S.D. Tex. Nov. 4, 2014) ("Absent similarity in actual job performance, a uniform classification alone may be insufficient to meet the certification standard."); *Deane v. Fastenal Co.*, No. 11-cv-0042-YGR, 2013 WL 675462, at *2 (N.D. Cal. Feb. 25, 2013) ("Plaintiffs cannot simply rely on the fact that [the

employer] categorized them all as exempt, but must show a "substantial level of commonality" among the duties performed and time spent on them ... [T]he discrepancies between the tasks performed, as well as the proportion of time each of them spent on those tasks, makes collective treatment here impracticable."); *Richter v. Dolgencorp, Inc.*, No. 7:06-cv-1537-LSC, 2012 WL 5289511, at **2-9 (N.D. Ala. Oct. 22, 2012) (decertifying collective despite company-wide use of executive exemption for managers because exemption determination requires extensive, fact-based inquiry as to each plaintiff's job duties); *Cruz v. Lawson Software, Inc.*, 764 F. Supp. 2d 1050, 1058 (D. Minn. 2011) ("[t]he classification process is not strong evidence when evaluating whether employees are similarly situated."); *Oetinger v. First Residential Mortg. Network*, No. 3:06-cv-381-H, 2009 WL 2162963, at *3 (W.D. Ky. July 16, 2009) (decertifying collective where class members' work varied based on manager and team; explaining that "the employer's classification means little compared to the employee's actual job duties and circumstances"); *King v. West Corp.*, No. 8:04-cv-318, 2006 WL 118577, at *14 (D. Neb. Jan. 13, 2006) (employees with uniform job titles and similar job descriptions are not similarly situated "if their day-to-day job duties vary substantially").

*Dukes* also illustrates the importance of evaluating whether the defendant's right to present individual defenses counsels against proceeding in a class or collective manner. In *Dukes*, the district court certified the employees' claims for backpay under Rule 23(b)(2) as "incidental" to injunctive or declaratory relief. *Id.* at 360. This Court held that, without a mechanism under Rule 23(b)(2) for Wal-Mart to present defenses to each plaintiff's claim for backpay, class treatment was improper. *Id.* at 366. Plaintiffs and the court of appeals proposed using a

> sample set of the class members would be selected, as to whom liability for sex discrimination and the backpay owing as a result would be determined in depositions supervised by a master. The percentage of claims determined to be valid would then be applied to the entire remaining class, and the number of (presumptively) valid claims thus derived would be multiplied by the average backpay award in the sample set to arrive at the entire class recovery—without further individualized proceedings.

*Id.* at 367. The Court, however, would not allow a class to be certified that barred Wal-Mart from "litigating its statutory defenses to individual claims." *Id.*

The rule articulated in *Scott*, however, would effectively prevent courts from considering the impact of individual defenses to otherwise "similarly situated" collective members. *Cf. Morgan v. Family Dollar Stores, Inc.*, 551 F.3d 1233, 1262 (11th Cir. 2008) ("[T]he district court must consider whether the defenses that apply to the opt-in plaintiffs' claims are similar to one another or whether they vary significantly"); *Thiessen v. Gen. Elec. Cap. Corp.*, 267 F.3d 1095, 1103 (10th Cir. 2001) ("During this 'second stage' analysis, a court reviews several factors, including … the various defenses available to defendant which appear to be individual to each plaintiff[.]") Failing to address individual defenses adversely impacts employers' due process right to present every available defense that they may have to employees' claims. In sum, *Scott*'s exclusive focus on whether there is a "similarity" with respect to an issue of law or fact, to the detriment of other important factors, precludes courts

from evaluating the entire record to determine whether collective treatment is proper. This, in turn, deprives employers defending FLSA collectives from vindicating their rights to due process and a just determination of the plaintiffs' claims.

Second, *Scott* is at odds with this Court's decision in *Tyson Foods, Inc. v. Bouaphakeo,* 136 S. Ct. 1036 (2016), which requires courts to consider "fairness and utility" when plaintiffs wish to use statistical or sampling evidence to establish common facts among class or collective members. In *Tyson Foods*, employees alleged that they were not paid overtime wages when donning and doffing protective equipment in violation of the FLSA. 136 S. Ct. at 1043. The employees offered statistical evidence developed from their experts' observations of a sample of employees because neither Tyson Foods nor the employees had kept record of the time they spent putting on and taking off equipment. *Id.* at 1043-44. The Court wrote that "[i]n many cases, a representative sample 'is the only practicable means to collect and present' relevant data establishing a defendant's liability." *Id.* at 1047.

The Court's conclusion that representative samples were appropriate in *Tyson Foods*, when combined with the standard in *Scott*, would allow plaintiffs to show a similar question of fact using only representative samples, but bypassing the case-by-case considerations of "fairness and utility" also counseled by the Court in *Tyson Foods*. *Compare* 136 S. Ct. at 1049, *with Scott*, 954 F.3d at 521. Chief Justice Roberts' concurring opinion and Justice Thomas's dissent illustrate the problem of narrowly focusing on similarities (the *Scott* rule) and excluding evidence of differences and how they impact fairness

and due process (factors considered under the flexible "multifactor" approach).

In *Tyson Foods*, Chief Justice Roberts analyzed the experts' statistical evidence of average donning and doffing times and concluded that such "common evidence" could not be reconciled with the jury's damages award without individualized evidence of actual donning and doffing times. *Tyson Foods*, 136 S. Ct. at 1053. The employees argued they were entitled to $6.7 million, but the jury awarded $2.9 million. *Id.* Chief Justice Roberts attempted to reconcile the common evidence with the verdict, but armed with only average donning and doffing times, the most reasonable inference he could draw was that the jury must have found that some employees donned and doffed either for less time than the average or no time at all. *Id.* at 1052. Some of these employees necessarily fell below the 40-hour threshold for overtime pay. But, if the jury found that some employees worked no overtime, then the federal court had no Constitutional authority to award those employees any damages and the jury verdict potentially could not stand. *Id.* at 1053. Individualized evidence of donning and doffing could have rectified this defect in the jury's verdict; and, under a "multifactor" approach, could have resulted in decertification. But under *Scott*, evidence of individual time differences could not be considered or used to decertify.

In dissent, Justice Thomas expanded on the downside risk of focusing only on commonalities without considering the impact of individual differences on the employer's ability to defend itself:

> The plaintiffs' claims here had one element that was clearly individualized: whether each employee worked over 40 hours without receiving full overtime pay. *The amount of time that employees spent on donning and doffing varied by person because individuals take different amounts of time to don and doff the same gear, and their gear varied.* This issue was critical to determining Tyson's liability because some employees would not have worked over 40 hours per week without counting time spent on donning and doffing. The critical issue for class certification thus was whether the individualized nature of employees' donning and doffing times defeated predominance.

*Tyson Foods*, 136 S. Ct. at 1054 (emphasis added). Even the statistical data showed wide variations between employees. *Id.* at 1055. These variations were material; even slight mistakes in the experts' average could result in hundreds of employees having no claim for overtime. *Id.* The jury, apparently, agreed with that assessment, awarding less than half of what the experts' calculations would have resulted in. *Id.*

All of this is to say that district courts should address similarities, disparities, individualized defenses, and due process at the decertification stage to determine whether collective treatment is appropriate. But under *Scott,* such inquiries would be improper, thus depriving defendants of due process in the evaluation of such claims.

## II. *Scott*'s Decertification Test Has Been Interpreted By Plaintiffs to Create a New, and Improper, Conditional Certification Standard

Most courts agree the first step in the collective action certification process imposes a "fairly lenient" or "modest" burden, because plaintiffs usually seek certification prior to the exchange of significant discovery, and often on the basis of the pleadings. Courts often "conditionally certify" collectives, entitling plaintiffs to disseminate notice of their claims to all individuals allegedly affected in common by an employer's purportedly unlawful policy or plan.

At the second step, defendants ask the court to decertify the collective. To prevail, defendants must submit evidence showing that plaintiffs are not, in fact, "similarly situated." As Petitioner points out, there is a deep split among the circuit courts of appeal regarding the appropriate standard for decertification. Nevertheless, district courts and circuit courts generally agree that, for due process reasons, the second step is more rigorous and exacting than the first. They impose a more exacting burden at the second step because, by then, substantially more information is available to the parties and the court to determine whether the individual claims of the opt-in plaintiffs can be fairly tried as a collective action.

Because step-one conditional certification is presumed to be more lenient than step-two decertification, plaintiffs have drawn the lesson that the Second Circuit's new, relaxed decertification standard *de facto* lowers the conditional certification standard as well. That is, since *Scott*, plaintiffs in the Second Circuit have argued that the burden of proof for conditional certification is now even

more "modest" and "lenient" than before, reasoning that a more permissive first step is necessary to prevent the two steps from collapsing into one. At least one court has bought into this reasoning. In *Pequero v. Montafon*, No. 18-CV-12187, 2020 WL 4016756 (S.D.N.Y. July 15, 2020), the court explained its view of the significance of *Scott* to conditional certification as follows:

> As for the initial procedural step, the [*Scott*] court provides less guidance, but, logically, there should certainly be no more stringent test for "similarity" at the first, more lenient, stage of the certification process than at the second. Thus, this Court understands that the requirement that the named plaintiffs make an initial "modest factual showing that they and others together were victims of a common policy or plan that violated the law," means that they must simply show, through pleadings, affidavits, and/or declarations that are not entirely conclusory, that they and the potential opt-in plaintiffs share at least some similar issue of material law or fact with respect to the defendant's alleged unlawful wage policy or plan.

*Id.* at *6. Put differently, *Pequero* concluded that plaintiffs are no longer even required to demonstrate at the first step that they were subject to a common, unlawful plan. Rather, in the court's view, they may satisfy the step-one conditional certification standard simply by alleging that they share just *some facet* of a policy or plan. Thus, *Pequero* reads *Scott* to mean that plaintiffs' first-step burden is paltry and can be satisfied by as little as a single declaration that is not "entirely conclusory." *Id.*

*Scott's* distorting impact is also on display in *Jibowu v. Target Corporation*, No. 17-CV-03875 (S.D.N.Y.). There, plaintiffs moved to conditionally certify a collective of about 14,000 managers purportedly misclassified as exempt from overtime. Defendant opposed conditional certification with anecdotal and statistical evidence showing managers devote materially different amounts of time to managerial tasks. In supplemental briefing, plaintiffs argued that *Scott* impacted not only the standard for decertification, but also the standard for initial conditional certification, and relied on *Scott* to argue that individualized issues "cannot possibly defeat first stage notice at which time the merits are not even to be considered." *Id.*, Dkt. No. 115, p. 2. According to the *Jibowu* plaintiffs, it is enough to point to the existence of a "uniform classification [analysis], common policies, and common job descriptions." *Id.* In subsequent briefing, the plaintiffs again argued that *Scott* relaxes the first-step standard, positing that the mere presence of a "uniform corporate policy detailing employees' job duties" alone now suffices. *Id.*, Dkt. No. 118, p. 1. The *Jibowu* plaintiffs' efforts to expand *Scott* to the conditional certification stage illustrates another practical impact of the decision on FLSA litigation.

Of course, the question of the appropriate standard for step-one conditional certification was not at issue in the decision below. And this Court need not reach that question to resolve the issue presented in the Petition. That said, as the examples above show, one practical result of the *Scott* decision is that it has emboldened plaintiffs to argue (and at least one court to agree) that their step-one conditional certification burden is now actually no burden at all. Thus, *Scott* not only exacerbates the split among

courts regarding the standard for step-two decertification, it has the effect of deepening the divide as to the step-one conditional certification standard as well.

## III. *Scott* Ensures the Second Circuit Will Disproportionately Impact FLSA Case Law

Petitioners have persuasively argued that *Scott's* decertification standard conflicts with, and is more lenient than, the standard applied by most circuit courts. *See* Pets.' Br., pp. 14-22. Additionally, courts in FLSA collective actions generally defer to plaintiffs' choice of judicial forum. *See Mercier v. Sheraton Int'l, Inc.*, 981 F.2d 1345, 1349 (1st Cir. 1992). Thus, the *Scott* decision will invite forum-shopping, as it gives any prospective plaintiff a compelling incentive to seek relief for alleged FLSA violations in courts within the Second Circuit. *Cf. Bartley v. Euclid, Inc.*, 158 F.3d 261, 281 (5th Cir. 1998), *vacated on other grounds*, 180 F.3d 175 (5th Cir. 1999) (recognizing that endorsing a standard lower than that used by sister courts gives plaintiffs a "considerable" incentive to file cases in that jurisdiction because it is "easier for them to win a case.").

## IV. *Scott* Will Result in an Increase in FLSA Claims Styled as Nationwide Collective Actions, Resulting in Vast Manageability Issues for Litigants and Courts

*Scott* will exacerbate the trend of increased FLSA collective action filings and, in particular, will encourage individual plaintiffs to plead claims as practically unmanageable *nationwide* collective actions to maximize settlement pressure.

As Petitioners point out, FLSA collective actions are on the rise. Over the last decade, the increase in filings has resulted in a "burgeoning case load" within the federal courts and "more FLSA certification rulings than in any other substantive area of complex employment litigation." Seyfarth Shaw LLP, *Annual Workplace Class Action Litigation Report: 2020 Edition*, 4-5 (2020). The *Scott* decision will only escalate this trend and will further burden district court dockets with unwieldy, nationwide collective actions.

Class action lawyers are drawn to FLSA litigation, where the "plaintiffs' bar can convert their case filings more readily into certification orders, and create the conditions for opportunistic settlements over shorter periods of time." *Id.* at 6. Moreover, plaintiffs' attorneys are motivated to style an individual's FLSA claim as a nationwide collective, thus maximizing the number of potential opt-in plaintiffs, magnifying issues of manageability, and vastly increasing the cost of defense, all of which they can leverage to extract larger settlements, with limited, if any, regard to the strength of the underlying merits of the claim. *See Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1632 (2018) ("[I]t's also well known that [class actions] can unfairly 'plac[e] pressure on the defendant to settle even unmeritorious claims'") (*quoting Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 445, n. 3, (2010) (GINSBURG, J., dissenting)); *AT&T Mobility LLC v. Concepcion*, 563 US 333, 350 (2010) ("But when damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable. Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims. Other

courts have noted the risk of 'in terrorem' settlements that class actions entail, *see, e.g.*, *Kohen v. Pacific Inv. Mgmt. Co. LLC*, 571 F.3d 672, 677–678 (7th Cir. 2009)"); *Bigger v. Facebook, Inc.*, 947 F.3d 1043, 1049 (7th Cir. 2020) ("Generally speaking, expanding the litigation with additional plaintiffs increases pressure to settle, no matter the action's merits.").

With the large-scale collective actions that plaintiffs will now rush to bring in courts in the Second Circuit to take advantage of the lower standard set forth in *Scott*, defendants will face increasing pressure to settle instead of moving for decertification on the merits. *See De Asencio v. Tyson Foods, Inc.*, 342 F.3d 301, 310 (3d Cir. 2003), *as amended* (Nov. 14, 2003) ("Notably, aggregation affects the dynamics for discovery, trial, negotiation and settlement, and can bring hydraulic pressure to bear on defendants."). That is to say, plaintiffs' attorneys will be incentivized to cobble together large-scale collectives in order to extract easy settlements from companies that would rather avoid the staggering cost of nationwide class discovery and the increased risk of an adverse outcome under *Scott*'s lower standard.

In sum, the *Scott* decision will result in exponential growth of nationwide FLSA collective action filings in the Second Circuit, creating vast manageability issues for federal courts and pressuring defendants into settlements without regard to the merits of the claims.

## CONCLUSION

For all of the foregoing reasons, *amicus curiae* WHDI respectfully urges the Court to grant the Petition.

Respectfully submitted,

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