No. _____

IN THE

Supreme Court of the United States

MAXIMUS, INC.,

Applicant,

v.

SHAREY THOMAS, ET AL.,

Respondents.

EMERGENCY APPLICATION FOR A STAY OF AN ORDER ENTERED BY THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

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PARTIES TO THE PROCEEDING AND RELATED PROCEEDINGS

The parties to the proceedings below are as follows:

Applicant Maximus, Inc. is the defendant in the district court and petitioner in the court of appeals.

Respondents Sharey Thomas; Jennifer Gilvin; Laura Vick; Nyeshia Young; Olga Ramirez; Jennifer Salcido; Jimenlly Salcedo; Brenda Fowler; and Shannon Garner are the named plaintiffs in the district court and respondents in the court of appeals. The individuals who opted in to the district court proceedings are as follows: Rakajah Allen; Tiffany Banks; Tevin Belim; Brittany Bell; Jennifer Boggan; Mahagony Bourne; Anzette S. Bowens; Jo A. Boyce; Emily Brinegar; Christina Brock; John L. Brown, Jr.; Shakiera Butler; Michelle Cook; Barbara M. Davis; Deanna Deberry; Keisha Dehaney; Kashanna Denham; Kristian Dillon; Jerrika Dobson; Abril Dominguez; Pamela Ferguson; Don Freeman; Karla Garcia; Marian Garner; Stephanie L. Gilfillan; Jakia Green; Destiny Griffin; Byron Harper; Keyuna Harrington; Jasmine Harris; Nashunner Haynes; Shalonda Hinton; Carma T. Howze; Nicole Joyce Jackson; Hayley R. Jefcoat; Demayah Johnson Woods; Takimbra Knight; Kizzy Lewis; Lyndia Luna; Kristal Luna; Keandra McCarty; Micole McCullon; Delisha McGowan; Kylia Murphy; Marcades Myers; Shanikqua Myers; Tiawanna Newell; Jade Newsome; Randy Newsome; Jasmine Parker; Patricia Parker; Raven Perkins; Tina Polk; Jessica Powell; Q'Ianna White; Cowanda Reed; ARoyalty Robertson; Karla Salinas; Anthony Jr. Smith; Bradford Stinson; Patricia Story; Brianna Tillery; Lisa

I. Tiscareno; Gregory Tisdale; Bionca Warren; Tashyra Warren; Melanie S. Westbrook; Mahogany Williams; Jennifer Wilmert; Michaela Cole; Nia Hood; Daryl Pride; Rebecca Baker; Wykeria Coleman; Falana Hare; Marneiqwa Johnson; Jalen Magee; Ashton Woodson; Teshia Jones; Patricia Baggett; Tywonda Robinson; Fatisha Blanding; Linda Carter; Sherry Collier; Stephanie D. Miller; Esperanza Ortiz; Timothy Parker; Latotianna Redd; Karen Smith; Terrany Thomas; Lynn Marie Young; Claudia Salas; Maria Torres; Denotra Clayton; Shanece Baker; Laqundra Craft; Laquandra Davis; Domique Hays; Kiontranese Johnson; Andrew Marshall; Amanda Moseley; Robynn Burse; Deborah Gay; Courtney Smallwood; Michelle Solis; Ranishia Allen; Jailah Garner; Raneshia Harris; Latisha Lundy; Raul Marinez, Jr.; Mignonne Mondaoko; Chelsey Neuman; Ki Smith; Chelsea Beck; Arlene Burciaga; Shana Clark; Sabrina Cook; Kimberly Donaldson; Joanna Escalante; Jessica Flores; Jessica Luera; Armando Martinez; Carlos Martinez; Melissa Valdez; Jessica Villegas; Laura Wright; Dolores Yanez; Leonel Zamora; Nancy Arredondo; Ashley Barton; Samantha Cain; Vanessa Cotton; KaDeidra Ducre; Kierra Gill; Ellis Hill, Jr.; Trichelle King; Jordan Lott; Brianna Parks; Briana Pruitt; Brenda Qualls; Kristina Williams; Martha Williams; Carlos Medina, Jr.; Carolina Esparza; Amanda Izaguirre; and Monique Lewis.

The proceedings below are as follows:

1. *Thomas* v. *Maximus, Inc.*, No. 3:21-cv-00498-DJN (E.D. Va.)
2. *Maximus, Inc.* v. *Thomas*, No. 22-185 (4th Cir.)

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Applicant Maximus, Inc. states that it has no parent corporation and that BlackRock, Inc. (NYSE: BLK) owns 10% or more of its stock.

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TO THE HONORABLE JOHN G. ROBERTS, CHIEF JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE FOURTH CIRCUIT:

Under Rule 23 and the All Writs Act, 28 U.S.C. § 1651, Applicant Maximus, Inc. moves this Court to stay the Eastern District of Virginia's order conditionally certifying Plaintiffs' putative collective action under the Fair Labor Standards Act ("FLSA") and authorizing Plaintiffs' counsel to notify allegedly similarly situated employees of the action until this Court has disposed of Maximus' petition for a writ of certiorari. In issuing its order, the district court relied on the two-step conditional certification-decertification approach to collective actions first set forth in *Lusardi* v. *Xerox Corp.*, 118 F.R.D. 351 (D.N.J. 1987), and by denying Maximus' petition for interlocutory review and petition for rehearing, the Fourth Circuit left that decision intact. Although *Lusardi*'s approach has garnered widespread acceptance among district courts and has received the imprimatur of a handful of appellate courts, it has no basis in the FLSA's text and impermissibly stirs up litigation. For these reasons, the Fifth Circuit recently—and correctly—rejected *Lusardi* and held that district courts must "rigorously enforce" the "FLSA's similarity requirement … at the outset of the litigation." *See Swales* v. *KLLM Transp. Servs., LLC*, 985 F.3d 430, 443 (5th Cir. 2021).

Given the circuit split between the federal appellate courts that have implicitly endorsed *Lusardi* (which includes the Fourth Circuit because it has left the district court's erroneous decision to apply the two-step approach intact) and the Fifth Circuit, at least four justices will likely vote to grant Maximus' petition for a writ of

certiorari. Even without this circuit split, certiorari would still be a reasonable probability because of the importance of determining the proper standard for certifying FLSA collective actions to the thousands of putative FLSA collective actions that plaintiffs file each year.

After granting certiorari, there is a fair prospect that the Court will reverse the district court's conditional-certification order for two reasons. First, as the Fifth Circuit recognized in *Swales*, *Lusardi*'s two-step approach is untethered to the statutory text, making it inconsistent with the Court's modern textualist approach to statutory interpretation. Second, the lenient approach to conditional certification is incompatible with the spirit of the Court's decisions in *Wal-Mart Stores, Inc.* v. *Dukes*, 564 U.S. 338 (2011), and *Comcast Corp.* v. *Behrend*, 569 U.S. 27 (2013), which is ensuring that only those individuals whose claims depend on a shared set of facts and circumstances may participate in representative litigation. Thus, there is at least a fair prospect that this Court will reverse the district court's order.

In addition to the likely merit of Maximus' petition, Maximus would suffer irreparable harm in the absence of a stay. Without a stay, Plaintiffs' counsel may distribute notice of the action to more than 10,000 current and former employees, many of whom are most likely not similarly situated to the named Plaintiffs, thus stirring up unwarranted litigation and ratcheting up the pressure on Maximus to settle this case regardless of its merits. Plaintiffs, on the other hand, would not suffer any prejudice from a stay because the district court has tolled the statute of limitations applicable to their FLSA claims.

Because of the likely merit of Maximus' petition and the harm Maximus would suffer in the absence of a stay, Maximus sought a stay from the Fourth Circuit and from the district court. Both courts, however, refused to stay the proceedings. To facilitate meaningful review of the standard applicable to certification motions under the FLSA, Maximus requests that this Court enter an order staying the district court's conditional-certification order pending the disposition of Maximus' petition for a writ of certiorari by September 1, 2022.[1]

STATEMENT

Plaintiffs are current and former Maximus employees who allege that Maximus did not compensate them for all hours worked, including hours over 40 in a workweek at the overtime rate under the FLSA. (Plaintiffs' First Amended Collective/Class Action Complaint ¶ 87, *Thomas* v. *Maximus, Inc.*, No. 3:21-cv-00498-DJN (E.D. Va. Nov. 2, 2021).) On November 3, 2021, before the parties conducted any discovery, Plaintiffs filed a motion requesting that the district court conditionally certify a putative collective of, and facilitate notice of the action to, a broad and diverse cohort of "all hourly call-center employees who were employed by Maximus, Inc. anywhere in the United States, at any time within the past three years, through the

[1] The district court stayed proceedings for 30 days after the Fourth Circuit denied Maximus' petition for a rehearing or rehearing en banc. (*See* Order (Lifting Stay), *Thomas* v. *Maximus, Inc.*, No. 3:21-cv-00498-DJN (E.D. Va. July 27, 2021).) The Fourth Circuit denied that petition on August 2, 2022. (Order, *Maximus, Inc.* v. *Thomas*, No. 22-185 (4th Cir. Aug. 2, 2022), Appendix ("App.") at 70.) Because the district court's conditional-certification order may take effect on September 1, 2022, Maximus requests that the Court enter a stay on or before that date.

final disposition of this matter." (Plaintiffs' Opposed Motion for Conditional Certification and Notice to Putative Class Members at 1, *Thomas* v. *Maximus, Inc.*, No. 3:21-cv-00498-DJN (E.D. Va. Nov. 3, 2021).)

In ruling on Plaintiffs' certification motion, the district court applied *Lusardi*'s two-step certification process. (*See* Memorandum Opinion (Granting in Part and Denying in Part Motion for Conditional Certification and Notice and Ordering Further Briefing), *Thomas* v. *Maximus, Inc.*, No. 3:21-cv-00498-DJN (E.D. Va. Feb. 28, 2022), App. at 7–15; *see also* Order (Granting in Part and Denying in Part Motion for Conditional Certification and Notice and Ordering Further Briefing), *Thomas* v. *Maximus, Inc.*, No. 3:21-cv-00498-DJN (E.D. Va. Feb. 28, 2022), App. at 2.) Thus, it applied a "somewhat lenient standard" to Plaintiffs' motion that required them to make only "'a modest factual showing sufficient to demonstrate that they and the potential plaintiffs were victims of a common policy or plan that violated the law'" (*see* App. at 8–9 (quoting *Choimbol* v. *Fairfield Resorts, Inc.*, 475 F. Supp. 2d 557, 564 (E.D. Va. 2006))), leaving the application of "'a more stringent factual determination' to decide whether the putative collective fulfills the 'similarly situated' standard" for a later date (*see id.* at 6 (quoting *LaFleur* v. *Dollar Tree Stores, Inc.*, 30 F. Supp. 3d 463, 468 (E.D. Va. 2014))). Unsurprisingly, the district court concluded that Plaintiffs satisfied their burden under the first step of *Lusardi* and conditionally certified their proposed collective for the purpose of facilitating notice to potential members. (*Id.* at 1–2.) But recognizing the lack of appellate guidance on the proper standard for certification and the importance of this issue, the district court also invited Maximus to file

a motion to certify an interlocutory appeal on whether it should have applied the more demanding *Swales* standard. (*Id.* at 2.)

On March 14, 2022, Maximus filed that motion. (Defendant's Opposed Motion to Amend Order to Provide for Certification of an Interlocutory Appeal, *Thomas* v. *Maximus, Inc.*, No. 3:21-cv-00498-DJN (E.D. Va. Mar. 14, 2022).) Approximately two months later, the district court allowed Maximus' motion and amended its order granting Plaintiffs' certification motion to certify the following question for interlocutory review: "What legal standard should courts apply when deciding whether to certify a collective action under the Fair Labor Standards Act, 29 U.S.C. § 216(b)?" (Order (Certifying Appeal, Denying Motion for Partial Reconsideration and Granting Motion to Strike), *Thomas* v. *Maximus, Inc.*, No. 3:21-cv-00498-DJN (E.D. Va. May 10, 2022), App. at 25; *see also* Memorandum Opinion (Certifying Appeal, Denying Motion for Partial Reconsideration and Granting Motion to Strike), *Thomas* v. *Maximus, Inc.*, No. 3:21-cv-00498-DJN (E.D. Va. May 10, 2022), App. at 32–39; Amended Order (Granting in Part and Denying in Part Motion for Conditional Certification and Notice, Staying Case and Certifying Interlocutory Appeal), *Thomas* v. *Maximus, Inc.*, No. 3:21-cv-00498-DJN (E.D. Va. May 10, 2022), App. at 48; Amended Memorandum Opinion (Granting in Part and Denying in Part Motion for Conditional Certification and Notice, Staying Case and Certifying Interlocutory Appeal), *Thomas* v. *Maximus, Inc.*, No. 3:21-cv-00498-DJN (E.D. Va. May 10, 2022), App. at 52–61.)

On May 19, 2022, Maximus petitioned the Fourth Circuit to answer the question that the district court had certified for review. (Petition for Permission to Appeal

Pursuant to 28 U.S.C. § 1292(b) and Federal Rule of Appellate Procedure 5, *Maximus, Inc.* v. *Thomas*, No. 22-185 (4th Cir. May 19, 2022).) On July 7, 2022, a divided panel of the Fourth Circuit denied Maximus' petition, with one judge voting to allow interlocutory review. (Order, *Maximus, Inc.* v. *Thomas*, No. 22-185 (4th Cir. July 7, 2022), App. at 69.) Maximus then filed a petition for rehearing or rehearing en banc (Petition for Panel Rehearing or Rehearing En Banc, *Maximus, Inc.* v. *Thomas*, No. 22-185 (4th Cir. July 21, 2022)), which the Court denied on August 2, 2022 (Order, *Maximus, Inc.* v. *Thomas*, No. 22-185 (4th Cir. Aug. 2, 2022), App. at 70.). Less than a week later, Maximus moved the Fourth Circuit to stay the issuance of its mandate pending the disposition of Maximus' petition for a writ of certiorari. (Defendant-Petitioner's Motion to Stay Mandate, *Maximus, Inc.* v. *Thomas*, No. 22-185 (4th Cir. Aug. 8, 2022).) The Fourth Circuit denied that motion on August 15, 2022. (Order, *Maximus, Inc.* v. *Thomas*, No. 22-185 (4th Cir. Aug. 15, 2022), App. at 71.)

While Maximus' motion to stay the Fourth Circuit's mandate was pending, the district court requested that the parties participate in a settlement conference with a magistrate judge. (Email from Patrick F. Dillard, Law Clerk to the Honorable David J. Novak, U.S. Dist. Judge, U.S. Dist. Court for the E. Dist. of Va., to Zev Antell, Partner, Butler Curwood PLC et al. (Aug. 8, 2022, 13:38 EDT), App. at 76.) Maximus informed the court that it believed that proceeding with the settlement conference before the Fourth Circuit ruled on Maximus' motion to stay its mandate was "premature." (Email from Paul DeCamp, Member of the Firm, Epstein Becker & Green, P.C., to Patrick F. Dillard, Law Clerk to the Honorable David J. Novak, U.S. Dist.

Judge, U.S. Dist. Court for the E. Dist. of Va., et al. (Aug. 9, 2022, 13:34 EDT), App. 75–76.) The court disagreed and unequivocally stated that it did "not intend to stay this case further at this point." (Email from Patrick F. Dillard, Law Clerk to the Honorable David J. Novak, U.S. Dist. Judge, U.S. Dist. Court for the E. Dist. of Va., to Paul DeCamp, Member of the Firm, Epstein Becker & Green, P.C., et al. (Aug. 10, 2022, 10:27 EDT), App. at 74.) Maximus asked the court to reconsider and sought permission to "brief whether the [d]istrict [c]ourt proceedings should be stayed pending the issuance of the [Fourth] Circuit's mandate and/or the filing of Maximus' petition for a writ of certiorari." (Email from Francesco A. DeLuca, Senior Counsel, Epstein Becker & Green, P.C., to Patrick F. Dillard, Law Clerk to the Honorable David J. Novak, U.S. Dist. Judge, U.S. Dist. Court for the E. Dist. of Va., et al. (Aug. 10, 2022, 15:05 EDT), App. at 72–73.) The court, however, did not stay proceedings or provide Maximus with an opportunity to brief whether a stay was warranted. (Email from Patrick F. Dillard, Law Clerk to the Honorable David J. Novak, U.S. Dist. Judge, U.S. Dist. Court for the E. Dist. of Va., to Francesco A. DeLuca, Senior Counsel, Epstein Becker & Green, P.C., et al. (Aug. 10, 2022, 16:48 EDT), App. at 72.)

REASONS FOR GRANTING THE APPLICATION

I. A STAY IS NOT AVAILABLE FROM ANY OTHER COURT OR JUDGE.

"An application for a stay shall set out with particularity why the relief sought is not available from any other court or judge." *See* Sup. Ct. R. 23.3. Here, Maximus filed a motion to stay the Fourth Circuit's mandate, which the Fourth Circuit denied. (*See* App. at 71.) The Eastern District of Virginia also stated that it would not stay

the case further and denied Maximus' request for permission to brief the propriety of a stay. (*See* App. at 72–77.) Accordingly, a stay is not available from any other court or judge, and this Court should enter a stay to permit meaningful review of the proper standard for certifying FLSA collective actions.

II. MAXIMUS' REQUEST FOR A STAY SATISFIES ALL THE NECESSARY ELEMENTS.

This Court should stay the district court's conditional-certification order pending the disposition of Maximus' petition for a writ of certiorari. To obtain this relief,

> an applicant must show (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay.

Hollingsworth v. *Perry*, 558 U.S. 183, 190 (2010). Additionally, "[i]n close cases the Circuit Justice or the Court will balance the equities and weigh the relative harms to the applicant and to the respondent." *Id.* Maximus satisfies all these requirements.

A. There Is a Reasonable Probability that Four Justices Would Vote to Grant Maximus' Petition.

Grounds for granting a petition for a writ of certiorari include "a United States court of appeals … enter[ing] a decision in conflict with the decision of another United States court of appeals on the same important matter" or "a United States court of appeals … decid[ing] an important question of federal law that has not been, but should be, settled by [the Supreme] Court." *See* Sup. Ct. R. 10(a), (c). Although a petition need only meet one factor to warrant review, Maximus' petition will satisfy both.

First, the Fourth Circuit's decision to leave the district court's ruling undisturbed conflicts with the Fifth Circuit's decision in *Swales*. Additionally, the decisions of at least seven circuits that have implicitly endorsed *Lusardi*'s two-step approach conflict with *Swales*. *See Myers* v. *Hertz Corp.*, 624 F.3d 537, 554–55 (2d Cir. 2010) ("In determining whether to exercise this discretion in an "appropriate case[ ]," the district courts of this Circuit appear to have coalesced around a two-step method, … which … we think is sensible.") (footnote omitted); *Zavala* v. *Wal Mart Stores Inc.*, 691 F.3d 527, 536 (3d Cir. 2012) ("We implicitly embraced this two-step approach, and we affirm its use here."); *In re HCR ManorCare, Inc.*, No. 11-3866, 2011 WL 7461073, at *1 (6th Cir. Sept. 28, 2011) ("We have … implicitly upheld the two-step procedure in FLSA actions.");[2] *Campbell* v. *City of Los Angeles*, 903 F.3d 1090, 1110 (9th Cir. 2018) ("The two-step approach has been endorsed by every circuit that has considered it.") (footnote and internal citations omitted); *Thiessen* v. *Gen. Elec. Capital Corp.*, 267 F.3d 1095, 1105 (10th Cir. 2001) ("Arguably, the *ad hoc* approach is the best of the three approaches outlined because it is not tied to the Rule 23 standards."); *Morgan* v. *Family Dollar Stores, Inc.*, 551 F.3d 1233, 1260 (11th Cir. 2008) ("While not requiring a rigid process for determining similarity, we have sanctioned a two-stage procedure for district courts to effectively manage FLSA collective actions in the pretrial phase."). Because of the importance of the standard applicable to FLSA

[2] The Sixth Circuit recently accepted an interlocutory appeal from the Southern District Court of Ohio to determine "what standard to apply when conditionally certifying a collective action." *See* Order, *In re A&L Home Care & Training Ctr.*, No. 21-305 (6th Cir. Feb. 4, 2022).

certification motions (which Maximus discusses in greater detail below), at least four justices will likely vote to resolve this circuit split.[3]

Second, this Court has not addressed the standard applicable to FLSA certification motions. *See Swales*, 985 F.3d at 434. But because of the importance of that issue, it should. FLSA collective actions filings have exploded in recent years. From August 1, 2002 to August 1, 2012, employees filed at least 19,292 putative FLSA collective actions.[4] Over the next ten years, that number increased by over 67% to 32,259.[5]

Not only have FLSA collective actions grown in number in recent years, they have also outpaced other types of representative employment litigation. Employees filed at least 8,436 putative FLSA collective actions from August 1, 2019 to August 1,

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[3] This Court granted a writ of certiorari in a similar procedural posture in *Standard Fire Insurance Co.* v. *Knowles*. *See* 568 U.S. 588, 591–92 (2013) (granting a writ of certiorari where the district court's order conflicted with the decision of a federal appellate court after the Eighth Circuit denied a petition for interlocutory review and petition for rehearing with a suggestion for rehearing en banc).

[4] Maximus generated this figure using Westlaw Edge's Litigation Analytics by (a) clicking "Browse all case types"; (b) selecting "Fair Labor Standards Act (NOS 710)"; (c) toggling to "Federal"; (d) clicking "See all dockets"; (e)limiting "Court" to "District Ct."; (f) filtering "Date" by "Date range" and entering "08/01/2002" and "08/01/2012"; and (g) limiting the results to "Show only Class Actions" under "Advanced filtering options."

[5] Maximus generated this figure using Westlaw Edge's Litigation Analytics by (a) clicking "Browse all case types"; (b) selecting "Fair Labor Standards Act (NOS 710)"; (c) toggling to "Federal"; (d) clicking "See all dockets"; (e) limiting "Court" to "District Ct."; (f) filtering "Date" by "Date range" and entering "08/01/2012" and "08/01/2022"; and (g) limiting the results to "Show only Class Actions" under "Advanced filtering options."

2022.[6] By contrast, the number of putative employment-discrimination class actions that employees filed during the same period was less than one tenth of that number (namely, 801).[7]

Without question, the popularity of FLSA collective actions is a byproduct of the lenient conditional-certification standard that courts apply at the first step of *Lusardi*'s approach. Theoretically, an employer may move to decertify a conditionally certified collective at the second stage after conducting discovery, but in reality, they rarely file those motions. Of the 8,346 putative FLSA collective actions that employees filed from August 1, 2019 to August 1, 2022, employers moved for decertification in only 146—or less than 2%—of those cases.[8] The reason for this is that "conditional certification frequently subjects employers to 'mind-boggling' discovery, … plac[ing] enormous pressure on employers to settle prior to reaching the second, decertification

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[6] Maximus generated this figure using Westlaw Edge's Litigation Analytics by (a) clicking "Browse all case types"; (b) selecting "Fair Labor Standards Act (NOS 710)"; (c) toggling to "Federal"; (d) clicking "See all dockets"; (e) limiting "Court" to "District Ct."; (f) filtering "Date" by "Date range" and entering "08/01/2019" and "08/01/2022"; and (g) limiting the results to "Show only Class Actions" under "Advanced filtering options."

[7] Maximus generated this figure using Westlaw Edge's Litigation Analytics by (a) clicking "Browse all case types"; (b) selecting "Discrimination - Federal Statutory (NOS 442)"; (c) toggling to "Federal"; (d) clicking "See all dockets"; (e) limiting "Court" to "District Ct."; (f) filtering "Date" by "Date range" and entering "08/01/2019" and "08/01/2022"; and (g) limiting the results to "Show only Class Actions" under "Advanced filtering options."

[8] Maximus determined the number of motions to decertify that were filed by (a) searching "Federal District Court Dockets" on Westlaw using the following search "adv: motion +3 decertif!"; (b) selecting "FLSA" under "Key Nature of Suit"; and (c) limiting the "Date" to a "Date range" of "08/01/2019" to "08/01/2022."

step." Allan G. King, Lisa A. Schreter, Carole F. Wilder, *You Can't Opt Out of the Federal Rules: Why Rule 23 Certification Standards Should Apply to Opt-in Collective Actions Under the FLSA*, 5 FED. CTS. L. REV. 1, 10 (2011) (quoting *Williams* v. *Accredited Home Lenders, Inc.*, No. 1:05-CV-1681-TWT, 2006 WL 2085312, at *5 (N.D. Ga. July 25, 2006)); *accord Swales*, 985 F.3d at 436 (recognizing that conditional certification "exerts formidable settlement pressure"); *Bigger* v. *Facebook, Inc.*, 947 F.3d 1043, 1049 (7th Cir. 2020) (recognizing that sending notice to employees who are not similarly situated to the named plaintiff "would unfairly amplify settlement pressure").

And recent data confirm that this pressure leads to a significant number of settlements. From August 1, 2012 to August 1, 2022, parties to putative FLSA collective actions resolved approximately 86% of them through a settlement or uncontested dismissal and brought less than 6% of them to an end as a result of a dispositive motion or verdict.[9] Because that settlement pressure has nothing to do with the merits of a case, it is important for this Court to rule on this issue so that only truly similarly situated employees may opt in to an FLSA collective action.

In light of the circuit split on the standard for certifying FLSA collective actions, as well as the importance of this issue to the thousands of such cases filed every

[9] Maximus generated these figures using Westlaw Edge's Litigation Analytics by (a clicking "Browse all case types"; (b) selecting "Fair Labor Standards Act (NOS 710)"; (c) clicking "Outcomes"; (d) toggling to "Federal";" (e) limiting "Court" to "District Ct."; (f) filtering "Date" by "Date range" and entering "08/01/2012" and "08/01/2022"; and (g) limiting the results to "Show only Class Actions" under "Advanced filtering options."

year, there is a reasonable probability that four justices would vote to grant Maximus' petition for a writ of certiorari.

B. There Is a Fair Prospect that at Least Five Justices Will Decide to Reverse the District Court's Order.

1. *Lusardi* is inconsistent with the Court's modern textualist approach to statutory interpretation.

Since the District of New Jersey decided *Lusardi* in 1987, the Supreme Court has moved toward textualism as its preferred approach to statutory interpretation. *See* Robert J. Pushaw, Jr., *Comparing Literary and Biblical Hermeneutics to Constitutional and Statutory Interpretation*, 47 PEPP. L. REV. 463, 488 (2020) ("Textualism was the dominant form of statutory interpretation until the 1940s, was revived by Justice Scalia and others in the 1980s, and is now the majority approach."); *see also, e.g.*, *Bostock* v. *Clayton Cnty.*, 140 S. Ct. 1731, 1749 (2020) (Gorsuch, J.) ("This Court has explained many times over many years that, when the meaning of the statute's terms is plain, our job is at an end. The people are entitled to rely on the law as written, without fearing that courts might disregard its plain terms based on some extratextual consideration."). And as five circuit courts have recognized, the FLSA's text does not require *Lusardi*'s two-step approach to certification. *See Waters* v. *Day & Zimmermann NPS, Inc.*, 23 F.4th 84, 89 (1st Cir. 2022) ("Conditional certification is not a … statutory requirement."); *Myers*, 624 F.3d at 555 (recognizing that the "two-step method" is "not required by the terms of FLSA"); *Zavala*, 691 F.3d at 536 (recognizing that "conditional certification … is neither necessary nor sufficient for

the existence of a representative action under the FLSA") (internal quotations omitted); *Swales*, 985 F.3d at 440 ("The FLSA … says nothing about 'conditional certification.'"); *Bigger*, 947 F.3d at 1049 n.5 ("We have not required this two-stage approach, nor do we do so now."). Absent explicit statutory authorization to conditionally certify a putative collective for the purpose of disseminating notice to individuals who may not be similarly situated to the named plaintiffs, it is likely that a majority of the justices would reject *Lusardi*'s approach.

On this point, the dichotomy between the majority opinion and Justice Scalia's dissent in *Hoffman-La Roche Inc.* v. *Sperling*, 493 U.S. 165 (1989), is instructive as to how the Court would likely rule on this issue. In *Hoffman-La Roche*, the majority held that a district court may exercise its "managerial responsibility" to facilitate notifying potential plaintiffs of a putative collective action under the Age Discrimination in Employment Act (which "incorporates the enforcement provisions of the [FLSA]"). *See* 493 U.S. at 167, 171. As part of its rationale, the majority opinion relied on "[t]he broad remedial goal" of the FLSA. *See id.* at 173.

In a dissenting opinion, Justice Scalia criticized the majority opinion as being untethered to the FLSA's text and lacking a historical antecedent:

> [G]iving a court authority to take action directed, not to the resolution of the dispute before it, but to the generation and management of other disputes, is, if not unconstitutional, at least so out of accord with age-old practices that surely it should not be assumed unless it has been clearly conferred. Yet one searches the Court's opinion in vain for any explicit statutory command that federal courts assume this novel role.

See Hoffman-La Roche, 493 U.S. at 176 (Scalia, J., dissenting) (emphasis omitted).

These same criticisms apply to conditional certification. The text of the operative provision of the FLSA says nothing about conditional certification; rather, it provides only as follows:

> An action to recover the liability prescribed in the preceding sentences may be maintained against any employer … by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.

See 29 U.S.C. § 216(b). And the concept of conditional certification does not have a deeply rooted history. On the contrary, it appears that the concept of conditional certification in the class-action context emerged in the mid-1960s and early 1970s—and only after Congress amended Federal Rule of Civil Procedure to provide for conditional certification in 1966. *See* Fed. R. Civ. P. 23 (1966) ("As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits."); *see also Hicks* v. *Crown Zellerbach Corp.*, 49 F.R.D. 184, 196 (E.D. La. 1967), *supplemented*, 321 F. Supp. 1241 (E.D. La. 1971); *Cannon* v. *Texas Gulf Sulphur Co.*, 53 F.R.D. 220, 221 (S.D.N.Y. 1971); *Seligson* v. *Plum Tree, Inc.*, 61 F.R.D. 343, 344 (E.D. Pa. 1973); *Scott* v. *Parham*, 69 F.R.D. 324, 326 (N.D. Ga. 1975).[10] Clearly, conditional

[10] In 2003, Congress amended the Federal Rules of Civil Procedure to remove the concept of conditional certification. *See* Fed. R. Civ. P. 23 advisory committee note (2003). The purpose of eliminating conditional certification was to "to avoid the unintended suggestion, which some courts [had] adopted, that class certification may be

certification is not an age-old practice, and when Congress intended courts to have that power, it has clearly said so.

Because *Hoffman-LaRoche*'s reliance on the purpose of the FLSA is out of step with modern tenets of statutory interpretation, and Justice Scalia's dissent embodies the Court's current textualist jurisprudence, the Court will likely rule that, without express congressional approval, courts are powerless to conditionally certify FLSA collective actions.

Indeed, the Court's 2018 decision in *Encino Motorcars, LLC* v. *Navarro* shows that its guidepost for interpreting the FLSA is its text, not generalizations regarding its purpose. *See* 138 S. Ct. 1134 (2018). There, five justices—Chief Justice Roberts and Justices Thomas, Kennedy, Alito, and Gorsuch—rejected the notion that the Court should construe the FLSA's exemptions narrowly "[b]ecause the FLSA gives no 'textual indication' that its exemptions should be construed narrowly," *Encino Motorcars*, 138 S. Ct. at 1142 (quoting A. SCALIA & B. GARNER, *Reading Law* 363 (2012)), and "[t]he narrow-construction principle relies on the flawed premise that the FLSA 'pursues its remedial purpose at all costs,'" *id.* (quoting *Am. Express Co.* v. *Italian Colors Rest.*, 570 U.S. 228, 234 (2013)). Again, absent any "textual indication" that the FLSA authorizes *Lusardi*'s two-step approach, this Court is likely to reverse the district court's conditional-certification order.

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granted on a tentative basis, even if it is unclear that the rule requirements are satisfied." COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, *Summary of the Report of the Judicial Conference Committee on Rules of Practice and Procedure*, at 10–11(Sept. 2002), available at https://www.uscourts.gov/sites/default/files/fr_import/ST9-2002.pdf.

2. In recent years, the Court has instructed lower courts to consider merits issues to ensure that only those individuals who share the same claim may participate in representative litigation.

In *Wal-Mart Stores, Inc.* v. *Dukes*, the Court held that Federal Rule of Civil Procedure 23(a)(2)'s commonality provision requires class members' claims to raise not merely class-wide questions, but questions with class-wide answers. 564 U.S. 338, 350 (2011). Just under two years later, in *Comcast Corp.* v. *Behrend*, the Court held that putative class members failed to satisfy Federal Rule of Civil Procedure 23(b)(3)'s predominance requirement because their damages model failed to connect their purported damages to the wrong they allegedly suffered. 569 U.S. 27, 37–38 (2013). In both cases, the Court reasoned that addressing these requirements and determining who may properly participate in a class action may "require[] inquiry into the merits of the claim." *Id.* at 35; accord *Dukes*, 564 U.S. at 351 (recognizing that a commonality analysis "[f]requently … will entail some overlap with the merits of the plaintiff's underlying claim").

While *Swales* requires the exact same merits inquiry to ensure that only those employees who are similarly situated may opt in to an FLSA collective action, *see* 985 F.3d at 441 (holding that "[t]he fact that a threshold question is intertwined with a merits question does not itself justify deferring those questions until" *Lusardi*'s second step and that it was improper to "ignore" merits issues on a motion for certification), *Lusardi* disregards "merits issues at [the] first step," opening the floodgates for diverse plaintiffs with little to nothing in common to opt in to a collective action (*see* App. at 15). Stated differently, *Swales* embodies the same concerns that underlie this

Court's decisions in *Dukes* and *Comcast*; *Lusardi* ignores them. As a result, there is a fair prospect that the Court will adopt the *Swales* standard and reverse the district court's order.

C. Maximus Would Suffer Irreparable Harm in the Absence of a Stay.

Without a stay, upwards of 10,000 of current and former employees may receive notice of the conditionally certified collective action. (Transcript of Proceedings Held on Jan. 7, 2022 at 6:12–17, *Thomas* v. *Maximus, Inc.*, No. 3:21-cv-00498-DJN (Jan. 14, 2022).) But as the district court recognized, they likely are not similarly situated and would not receive notice under *Swales*. (Transcript of Proceedings Held on Feb. 25, 2022 at 8:11–21, *Thomas* v. *Maximus, Inc.*, No. 3:21-cv-00498-DJN (Feb. 27, 2022) ("This is not one of the better cases I've seen.… So I think the standard here could be very dispositive in terms of whether or not I certify this as a class.").) Thus, employees who are not similarly situated to Plaintiffs may receive notice of this action and opt in, stirring up unwarranted litigation and unduly increasing the settlement pressure on Maximus. Staying the conditional-certification order would avoid these adverse results and would permit meaningful review of an issue that, for these very reasons, has historically evaded appellate scrutiny.

D. Although Maximus Would Suffer Irreparable Harm Without a Stay, Plaintiffs Would Not Suffer any Prejudice if the Court Grants a Stay.

Maximus satisfies the three factors required for this Court to stay the district court's order, so there is no need to balance the equities. Even if there were, the equities support granting a stay. As Maximus has demonstrated above, it would suffer irreparable harm in the absence of a stay. Plaintiffs, on the other hand, would

not suffer any harm if the Court grants a stay because the district court has tolled the statute of limitations applicable to their FLSA claims. (Order (Lifting Stay) at 1–2, *Thomas* v. *Maximus, Inc.*, No. 3:21-cv-00498-DJN (July 27, 2022).) *See, e.g.*, *Castle* v. *Wells Fargo Fin., Inc.*, No. C 06-4347 SI, 2007 WL 1105118, at *2 (N.D. Cal. Apr. 10, 2007) ("[T]he statute of limitations should be equitably tolled to eliminate any prejudice suffered by collective class members as a result of the stay of this litigation."); *Keen* v. *Limousine*, No. 216CV01903JCMGWF, 2016 WL 6828199, at *3 (D. Nev. Nov. 18, 2016) ("[E]quitably tolling the statute of limitations will eliminate any prejudice suffered by potential plaintiffs and preserve their claims that will otherwise be lost as a result of the stay."). Accordingly, the equities favor staying the district court's order pending the disposition of Maximus' petition for a writ of certiorari.

CONCLUSION

For these reasons, the Court should stay the district court's order conditionally certifying Plaintiffs' proposed collective and authorizing Plaintiffs' counsel to send notice of the action to supposedly similarly situated employees pending the disposition of Maximus' petition for a writ of certiorari. Because that order will take effect on September 1, 2022, the Court should enter the stay on or before that date.

Respectfully submitted,

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