No. 20-257

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

REPLY BRIEF FOR THE PETITIONERS

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In the more than 80 years since Congress enacted the Fair Labor Standards Act, this Court has never provided guidance to lower courts regarding the appropriate analysis for determining whether employees are "similarly situated" for purposes of the FLSA's collective-action mechanism. The result has been intractable conflict and widespread confusion. The courts of appeals have developed three competing approaches to determining whether employees are "similarly situated," and courts and commentators alike have long recognized that those approaches are fundamentally incompatible. The numerous amici supporting petitioners only confirm the importance of the issue and the need for this Court's review.

In the decision below, the court of appeals not only purported to adopt the most lenient of the three approaches, as articulated by the Ninth Circuit; it in fact adopted an even more permissive standard, thereby going further than any other court of appeals in the Nation. As Judge Sullivan recognized in dissent, the decision below reduces the "similarly situated" requirement to a "mere formality." Pet. App. 35a.

Respondents do not dispute that the courts of appeals have adopted competing tests for determining whether employees are "similarly situated" under the FLSA. Nor do they disagree that the question presented is exceedingly important or that this case is a suitable vehicle for addressing it.

Instead, respondents contend that review is unnecessary based on a strained attempt to harmonize the cases applying competing approaches for determining "similarly situated" status. But as respondents concede, even their unifying theory would not explain away the circuit conflict in its entirety, since the Seventh Circuit has applied a wholly distinct approach. And in arguing that the other courts of appeals focus only on the similarities between employees, respondents brush past the fact that many of those courts also explicitly consider dissimilarities and the employer's individualized defenses. This Court should take those courts at their word: the courts of appeals are applying irreconcilable legal standards that can (and often do) lead to conflicting results.

In the end, respondents offer no compelling reason why the Court should pass on this rare opportunity to provide guidance on a question of statutory interpretation that is so important, arises so frequently, and has so bewildered the lower courts. The petition for a writ of certiorari should be granted.

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

The courts of appeals have adopted three competing approaches for determining whether employees are "similarly situated" for purposes of the FLSA's collective-action mechanism, 29 U.S.C. 216(b). Most circuits have adopted a flexible, multifactor approach that permits district courts to weigh dissimilarities among employees and fairness and procedural considerations; 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. See Pet. 14-22.

Respondents concede that the Seventh Circuit's approach is an outlier. See Br. in Opp. 22. And they also concede that there are "differences" in how the remaining courts of appeals "describe their 'similarly situated' tests." *Id.* at 2. Those concessions are wise, given the number of courts and commentators that have recognized the divergence in approaches. 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 and Procedure* § 1807, at 477-485, 497-498 (3d ed. 2005); 1 Joseph M. McLaughlin, *McLaughlin on Class Actions* § 2:16, at 168-172 (16th ed. 2019).

Respondents nevertheless argue (Br. in Opp. 13-19) that the longstanding and recognized conflict is largely illusory because two of the competing approaches "function in practice" the same way, leaving little need for guidance

from the Court. *Id.* at 13. That argument is seriously flawed.

1. Respondents contend that there are no "meaningful differences" between the multifactor approach and the common-material-issue approach because the courts applying them really "focus[]" on "whether the evidence supports a common theory" of FLSA liability "to which the employer can respond with common defenses." Br. in Opp. 14, 17. As a preliminary matter, even if that were an accurate gloss on the cases, it would not eliminate the circuit conflict, given the Seventh Circuit's discrete approach taking Rule 23 considerations into account as part of the "similarly situated" analysis. See *id.* at 22; *Herrington* v. *Waterstone Mortgage Corp.*, 907 F.3d 502, 507 n.4 (7th Cir. 2018) (Barrett, J.); *Espenscheid*, 705 F.3d at 772; *Alvarez* v. *City of Chicago*, 605 F.3d 445, 449 (7th Cir. 2010).[1]

But more importantly, the decisions in the circuit conflict defy respondents' effort to reconcile them. Respondents suggest that courts do not consider dissimilarities among employees or individualized defenses when the employees share a common theory of FLSA liability—and in particular, when liability is premised on a "common FLSA-violating practice." Br. in Opp. 19. But courts applying the multifactor approach routinely consider dissimilarities and individualized defenses when liability is premised on a common employment practice. See, *e.g.*, *Zavala* v. *Wal-Mart Stores Inc.*, 691 F.3d 527, 538 (3rd Cir. 2012); *Morgan* v. *Family Dollar Stores, Inc.*, 551 F.3d 1233, 1263 (11th Cir. 2008), cert. denied, 558 U.S. 816 (2009); *Anderson* v. *Cagle's, Inc.*, 488 F.3d 945, 949-950,

[1] Cf. *BP p.l.c.* v. *City & County of Baltimore*, No. 19-1189 (Oct. 2, 2020) (granting certiorari based on an 8-2-1 circuit conflict, with the Seventh Circuit alone taking the most expansive position).

954 n.8 (11th Cir. 2007); *Lockhart* v. *Westinghouse Credit Corp.*, 879 F.2d 43, 52 (3d Cir. 1989).

Respondents also suggest that courts do not consider whether "procedural and fairness" concerns make collective resolution of FLSA claims unmanageable or prejudicial to defendants. See Br. in Opp. 15. But every court of appeals that applies the multifactor approach views those concerns as pertinent. See *Halle* v. *West Penn Allegheny Health System Inc.*, 842 F.3d 215, 226 (3d Cir. 2016); *Morgan*, 551 F.3d at 1261; *O'Brien* v. *Ed Donnelly Enterprises, Inc.*, 575 F.3d 567, 584 (6th Cir. 2009); *Bouaphakeo* v. *Tyson Foods, Inc.*, 765 F.3d 791, 796 (8th Cir. 2014), aff'd on other grounds, 136 S. Ct. 1036 (2016); see also *Thiessen* v. *General Electric Capital Corp.*, 267 F.3d 1095, 1103 (10th Cir. 2001), cert. denied, 536 U.S. 934 (2002).

If a court of appeals concluded that dissimilarities, individualized defenses, and procedural and fairness considerations were irrelevant in the face of a common challenged employment policy, one would expect the court to have said so. And indeed, two have: both the Second Circuit in the decision below and the Ninth Circuit have held that employees are "similarly situated" for purposes of Section 216(b) as long as "they share a similar issue of law or fact material to the disposition of their FLSA claims," regardless of "dissimilarities in other respects." Pet. App. 21a-22a (citation omitted); see *Campbell*, 903 F.3d at 1117.

In adopting that approach, however, the Second and Ninth Circuits grasped the nettle and admitted what respondents will not: namely, that their test conflicts with the multifactor approach. For example, in *Campbell*, *supra*, the Ninth Circuit devoted pages of its opinion to describing the "majority" and "minority" approaches for determining "similarly situated" status. See 903 F.3d at 1111-1115. Finding flaws in both approaches, the Ninth Circuit "developed [its] own standard." *Senne* v. *Kansas*

City Royals Baseball Corp., 934 F.3d 918, 948 (9th Cir. 2019), cert. denied on other questions, No. 19-1339 (Oct. 5, 2020). And in the decision below, the Second Circuit approvingly cited *Campbell* and expressly "question[ed]" whether the multifactor approach "is consistent with the notion that party plaintiffs are similarly situated * * * to the extent they share a similar issue of law or fact material to the disposition of their FLSA claims." 954 F.3d at 517.[2]

Respondents are thus plainly wrong to say that there is "increasing convergence" among the courts of appeals. Br. in Opp. 15 n.4. Quite the contrary, the Seventh Circuit has long charted a different course from the majority of courts of appeals, and now the Second and Ninth Circuits have charted yet another in the opposite direction.

2. Respondents also argue that, even if courts of appeals describe the multifactor and common-material-issue approaches differently, the "results they reach" under those approaches are the same. Br. in Opp. 2. Yet respondents do little to prove that claim; all but one of the cases that respondents cite for that proposition applied the multifactor approach. See *id.* at 15-19.

And the competing approaches most certainly lead to differing results, as this case illustrates. Under the permissive approach adopted in the decision below, the court of appeals held that the collective action could potentially proceed despite significant variances in the work that Chipotle apprentices performed—variances that led to the denial of class certification on respondents' state-law claims. See Pet. App. 14a-19a. But based on those same dissimilarities, Judge Sullivan would have affirmed the

[2] Due to a typographical error, a portion of the quoted language was omitted in the appendix to the petition. See Pet. App. 24a.

decertification of the collective action under the multifactor approach. See *id.* at 38a-39a. Application of the common-material-issue approach would likely have changed the outcome in other cases in the circuit conflict too. See Retail Litigation Center Br. 7-10 (discussing *Zavala*, *supra*, and *Anderson*, *supra*).

It is not surprising that the multifactor approach and the common-material-issue approach would lead to different outcomes, both in this case and in others. FLSA plaintiffs will frequently manage to identify *some* common issue of fact or law material to the disposition of an FLSA claim, permitting collective adjudication under the Second and Ninth Circuit's more permissive approach. But the dissimilarities might be so overwhelming that the collective action is unmanageable for the district court or prejudicial to the defendant, permitting decertification under the multifactor approach. That is precisely the case here.

In the end, respondents' attempt to whittle away the circuit conflict reduces to a claim that the courts of appeals are not applying the law as they say they are. But by their own terms, the courts of appeals are applying three different approaches to determining whether employees are "similarly situated" for purposes of the Section 216(b). Those approaches are irreconcilable, as the courts themselves have repeatedly recognized. The resulting conflict, on an exceptionally important question of statutory interpretation, desperately warrants the Court's review.

B. The Decision Below Is Incorrect

When the phrase "similarly situated" is read in the context of Section 216(b), it is clear that certification of a collective action is appropriate only when employees are "similarly situated" for the purpose of litigating their claims on a collective basis in a single proceeding. And

that necessarily requires consideration of dissimilarities among employees as well as procedural and fairness considerations. Respondents offer several arguments in defense of the court of appeals' permissive standard, but each is unpersuasive.

1. Respondents primarily argue that the court of appeals did not "create a rigid rule" permitting certification "even where a single similarity among plaintiffs is swamped by legally relevant differences" and instead merely rejected the application of Rule 23 standards. Br. in Opp. 25, 29. But that is impossible to square with the court of appeals' express holding that the "similarly situated" standard is "met" when "there is similarity with respect to an issue of law or fact material to the disposition of their FLSA claim"—a holding that triggered Judge Sullivan's dissent. Pet. App. 22a n.4 (internal quotation marks omitted); see *id.* at 34a-39a.

Respondents' characterization is also impossible to square with the court of appeals' criticism of the flexible, multifactor approach. See Pet. App. 24a. That approach *requires* consideration of the "disparate factual and employment settings of the individual plaintiffs," *Anderson*, 488 F.3d at 953 (citation omitted), whereas the court of appeals' approach *forbids* considerations of such "dissimilarities" if the employees share a common material issue of law or fact, see Pet. App. 22a (citation omitted).

2. Respondents next contend (Br. in Opp. 26) that the court of appeals correctly refused to incorporate the requirements for Rule 23 class actions into the FLSA's "similarly situated" requirement. But while the FLSA does not expressly *incorporate* Rule 23's requirements, even the court of appeals recognized that at least some Rule 23 considerations are *relevant*—specifically, the commonality requirement of Rule 23(a). See Pet. App. 32a.

There is no reason that other Rule 23 considerations could not be relevant as well, such as those underlying the typicality and predominance requirements. See Chamber Br. 11-17. After all, the phrase "similarly situated" has been associated with class actions since the days of equity practice, see Pet. 25-26; courts applied the original version of Rule 23 to FLSA collective actions before the 1967 amendments to Rule 23, see Chamber Br. 16; and the Rules Committee drafted the current version of Rule 23 to "describe[]" in "practical terms" the circumstances in which collective litigation is permissible, see Fed. R. Civ. P. 23 advisory committee notes (1966). In short, courts should not ignore the principles motivating Rule 23 to the extent they are helpful in determining whether a set of FLSA claims are capable of "efficient resolution in one proceeding." *Hoffmann-La Roche Inc.* v. *Sperling*, 493 U.S. 165, 170 (1989).

Even if Rule 23 standards were entirely irrelevant, moreover, that would not mean the court of appeals' approach is correct. As Judge Sullivan recognized, it is simply "[c]ommon sense" that the "existence of multiple dissimilarities" among employees is "highly relevant" to determining whether employees are "similarly situated" for purposes of Section 216(b). Pet. App. 34a. The court of appeals' decision is thus indefensible regardless of whether it properly refused to consider certain Rule 23 considerations.

3. Respondents also contend that district courts have sufficient "case management tools" to ensure that the court of appeals' lenient approach to the certification of FLSA collective actions does not result in unwieldy litigation. Br. in Opp. 29-30. But it is unclear why a district court should be tasked with curing the court of appeals' erroneous interpretation of the FLSA through the use of case-management techniques.

In any event, the case-management tools that respondents identify are no panacea for the court of appeals' flawed legal standard. The ability to call witnesses representative of various subgroups of employees will hardly be sufficient when a defendant has individualized defenses against each of hundreds or thousands of employees. See Br. in Opp. 29. And even if resolution of a single common material issue is itself feasible, see *id.* at 30, an employer may be functionally precluded from defending itself if the dissimilarities among its employees mean that the proof at trial is not representative of the collective. While the parties could attempt to ameliorate that problem through individualized discovery and motions practice, it would hardly promote efficiency—the very purpose of the collective-action mechanism. The only way truly to avoid the problems spawned by the court of appeals' interpretation of Section 216(b) is thus to reject it altogether. This Court should grant review and do just that.

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

Respondents do not dispute that this case is a suitable vehicle for resolving the question presented. Nor do respondents seriously argue that the question presented is unimportant. Respondents attempt to downplay the significant number of FLSA collective actions filed each year on the ground that "many" collective actions are never certified due to arbitration agreements that forbid collective proceedings. See Br. in Opp. 31. But respondents make no effort to quantify that figure, and recent data suggest that most non-unionized private-sector workers are not subject to collective-action waivers. See Alexander J.S. Colvin, Economic Policy Institute, *The Growing Use of Mandatory Arbitration* 11 (2018).

Respondents also argue that the decision below "does not appear to be changing the litigation landscape" in the Second Circuit. Br. in Opp. 31. While it is obviously too early to ascertain the full effects of the decision below, the Second Circuit was a hotbed for employment litigation even before its decision in this case. See DRI Br. 12-13. And FLSA plaintiffs with cases in the Second Circuit are already seeking to take advantage of the decision below at the conditional-certification stage. See Wage & Hour Defense Institute Br. 12-13. Given the relaxed standard adopted in the decision below, the Second Circuit will inevitably be the forum of choice for FLSA plaintiffs if its decision is allowed to stand.[3]

Absent this Court's guidance, the courts of appeals will remain hopelessly confused over the appropriate standard for determining whether employees are similarly situated for purposes of Section 216(b). The approach adopted in the decision below is deeply flawed and only adds to the confusion in the lower courts. And this case presents an ideal vehicle for the Court to break its decades-long silence on the issue. The Court should therefore grant the petition for certiorari, resolve the conflict on the question presented, and provide much needed guidance to the lower courts.

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[3] Respondents are correct (Br. in Opp. 32) that this case does not present the question of what standard should apply at the conditional-certification stage in FLSA collective actions. But as one amicus has explained, because FLSA plaintiffs are contending that the decision below "must have the ripple effect of lowering [the] threshold for initial, conditional certification," the decision below also "threatens to expand the divide as to the standard for conditional certification." Wage & Hour Defense Institute Br. 2.

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The petition for a writ of certiorari should be granted.

Respectfully submitted.

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