No. 20-257

In The
Supreme Court of the United States

CHIPOTLE MEXICAN GRILL, INC., et al.,

Petitioners,

v.

MAXCIMO SCOTT, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

The Fair Labor Standards Act ("FLSA") allows employees who are "similarly situated" to join together in a collective action to pursue certain types of claims, including unpaid overtime claims. The question presented is:

Whether plaintiffs who share common questions of law or fact that are material to the disposition of their FLSA claims are "similarly situated" for purposes of joining in a collective action to resolve those claims.

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INTRODUCTION

Petitioners paint a portrait of "chaos and confusion" among the federal courts of appeals that "cries out for this Court's review." Petition ("Pet.") 2-3. But a close examination of the caselaw reveals far more consensus than confusion, and the Second Circuit in the interlocutory opinion below sought to realign the district court with that consensus.

First, every court of appeals, including in the cases cited by Petitioners, looks to material similarities among named and opt-in plaintiffs to determine if they are "similarly situated" for purposes of 29 U.S.C. § 216(b). Courts find material similarity where the plaintiffs can offer evidence that "they suffer from a single, FLSA-violating policy, and when proof of that policy or of conduct in conformity with that policy proves a violation as to all the plaintiffs." *Bouaphakeo v. Tyson Foods, Inc.*, 765 F.3d 791, 796 (8th Cir. 2014), *aff'd*, 136 S. Ct. 1036 (2016) (quoting *O'Brien v. Ed Donnelly Enters., Inc.*, 575 F.3d 567, 585 (6th Cir. 2009)).

Conversely, without evidence of a common, FLSA-violating policy linking all collective members, courts will not find the plaintiffs "similarly situated" under any test, regardless of other ways in which the plaintiffs may be similar. *See Campbell v. City of Los Angeles*, 903 F.3d 1090, 1120-21 (9th Cir. 2018) (affirming district court's decertification order because police officers did not offer evidence probative of a departmentwide policy discouraging reporting of overtime).

Petitioners' purported circuit conflict elevates form over substance by focusing on differences in how courts of appeals describe their "similarly situated" tests and ignoring the similarities in how these tests are applied, and the similar results they reach. Some courts decertify FLSA collective actions while others do not because some plaintiffs have marshaled more evidence to support a common theory of FLSA liability, or have offered more workable trial plans, not because of meaningful differences in standards or tests. There is simply no chaos or confusion necessitating this Court's review.

Second, with one partial, fact-bound exception, all federal courts of appeals agree that neither the size of the collective, nor the predominance requirement for certifying a class under Federal Rule of Civil Procedure ("Rule") 23(b)(3), should bear on the FLSA's "similarly situated" standard. *See Monroe v. FTS USA, LLC*, 860 F.3d 389, 405-06 (6th Cir. 2017), *cert. denied*, 138 S. Ct. 980 (2018) ("[W]e have refused to equate the FLSA certification standard for collective actions to the more stringent certification standard for class actions under Rule 23."); *Karlo v. Pittsburgh Glass Works, LLC*, 849 F.3d 61, 86 (3d Cir. 2017) ("We decline to read the statutory phrase 'similarly situated' differently depending on the size of the collective action.").

The opinion below was consistent with both facets of this federal appellate consensus, as well as with the text of 29 U.S.C. § 216(b). It directed the district court, on remand, to focus on the factual findings of material similarity that the court had already made—a uniform

job description, a similar range of manual and managerial job duties, and a common employer policy of classifying all Apprentices as FLSA-exempt (a policy Chipotle implemented after interviewing just four Apprentices about their job duties). It also pulled the district court back from a sliding-scale test that changes what the phrase "similarly situated" means in the FLSA based on the number of plaintiffs that have joined a particular case. Both of these course corrections bring the district court's analysis in line with prevailing FLSA jurisprudence, and Petitioners' attempts to cast the opinion below as a dangerous outlier do not bear close scrutiny.

Petitioners' and their amici's policy arguments fare no better. They cite statistics about the number of FLSA collective actions filed, and raise the specter of forum shopping, never acknowledging the numerous headwinds collective actions already face. They want this Court to reverse 30-year-old precedent by changing the standard for conditional certification, even though conditional certification occurred in this case over seven years ago and is not part of the interlocutory order now before the Court. Ultimately, they ask for relief only Congress can provide: amendment of the FLSA to make it more like Rule 23. This Court cannot give Petitioners what they seek, and the petition should be denied.

STATUTORY AND PROCEDURAL BACKGROUND

A. The Fair Labor Standards Act

To ensure minimum standards for worker wages, and to protect law-abiding employers engaged in commerce from unscrupulous competitors who would use child labor and similar practices to undercut them, Congress passed the FLSA in 1938. *Citicorp Indus. Credit Inc. v. Brock*, 483 U.S. 27, 36-37 (1987). If an employer violates the FLSA by failing to pay the federal minimum wage for all hours worked, or the premium rate for overtime to employees who are entitled to such pay, that employer is liable to the affected employees for the unpaid wages and an equal amount as liquidated damages. 29 U.S.C. § 216(b). In that same provision, Congress specified how "[a]n action to recover the liability prescribed in the preceding sentences may be maintained": such civil actions may be prosecuted "by any one or more employees for and in behalf of himself or themselves and other employees similarly situated." *Id.*

When initially enacted, the FLSA authorized truly representative actions brought by labor unions, providing that employees "may *designate an agent or representative* to maintain such action for and in behalf of all employees similarly situated." Fair Labor Standards Act of 1938, Pub. L. No. 75-718, ch. 676, 52 Stat. 1060, 1069 (emphasis added). In response to a raft of union-initiated lawsuits, Congress removed this representative action provision as part of the Portal-to-Portal Act

in 1947, Pub. L. No. 80-49, 61 Stat. 84. *Nepper v. Rite Aid Corp.*, 675 F.3d 249, 254-55 (3d Cir. 2012).

As part of that same 1947 amendment to § 216(b), Congress added the provision requiring that any plaintiff wishing to join an FLSA collective action must "give[ ] his consent in writing to become such a party and such consent [must be] filed in the court in which such action is brought." 29 U.S.C. § 216(b); *Hoffmann-La Roche, Inc. v. Sperling*, 493 U.S. 165, 173 (1989) ("[R]esponding to excessive litigation spawned by plaintiffs lacking a personal interest in the outcome, the representative action by plaintiffs not themselves possessing claims was abolished, and the requirement that an employee file a written consent was added.").

Because of the requirement that each plaintiff affirmatively opt in to join the litigation, this Court has described the modern FLSA collective-action mechanism as a form of joinder. *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 75 n.1 (2013). Every party plaintiff who opts in has "the same status in relation to the claims of the lawsuit as do the named plaintiffs." *Prickett v. DeKalb Cty.*, 349 F.3d 1294, 1297 (11th Cir. 2003).

B. Rule 23(b)(3) and Congress's Continuing Use of the Collective-Action Framework

In 1966, the Federal Rules Advisory Committee amended Rule 23 to add, for the first time, the four class action prerequisites now codified at Rule 23(a)(1)-(4) and the opt-out class action procedure now codified

at Rule 23(b)(3). The notes accompanying this amendment discussed caselaw interpreting the pre-1947 version of § 216(b) and added that the "present provisions of" the FLSA "are not intended to be affected by Rule 23, as amended." Fed. R. Civ. P. 23 advisory committee's notes to 1966 amendment.

One year after these amendments to Rule 23 went into effect, Congress enacted the Age Discrimination in Employment Act ("ADEA"), codified at 29 U.S.C. § 621 *et seq*. The ADEA explicitly incorporates the collective-action procedure of the FLSA, 29 U.S.C. § 626(b), leading the Tenth Circuit to observe that "Congress clearly chose not to have the Rule 23 standards apply to class actions under the ADEA," adopting the FLSA's " 'similarly situated' standard" instead. *Thiessen v. Gen. Elec. Capital Corp.*, 267 F.3d 1095, 1105 (10th Cir. 2001); *see also Symczyk*, 569 U.S. at 74 ("Rule 23 actions are fundamentally different from collective actions under the FLSA[.]"); *id.* at 75 n.1 (noting "significant differences" between Rule 23 class certification and the "joinder process under § 216(b)").

C. History of This Litigation

1. Chipotle employs salaried staff, called Apprentices, to work in its thousands of restaurants alongside hourly employees. According to the Apprentice job description, which is uniform for all Chipotle locations throughout the country, Apprentices "lead[] the successful day-to-day operations" of the restaurant "by example" and by "serving as a role model" to the

rest of the crew. Record on Appeal ("ROA") Joint Appendix ("JA") 4246; *see also* JA 4255 (describing physical activity requirements of Apprentice position). Apprentices are scheduled for, and expected to work, between 50 and 55 hours per week, and based on their salaries, this results in hourly compensation to Apprentices that is only $1 to $2 more than what Chipotle pays to its FLSA-nonexempt, hourly employees like service managers. JA 733-34, 798, 1132.

In 2011, Chipotle hired a consultant to evaluate the Apprentices' primary job duties and determine if they should be classified as exempt or nonexempt from FLSA overtime requirements. The consultant made her determination after interviewing just four Apprentices. Petition Appendix ("Pet. App.") 42A. She recommended that the position be classified as exempt, based in part on her conclusion that Apprentices have the "same responsibility" at all Chipotle restaurants throughout the country. *Id.*; ROA Sealed Appendix ("SA") 910-13. Chipotle followed this recommendation, except for Apprentices in California. Pet. App. 42A.

Respondents filed suit in 2012, alleging that Chipotle had misclassified its Apprentices as "exempt" from overtime in violation of the FLSA. Respondents also included putative class claims regarding parallel state-law violations. The district court granted conditional certification of the collective action on June 30, 2013, authorizing notice to potential plaintiffs. Pet. App. 6A. Five-hundred sixteen Apprentices joined the litigation. Pet. App. 41A.

The record evidence demonstrated that Chipotle expected Apprentices to perform the same core duties, no matter where in the country they worked. JA 994. Despite the emphasis on management functions in their job description, testifying plaintiffs reported spending most of their time performing manual tasks like food preparation, customer service, and cleaning, alongside hourly workers. ROA JA 1406 (a majority); 8679 (80%); 8323 (90%); 8011 (95%). The manner in which they and their colleagues performed these manual tasks, moreover, was directed at a granular level of detail by uniform corporate policies. ROA SA 823-900 (manual for all aspects of food preparation and service, including, at SA 869, 17-step instructions for preparing a meat burrito).

All testifying plaintiffs also reported spending at least some time on managerial and human resources functions like interviewing potential employees (ROA JA 1454), scheduling employees' shifts (*id.* 8247), and supervising or training staff (*id.* 8456-57). Here too, however, Apprentices' discretion was limited by corporate policies that dictated how these functions were to be performed. ROA SA 59 (labor matrix determines staffing levels); ROA JA 60 (crew deployment chart determines positioning of employees on the service line at different levels of demand); ROA SA 690, ROA JA 8469-70 (describing MenuLink program that automates scheduling decisions); ROA Supplemental Joint Appendix ("SJA") 10975 (describing corporate questionnaires that closely script interviews). And, as a matter of Chipotle corporate policy, many management

functions were shared between salaried and hourly staff, with all crew members empowered to provide training and feedback to one another and to participate in interviews for new hires. ROA JA 576, 580, 1009-10, 8028; ROA SJA 10102-04.

2. Supplied with this evidence, the district court first considered Respondents' motion for certification of the state-law classes under Rule 23. It found commonality to exist "by a preponderance of evidence" because of Apprentices' single job description and uniform exempt classification, a classification decision Chipotle made after assessing the work duties of just four Apprentices. Pet. App. 45A-46A. "Also convincing" in the commonality analysis was the fact that "Chipotle has an expectation" that the core duties of all Apprentices are the same, no matter where they work, and "does not even gather individualized evidence from an Apprentice upon relocation to determine whether the Apprentice should remain exempt." *Id.* The district court similarly found typicality satisfied because in alleging that they were all misclassified as FLSA-exempt, the plaintiffs' claims shared a "legal theory and factual predicates." *Id.* at 47A.

Upon turning to Rule 23(b)(3), the district court found that individualized issues predominated. It noted that class members' "range of managerial tasks" and their "range of manual labor tasks" were similar. *Id.* at 49A. However, it concluded that some class members had greater management responsibilities than others. *Id.* at 52A-55A. It attributed these differences in management responsibility to differences in

geography, management structure, and sales volume, concluding that Apprentices in the six states "did not perform the same work, thus proof of their claims will not overlap." *Id.* at 55A-56A (citing *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 352 (2011)).[1]

Next, considering Petitioners' motion to decertify the FLSA collective action, the district court picked up right where it had left off in analyzing Rule 23 predominance. It concluded that "the 'similarly situated' analysis" under the FLSA "can be viewed, in some respects, as a sliding scale" where "the more opt-ins there are in the class, the more the analysis under § 216(b) will mirror the analysis under Rule 23." Pet. App. 58A. It then went on to declare that "disparities in job duties in this case seems axiomatic considering that the 516 opt-in plaintiffs worked at 37 states across Chipotle's nine geographic regions." *Id.* And the court reasoned that it would be difficult for Chipotle to pursue its defenses, that some or all of the plaintiffs were properly classified as exempt under 29 C.F.R. § 541.708, using representative proof given the "myriad of [plaintiff] accounts[.]" Pet. App. 60A.

3. The court of appeals reviewed the class certification denial under Rule 23(f) and reviewed the

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[1] In reaching this conclusion, the district court relied heavily on the testimony of one opt-in plaintiff, Lauren Kelsch, who reported that her duties and amount of management responsibility changed when she relocated from a store in Oregon to one in Kentucky. Pet. App. 59A. But most plaintiffs testified that their duties did not change appreciably, or at all, from one Chipotle location to another. ROA JA 7860-61, 8688-90.

decertification of the FLSA collective action under 28 U.S.C. § 1292(b). *Id.* at 9A. The opinion below affirmed the district court's denial of class certification due to lack of predominance, finding its conclusion within "the range of permissible decisions committed to its discretion." *Id.* at 18A. But it found the decertification order legally erroneous because the district court improperly analogized the FLSA collective-action procedure to Rule 23. *Id.* at 19A-20A (citing *Symczyk*, 569 U.S. at 75 n.1 for description of differences between Rule 23 class actions and § 216(b)'s joinder process).

The court held that the meaning of "similarly situated" must be rooted in the purpose behind the collective-action mechanism. According to this Court, Congress gave employees the right to pursue FLSA claims collectively in order to afford "the advantage of lower individual costs to vindicate rights by the pooling of resources." Pet. App. 21A (quoting *Hoffmann-La Roche Inc.*, 493 U.S. at 170). That efficiency objective would "only be achieved to the extent that named plaintiffs and opt-in plaintiffs share one or more issues of law or fact that are material to the disposition of their FLSA claims." Pet. App. 21A.

Where such material similarities exist, the court reasoned, proceeding collectively "may be *to that extent* appropriate, for it may *to that extent* facilitate the collective litigation of the party plaintiffs' claims." *Id.* at 22A (quotations omitted). The opinion below went on to note that courts frequently engage in such partial consolidation of common issues outside the FLSA context, pointing to Rule 42(a)(1). *Id.* at 22A n.5.

In the next part of its opinion, the court of appeals did not "reject" the so-called "ad hoc" approach to decertification, as Petitioners suggest. Pet. 11-12. Rather, it expressed concern with the possibility that the ad hoc analysis may open the door to the importation of Rule 23 requirements, particularly where courts "graft[] on[] . . . additional considerations." Pet. App. 25A. Indeed, that is just what the district court had done with its "sliding scale analogy," likening the "similarly situated" analysis to Rule 23 "in rough proportion to" the number of opt-in plaintiffs. *Id.* at 25A and n.8.

It is these analogies to Rule 23, including the sliding scale analogy used by the district court, that the opinion below flatly rejected—not the ad hoc test per se. *Id*. at 26A-31A. Specifically, the court held "that the requirements for certifying a class under Rule 23 are unrelated to and more stringent than the requirements for 'similarly situated' employees to proceed in a collective action under § 216(b)" and that "it is error for courts to equate the requirements of § 216(b) with those of Rule 23 in assessing" whether named and opt-in plaintiffs are "similarly situated." *Id.* at 29A-30A. Because the district court had made just such an error of conflation in relying on its predominance findings to decertify the collective action, the court of appeals remanded so that the district court could perform the FLSA analysis again, free from legally flawed analogies. *Id.* at 30A-33A.

REASONS FOR DENYING THE PETITION

Petitioners tell three different stories of disaster, all of which end with an urgent plea for this Court's intervention. All three are at odds with the facts.

First, Petitioners allude to disastrous disarray among the lower courts. In reality, no such disarray exists: the lower courts uniformly focus on material similarities between named and opt-in plaintiffs and all but one reject analogies between § 216(b) and Rule 23. Second, Petitioners suggest the opinion below is disastrously wrong. Yet it is grounded in the text of the FLSA and, unlike the district court opinion it vacated, it tracks the opinions of most other appellate courts in emphasizing material similarities among party plaintiffs and rejecting analogies to Rule 23. Finally, Petitioners point to disastrous consequences that would supposedly result if this Court does not step in, but empirical evidence does not bear out these doomsday claims.

I. Courts of Appeals Are in Accord That the FLSA's "Similarly Situated" Inquiry Focuses on Material Similarity and Is Distinct from Rule 23.

Petitioners charge that the lower courts are hopelessly confused about the FLSA's "similarly situated" standard, but an examination of how these supposedly disparate tests function in practice reveals no such confusion. In all of these circuits, the "similarly situated" analysis focuses on whether plaintiffs are similar

in respects material to their claims of FLSA liability; similarities and differences considered immaterial to the theory of liability will be ignored, while a lack of such material similarity will defeat certification. *Compare Morgan v. Family Dollar Stores, Inc.*, 551 F.3d 1233, 1261 (11th Cir. 2008), *with Campbell*, 903 F.3d at 1117.

With the exception of the Seventh Circuit, in an opinion focused mainly on plaintiffs' "infeasible" trial plan, *Espenscheid v. DirectSat USA, LLC*, 705 F.3d 770 (7th Cir. 2013), the courts of appeals are also unified in their rejection of any merger of § 216(b)'s "similarly situated" standard with the requirements of Rule 23. These courts all recognize that § 216(b) affords a right to proceed collectively, and that the character of this right—along with the affirmative opt-in consent necessary to exercise it—makes these Congressionally authorized collective actions analytically distinct from the representative class actions governed by Rule 23(b)(3)'s notice and opt-out procedures. Perhaps Petitioners and their amici disapprove of the consensus the lower courts have reached on these issues, but their claims of lower court confusion ring hollow.

A. All Courts Focus on Legally Significant, or Material, Similarities in Applying § 216(b)'s "Similarly Situated" Standard.

Petitioners list a litany of appellate courts that employ a three-part "ad hoc" test to analyze whether named and opt-in plaintiffs are "similarly situated"

under § 216(b).[2] The test factors in the plaintiffs' factual and employment settings, the employer's available defenses, and fairness and procedural considerations. *See*, *e.g.*, *Morgan*, 551 F.3d at 1261; *O'Brien*, 575 F.3d at 584. Petitioners trace this test to the Third Circuit decision in *Lockhart v. Westinghouse Credit Corp.*, 879 F.2d 43 (3d Cir. 1989), *abrogated on other grounds by Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993). Pet. 15-16.

But, after identifying the test used, Petitioners do not discuss the conclusions actually reached by the courts in *Lockhart*, *Morgan*, and *O'Brien*, or the myriad other opinions that have applied the ad hoc framework. An analysis of how the ad hoc framework functions in practice reveals that when plaintiffs can point to evidence that they are similar in ways that bear on the specific theory of FLSA liability they are alleging, courts find them to be similarly situated for FLSA purposes, even when they differ from one another in other respects.

In *Lockhart*, an ADEA action, the Third Circuit found that the plaintiffs who had opted in to Mr. Lockhart's case were "similarly situated" because they all worked in Westinghouse's financial services division—albeit in different locations and under different

[2] Petitioners' own chronological narrative contradicts their conclusion that the appellate courts are in increasing disarray. Their account is instead one of increasing convergence, where the three-part test first articulated by a New Jersey district court in 1987 had been adopted, or at least cited approvingly, by the Third, Sixth, Eighth, Tenth and Eleventh Circuits by 2014. Pet. 15-18.

managers—and all "claimed that they were terminated from their employment positions as a result of a pattern, plan or practice of willful age discrimination." 879 F.2d at 52.

Morgan was an FLSA action much like this one, in which store managers alleged that they had been misclassified as exempt from receiving overtime pay. The Eleventh Circuit found "ample evidence" that the 1,424 opt-in plaintiffs were similarly situated with respect to their misclassification claim, including their "universal classification as store managers with the same job duties"; the relatively large amount of time they spent on nonmanagerial as opposed to managerial tasks; the "lack of managerial discretion that Family Dollar corporate policies afforded to store managers"; and the fact they were all paid a base salary, and no overtime, regardless of the number of hours they worked. 551 F.3d at 1262-63.

O'Brien largely turned on the power of an unaccepted offer of judgment to moot an FLSA plaintiff's claims and was later abrogated in part by *Campbell-Ewald Co. v. Gomez*, 577 U.S. 153 (2016). As relevant here, the Sixth Circuit in *O'Brien* held that plaintiff-employees of a McDonalds franchise were similarly situated "because their claims were unified by common theories of defendants' statutory violations." 575 F.3d at 585. Specifically, the *O'Brien* plaintiffs articulated two ways in which the defendants had violated their right under the FLSA to be compensated for all hours worked: 1) by forcing them to work off the clock; and 2) by editing their timesheets to alter the number of

reported hours. *Id.* These similarities justified proceeding as a collective action, even as the court acknowledged that "proofs of these theories [were] inevitably individualized and distinct." *Id.*[3]

As these decisions show, the ad hoc test provides a framework for courts to organize the often large quantities of evidence that are presented to them when weighing a motion for decertification in an FLSA case. But in practice, the test is far less about tallying similarities and differences (both of which are bound to appear) than it is about determining whether the evidence supports a common theory or theories of FLSA liability to which the employer can respond with common defenses.

Put another way, courts applying the ad hoc test find the "similarly situated" standard met when the similarities are material to the plaintiffs' theory of FLSA liability. *See*, *e.g.*, *Fenley v. Wood Grp. Mustang*, 325 F.R.D. 232, 244-45 (S.D. Ohio 2018) (applying ad hoc test and denying motion to decertify, concluding oil and gas pipeline inspectors were "similarly situated" because their job duties, while differing in some respects, involved performing manual labor in the field, and all claimed "they were paid according to a facially unlawful policy"); *Clark v. Centene Co. of Texas, L.P.*, 44 F. Supp. 3d 674, 688-89 (W.D. Tex. 2014) (denying decertification and finding nurses similarly situated

[3] The Sixth Circuit went on to find that an opt-in plaintiff was not similarly situated to the named plaintiffs because she "failed to allege" that she suffered from either of these FLSA-violating practices. *Id.* at 586.

under ad hoc test, concluding that the employer had identified "legitimate differences" in the plaintiffs' work locations and schedules but had failed to explain why those differences "are material and preclude collective resolution of" the plaintiffs' claims that the employer misclassified all of them as exempt from FLSA overtime); *Ruffin v. Avis Budget Car Rental, LLC*, No. 11 Civ. 1069, 2014 WL 294675, at *4 (D.N.J. Jan. 27, 2014) (applying ad hoc test and denying decertification because "[w]hile the record testimony contains variations with respect to certain aspects of Plaintiffs' job duties, they are immaterial differences").

Conversely, when the evidence does not reveal similarities among named and opt-in plaintiffs that bear on their theory of FLSA liability, then courts do not find them similarly situated, regardless of what test or standard those courts use to define the term. In *Zavala v. Wal-Mart Stores Inc.*, for example, the plaintiffs' theory of liability was that Wal-Mart hired contractors who in turn hired cleaners for its stores, and that these cleaners were not paid overtime under the FLSA, for which Wal-Mart was ultimately responsible as their employer. 691 F.3d 527, 530 (3d Cir. 2012). But the collective members worked for 70 different contractors, and both their hours and wages differed depending on the contractor they worked for, causing the Third Circuit to conclude that the alleged common scheme of underpayment was of "minimal utility in streamlining resolution of the claims[.]" *Id.* at 538.

Similarly, in *Anderson v. Cagle's, Inc.*, the Eleventh Circuit found the district court's decertification decision appropriate because many of the opt-in plaintiffs were not unionized, a fact that distinguished them from the named plaintiffs and on which a "key defense" to the plaintiffs' theory of FLSA liability turned. 488 F.3d 945, 953 n.8 (11th Cir. 2007). In other words, the named and opt-in plaintiffs differed regarding a fact material to proving the common FLSA-violating practice they alleged, and "the more material distinctions revealed by the evidence, the more likely the district court is to decertify the collective action." *Id.* at 953.

Although Petitioners point to the Ninth Circuit's decision in *Campbell* as a distinct branch in their purported circuit split, Pet. 19-21, the analysis in *Campbell* largely tracks that in *Zavala* and *Anderson*. The plaintiffs' theory of liability in *Campbell* was that all Los Angeles police officers were subject to a common FLSA-violating policy discouraging them from reporting small increments of overtime. But the evidence the officers submitted focused on interactions with "immediate supervisors at discrete work sites" and pointed to "variable practices variably applied" rather than the uniform, departmentwide policy alleged. 903 F.3d at 1120. Because the record did not support the existence of a departmentwide FLSA-violating policy, the Ninth Circuit concluded the district court had properly decertified the collective action. *Id.* at 1120-21.

B. Courts of Appeals Are Largely in Accord that the Rule 23 and § 216(b) Requirements Are Independent and Distinct.

This Court has observed that "Rule 23 class actions are fundamentally different from collective actions under the FLSA." *Symczyk*, 569 U.S. at 74. In making this observation, the Court broke no new ground but instead confirmed a long line of authority dating back to the 1970s, shortly after the modern class action device came into existence. *See*, *e.g.*, *Cooke v. Reynolds Metals Co.*, 65 F.R.D. 539, 540 (E.D. Va. 1975) (statutory class actions under the FLSA and ADEA are "independent of and unrelated to" Rule 23, and need not meet its requirements) (quotation omitted); *Hull v. Cont'l Oil Co.*, 58 F.R.D. 636, 637 (S.D. Tex. 1973) (Rule 23 "inapplicable" to ADEA action).

In the intervening 50 years, this consensus has only crystalized, with circuit after circuit explaining, in well-reasoned opinions, why Rule 23 considerations have no place in the § 216(b) collective-action analysis. In *Cameron-Grant v. Maxim Healthcare Services, Inc.*, the Eleventh Circuit analyzed the text of § 216(b) and its 1947 amendment and concluded that "§ 216(b) is a fundamentally different creature than the Rule 23 class action" because the opt-in requirement added in 1947 "prohibit[s] what precisely is advanced under Rule 23—a representative plaintiff filing an action that potentially may generate liability in favor of uninvolved class members." 347 F.3d 1240, 1248-49 (11th Cir. 2003).

Similarly, looking to the text of § 216(b), the Sixth Circuit in *O'Brien* criticized the district court for "improperly appl[ying] a Rule 23-type analysis when it reasoned that the plaintiffs were not similarly situated because individualized questions predominated[,]" a "more stringent standard than is statutorily required." 575 F.3d at 584-85. Importing Rule 23(b)(3) predominance into the § 216(b) analysis, the Sixth Circuit warned, would "undermine[ ] the remedial purpose of the collective-action device." *Id.* at 585-86; *see also Campbell*, 903 F.3d at 1112 (Section 216(b), "by omitting most of the requirements in Rule 23 for class certification, necessarily impose[s] a lesser burden"); *Thiessen*, 267 F.3d at 1105 ("incorporating the requirements of Rule 23" into the "similarly situated" analysis "would effectively ignore Congress' directive" that the § 216(b) standard was intended to be distinct).

Recognizing these fundamental differences, courts throughout the country have denied class certification under Rule 23 while simultaneously allowing a related collective action to continue under § 216(b). *See*, *e.g.*, *Frazier v. PJ Iowa, L.C.*, 337 F. Supp. 3d 848, 869-70 (S.D. Iowa 2018) (finding plaintiffs' evidence sufficient to conditionally certify an FLSA collective under § 216(b) but "unavailing under the more stringent standards of Rule 23"); *Morrison v. Ocean State Jobbers*, 290 F.R.D. 347, 359-61 (D. Conn. 2013) (finding that differences in deposition testimony about assistant store managers' degree of managerial responsibility defeated predominance under Rule 23(b)(3) but declining to decertify collective action because the

"similarly situated" analysis, even at the second, decertification stage, is "considerably less stringent" than Rule 23(b)(3)).[4]

Petitioners note that the Seventh Circuit has departed from this consensus by merging the Rule 23 and § 216(b) standards. Pet. 18-19. But they overstate the case. The Seventh Circuit recognizes that the FLSA and Rule 23 are analytically distinct, not least because Rule 23's procedural requirements are designed to protect the rights of absent class members, protections that are unnecessary in a § 216(b) action where only those who affirmatively opt in are bound. *Espenscheid*, 705 F.3d at 771-72.[5] Nonetheless, noting that "simplification is desirable in law," Judge Posner, writing for the panel in *Espenscheid*, analyzed the class and collective-action claims together, reasoning that considerations of efficiency are relevant to both Rule 23 and the FLSA.[6] The *Espenscheid* panel then found

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[4] *See also* Charles A. Wright et al., Federal Practice & Procedure § 1807 (3d. ed.) (lower courts in collective actions have "uniformly rejected" analogies to the heightened commonality requirement enunciated in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011), instead "reaffirming that the FLSA's 'similarly situated' requirement is less demanding than Rule 23").

[5] This Court amplified these distinctions in *Symczyk*, decided two months after *Espenscheid*, where it rejected Rule 23 cases as "inapposite" in deciding a question arising under the FLSA. 569 U.S. at 74. *Symczyk* also rejected an argument from the plaintiff there couched in Rule 23's and the FLSA's common objective of promoting efficiency, *id.* at 77-78, a common objective also relied on by Judge Posner's opinion in *Espenscheid*.

[6] Subsequent Seventh Circuit panels have also "analyze[d] together" decisions decertifying Rule 23 class actions and FLSA collective actions while continuing to acknowledge the distinctions

these considerations of efficiency counseled against certifying either the Rule 23 or FLSA actions because the plaintiffs had insisted upon an unworkable trial plan. 705 F.3d at 773-76.

The *Espenscheid* panel left open the possibility that a different trial plan might have yielded different results. And, in a later case, the Sixth Circuit refused to decertify an FLSA collective action bringing nearly identical claims against the same defendant. *Monroe*, 860 F.3d at 394-96, *cert. denied*, 138 S. Ct. 980 (2018). There, the parties jointly chose fifty (50) opt-in plaintiffs during the discovery phase, and trial witnesses were selected from among this representative sample. *Id.* at 394-96, 401. Once this representative sample was chosen, "defenses successfully asserted against testifying technicians were properly distributed across the claims of nontestifying technicians." *Id.* at 404.

The Sixth Circuit thus distinguished *Espenscheid* based in part on "factual[] and procedural" differences. *Id.* at 406; *see also Campbell*, 903 F.3d at 1115-16 (agreeing that procedural considerations like those discussed in *Espenscheid* could permit decertification if "the collective mechanism is truly infeasible" but noting that district courts have multiple case management mechanisms at their disposal). Even Judge Sutton, partially dissenting in *Monroe*, alluded to those same case management mechanisms, suggesting that a collective action would have been appropriate if

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that the opt-in requirements of the FLSA impose. *See Weil v. Metal Techs., Inc.*, 925 F.3d 352, 355 n.1 (7th Cir. 2019).

the plaintiffs had pursued their claims on behalf of three subclasses, each corresponding to one of their three theories of FLSA liability. *Monroe*, 860 F.3d at 418 (Sutton, J., concurring in part and dissenting in part).

Moreover, while the Seventh Circuit has conflated Rule 23 and FLSA collective-action requirements to some degree, no court of appeals has embraced a "sliding-scale" approach where Rule 23 increasingly applies as the size of a § 216(b) collective grows. To the contrary, courts confronted with such size-based arguments have flatly rejected them. *See Karlo*, 849 F.3d at 86 (rejecting plaintiffs' argument that an ADEA case should continue collectively, despite failing the "similarly situated" test under *Zavala*, because it only comprised nine members, holding that "[w]e decline to read the statutory phrase 'similarly situated' differently depending on the size of the collective action"); *see also Morgan*, 551 F.3d at 1265 ("the size of an FLSA collective action does not, on its own, compel the conclusion that a decision to collectively litigate a case is inherently unfair").

II. In Emphasizing Material Similarity and Rejecting Analogies to Rule 23, the Opinion Below Is Consistent with the Judicial Consensus, this Court's Precedents, and the Text of the FLSA.

Petitioners spend a lot of time criticizing, in an abstract way, the portion of the Second Circuit opinion

discussing the importance of material similarities among named and opt-in plaintiffs in the § 216(b) analysis. Pet. 22-25. But they say very little about the material similarities evident on this record among the named and opt-in plaintiffs in this case, many of which were already acknowledged by the district court. Pet. App. at 45A-46A, 49A. And they completely ignore the actual holdings of the opinion below regarding where the district court had erred: 1) that the requirements for determining if plaintiffs are similarly situated under § 216(b) are "separate and independent" from the requirements to certify a class under Rule 23, *id*. at 26A; and 2) that the district court erred in conflating these two distinct requirements by applying its sliding-scale analogy, *id.* at 29A-30A. Both of these holdings were narrow, and correct.

1. When the district court noted that "the more opt-ins there are in the class, the more the analysis under § 216(b) will mirror the analysis under Rule 23," *id*. at 58A, it cited to an earlier district court opinion, *Indergit v. Rite Aid Corp.*, 293 F.R.D. 632, 651 (S.D.N.Y. 2013). *Indergit*, in turn, derived the sliding-scale analogy from *Gardner v. Western Beef Properties*, No. 08 Civ. 2345, 2013 WL 1629299, at *4, *6 (E.D.N.Y. Mar. 25, 2013). The Second Circuit simply put a stop to the iterative adoption of this increasingly prevalent, outlier approach.

In rejecting Rule 23-like considerations that district courts in the Second Circuit had "grafted onto the ad hoc approach," Pet. App. 25A, 29A-30A, the opinion below did not reject the ad hoc approach outright. *See*

Vecchio v. Quest Diagnostics Inc., No. 16 Civ. 5165, 2020 WL 5604080, at *11 (S.D.N.Y. Sept. 18, 2020) (noting that the Second Circuit in *Scott* "did not explicitly forbid the use of the *ad hoc* approach"). Instead, it merely criticized the tendency of that multifactor test to "import, through a back door, [Rule 23] requirements with no application to the FLSA," in turn undermining "what is supposed to be one of the chief advantages of the ad hoc approach, that 'it is not tied to the Rule 23 standards.'" Pet. App. 24A (quoting *Thiessen*, 267 F.3d at 1105).

As the opinion below cogently explains, there was good reason for *Thiessen* and other appellate opinions to reject comparisons between opt-in collective actions and Rule 23 class actions. These reasons derive from the text of § 216(b) itself, which includes none of the procedural requirements of Rule 23. *Id.* at 27A. Instead, that statutory provision establishes the extent of employer liability for violating other substantive provisions of the FLSA and affords employees an express right to pursue "[a]n action to recover the liability prescribed in the preceding sentences . . . against any employer . . . " on behalf of "themselves and other employees similarly situated." 29 U.S.C. § 216(b). The only condition that extinguishes the right of similarly situated employees to proceed collectively is the initiation of a complaint by the Secretary of Labor over the same alleged FLSA violation. *Id.*

According to Petitioners, the context of § 216(b) suggests that the phrase "similarly situated" in that provision must refer to the ability to litigate all claims

collectively in a single proceeding. Pet. 23. But Petitioners do not actually base that conclusion on any language in § 216(b). That provision, read in its entirety, concerns the substantive requirements of the FLSA and the consequences of their violation. "Similarly situated" in that context thus turns on experiencing the same alleged FLSA violation and being able to jointly pursue "the liability prescribed in the preceding sentences." 29 U.S.C. § 216(b); *see also* Pet. App. 29A. The opinion below recognized this, pointing to the substantive character of the § 216(b) collective-action right, and its connection to other substantive rights granted by federal labor laws, as characteristics setting it apart from the general-purpose procedural requirements of Rule 23. Pet. App. 29A.

In light of this textual analysis, the Second Circuit instructed the district court to replace the Rule 23-based sliding scale that the court had used the first time with a different sliding scale on remand—this one rooted in the language and purpose of § 216(b): Collective treatment "may be . . . appropriate" to the extent that "named plaintiffs and opt-in plaintiffs are similar in some respects material to the disposition of their [FLSA] claims," because "to that extent" collective treatment may "facilitate the collective litigation of collective plaintiffs' claims." *Id.* at 33A. Implicit in this formulation is that to the extent that named and opt-in plaintiffs are *not* similar in respects material to the disposition of their claims, or are similar in *immaterial* respects, then collective treatment will not be appropriate. *See Campbell*, 903 F.3d at 1115-16 ("A

'collective' action in which, as a practical matter, no material dispute truly could be heard on a collective basis would hardly be consistent with the FLSA's remedial purpose.").

2. Material similarities certainly exist among the named and opt-in Apprentices in this case, including the similarities that supported the district court's finding of Rule 23(a)(2) commonality. Pet. App. 45A-46A (Chipotle's decision to classify all Apprentices as FLSA exempt after interviewing only four of them, and Chipotle's expectation that the core functions of the position are the same no matter where the Apprentice works).

Further similarities, evident in the record before the district court, have been found by other courts to link named and opt-in plaintiffs as "similarly situated," such as the similar allocations of time spent on managerial and manual labor tasks and similar limitations on managerial discretion due to centralized corporate policies. *See*, *e.g.*, *Kelly v. Healthcare Servs. Grp., Inc.*, 106 F. Supp. 3d 808, 811, 816, 818-19 (E.D. Tex. 2015) (86 representative plaintiffs in 900-plaintiff collective action testified to majority of time spent on manual rather than managerial tasks); *Kis v. Covelli Enters., Inc.*, No. 18 Civ. 54, 2019 WL 761573 at *2 (N.D. Ohio Feb. 21, 2019) (assistant managers at Panera stores were similarly situated because "Defendant exercises a significant degree of corporate micromanagement"); *see also Morgan*, 551 F.3d at 1262-63 (executive exemption defense, despite being fact-intensive, did not require decertification because the

employer "applied the executive exemption across-the-board to every store manager—no matter the size, region, or sales volume of the store"). These material similarities suggest that the evidence here would have supported a "similarly situated" finding in most if not all circuits, including those using the ad hoc approach.

To the extent that the district court found material differences, such as in store management structures that may have influenced the amount of responsibility a particular plaintiff possessed, there are case management techniques the court can employ on remand to address those differences. It could require trial testimony from at least some Apprentices with general managers in their stores and at least some Apprentices whose stores lacked a general manager, to ensure that the jury hears from a representative sample across that potentially material distinction. Pet. App. 55A-56A. To the extent that the testimony of a particular opt-in plaintiff, like Lauren Kelsch, differed materially from the testimony of most other plaintiffs, *id*. at 59A, such an atypical plaintiff can be dismissed from the case under Rule 21 without necessitating decertification of the entire collective action.

3. Contrary to Petitioners' and their amici's characterizations, the opinion below did not create a rigid rule where district courts in the Second Circuit will have no choice but to administer unwieldy collective actions, even where a single similarity among plaintiffs is swamped by legally relevant differences. The district court in this case, and district courts in future cases in the Second Circuit, retain all of their case

management tools for adjudicating claims collectively to the extent, and only to the extent, that doing so promotes efficiency. *Id*. at 22A n.5 (discussing partial consolidation under Rule 42(a)(1)); *see also O'Brien*, 575 F.3d at 586 (discussing partial decertification through dismissal of those plaintiffs who are not similarly situated).

In sending this case back to the district court to apply those case management tools, the opinion below did provide some guidance about what it means to be "similarly situated" for purposes of the FLSA: that the named and opt-in plaintiffs share factual or legal similarities material to the resolution of their FLSA claims, or as the statute puts it, their ability to "recover the liability prescribed in the preceding sentences[.]" 29 U.S.C. § 216(b). That guidance is neither radical nor destabilizing, but a logical construction of the statutory text. Moreover, it aligns with this Court's past recognition, and the consensus among the federal courts of appeals, that the FLSA's joinder procedure is "fundamentally different" from class actions under Rule 23. *Symczyk*, 569 U.S. at 74.

III. Petitioners' and Their Amici's Policy Arguments Are Speculative and Seek Relief This Court Cannot Give in This Case.

Petitioners insist that this Court's intervention is needed here because many FLSA collective actions are filed, insinuating that the opinion below will open the floodgates even further. Conspicuously absent from

Petitioners' narrative is any account of what happens to these FLSA cases after they are filed. In reality, many never reach the notice and conditional certification stage, let alone proceed to discovery and decertification, because class and collective-action bans in employee contracts either lead to their prompt dismissal, or enmesh them in collateral litigation about the enforceability of such provisions. *See Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018).

Petitioners also invoke the possibility of plaintiffs strategically filing suit in the Second Circuit due to its supposedly more favorable law, Pet. 28-29, and amicus DRI suggests that there are more FLSA actions filed in the Second and Ninth Circuits than elsewhere because plaintiffs' attorneys have "caught on" to these circuits' supposedly more favorable law. DRI Br. 13.

But their theories ignore the evidence, discussed in part I-A, *supra*, that in practice the Ninth Circuit's "similarly situated" analysis in *Campbell* does not yield different results than the standards used by other courts. *See*, *e.g.*, *Guanzon v. Vixxo Corp.*, No. 17 Civ. 1157, 2019 WL 1586873, at *7 (D. Ariz. Apr. 12, 2019) (granting decertification under *Campbell* because of disparate deposition testimony among plaintiffs, noting these differences "aren't immaterial" but "go to the heart of the merits"). The opinion below does not appear to be changing the litigation landscape in the Second Circuit either. *See Huer Huang v. Shanghai City Corp.*, No. 19 Civ. 7702, 2020 WL 5849099, at *12 (S.D.N.Y. Oct. 1, 2020) (denying conditional certification because differences in pay provisions and job

requirements between kitchen staff and delivery drivers meant they were not similarly situated); *Jibowu v. Target Corp.*, No. 17 Civ. 3875, 2020 WL 5820957, at *25 (E.D.N.Y. Sept. 30, 2020) (denying conditional certification because plaintiffs' evidence of a common nationwide FLSA-violating policy was "extremely thin"); *Vecchio*, 2020 WL 5604080, at *11 (granting motion to decertify because neither of plaintiff's asserted similarities, including a common policy of off-the-clock work and similar job responsibilities, "truly [constituted] a material issue that applies to the entirety of the collective").

Finally, several of Petitioners' amici, including DRI and the Chamber of Commerce, complain about the lenient standard for conditional certification and the lengthy and expensive discovery period that occurs before a motion for decertification can be filed. DRI Br. 6-11; Chamber Br. 17-20. But the only order before this Court is interlocutory in nature and involves a denial of decertification. It is hardly a proper vehicle for this Court to alter the standard for conditional certification, which occurred in this case back in 2013.

It is also unclear how these amici expect this Court to adjust the standard for conditional certification without reversing its own precedent and upending long-held understandings of how the collective-action mechanism in § 216(b) operates. *Symczyk*, 569 U.S. at 75 ("[t]he sole consequence of conditional certification is the sending of court-approved written notice to employees" (citing *Hoffmann-La Roche*, 493 U.S. at 171-72)); *Zavala*, 691 F.3d at 536 (conditional certification

"is neither necessary nor sufficient for the existence of a representative action under the FLSA" (internal quotations and alterations omitted)).

In short, Congress created a right within the FLSA, which it extended to the Equal Pay Act in 1963, Pub. L. No. 88-38, 77 Stat. 56, and the ADEA in 1967, for similarly situated workers to proceed collectively by consolidating claims in a single civil action. This statutory right is independent of and analytically distinct from the Rule 23 class action procedure that took on its present form in 1966. To the extent that Petitioners or their amici would like the collective-action mechanism to more closely resemble Rule 23 and adopt its procedural requirements, *see* Chamber Br. 11-17, they can certainly seek such a change. But they must do so in Congress, not in this Court. Their invitation to use the Second Circuit's interlocutory order in this case as a vehicle for back-door legislative amendment should not be countenanced.

CONCLUSION

The petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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