No. 18-1419

IN THE

Supreme Court of the United States

ANDREA HIRST, ET AL.,

Petitioners,

v.

SKYWEST, INC., ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Petitioners filed a putative class action alleging they were paid less than minimum wage in violation of the Fair Labor Standards Act, 29 U.S.C. § 206. Before the district court, Petitioners conceded that they could not allege they were underpaid in any given week.

The question presented is whether the Seventh Circuit erred in affirming the dismissal of Petitioners' complaint.

CORPORATE DISCLOSURE STATEMENT

The parent corporation of SkyWest Airlines, Inc. is SkyWest, Inc., a company that owns 10% or more of SkyWest Airlines, Inc.'s stock. SkyWest, Inc. has no parent corporation and no publicly held company owns 10% or more of its stock.

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STATEMENT

1. Under the bargaining agreement between SkyWest and its flight attendants, SkyWest pays those attendants at an hourly rate for either their "block time" or their "credit time," whichever is greater. App. 16a. As used in the industry, "block time" is "the actual time between when each flight … leaves a gate and when the main cabin door opens at its destination gate." *Id.* "Credit time," by comparison, is "the amount of time SkyWest estimates it will take to go from gate-to-gate." *Id.* A flight attendant's block time (or credit time) may be less than her "duty day," the time between when she reports for duty (after clearing security) and fifteen minutes after the cabin door opens at her final destination. App. 4a. For example, Plaintiff Sze was paid $21.28 per block hour. *Hirst* v. *SkyWest*, No. 1:15-cv-11117, Dkt. 85, ¶ 103 (filed Dec. 20, 2016). Similarly, Plaintiff Hirst was paid $22.49 per block hour. App. 8a–9a.

Petitioners are current and former flight attendants who filed a putative class and collective action against Respondent SkyWest Airlines, Inc., an airline owned by Respondent SkyWest, Inc. They generally alleged that, because they are not paid based on the duty day, they are paid less than minimum wage. *See* 29 U.S.C. § 206 ("Every employer shall pay to each of his employees who in any workweek is engaged in commerce ... not less than—$7.25 an hour.").

Plaintiffs' allegations varied in specificity when it came to the times they worked and the wages they were paid. One of the most specific allegations came from Plaintiff Stover. She claimed that during a two-week period in October 2012 she was paid $656.25 for 86.07 hours of duty time, or $7.62 an hour. App. 4a.

Plaintiff Lozano, by contrast, alleged only that he worked many hours of duty time, failing to allege any specific wages that he was paid. *Id.*

2. The district court dismissed Plaintiffs' initial complaints without prejudice for failing to plausibly allege an FLSA violation. App. 13a–14a. After multiple amendments—and limited discovery—the district court dismissed the flight attendants' claims with prejudice. App. 14a.

The district court held that in determining whether an employer has violated the minimum wage law, an employee's wage should be calculated as the average hourly wage across the workweek. App. 27a. The court found that no plaintiff "alleged even in more general terms that she or he was paid less than $7.25 per hour over the course of any workweek." *Id.* Indeed, "*the plaintiffs concede that they cannot do so*." *Id.* The district court thus held that plaintiffs had not adequately pleaded an FLSA violation.

3. On appeal, the Seventh Circuit affirmed the dismissal of the FLSA claim. App. 8a. Though Petitioners did not raise the issue in their opening brief, Petitioners eventually argued that their wages should be measured differently from those in other industries. Instead of using the workweek average, Petitioners wanted the measurement based on "pairing," or the work trip out and back from their base airport. App. 5a–6a.

The Seventh Circuit rejected this novel approach. After noting that the statute does not tell employers how to measure compliance with the minimum wage law, the court turned to Department of Labor guidance. App. 6a. That guidance, issued in 1940, adopted

the workweek as "the standard period of time over which wages may be averaged to determine whether the employer has paid [the minimum wage]." Wage & Hour Release No. R609 (Feb. 5, 1940), *reprinted in* 1942 WAGE AND HOUR MANUAL (BNA) 185.

Though that guidance was not an official regulation, in the eighty years since, the Department has never "deviated from this understanding" and "Congress has never seen fit to amend the law to change this understanding." App. 6a–7a. The Seventh Circuit also noted that "every other federal circuit to reach this issue has applied the workweek measure to *all* industries." App. 6a. Seeing "no reason to deviate," the Seventh Circuit joined the chorus. App. 7a.

Applying the per-workweek measure to the flight attendants' complaint, the court concluded they had failed to allege sufficient facts to plead a plausible claim. Following other circuit courts, the court explained, "plaintiffs must 'allege facts demonstrating there was *at least one* workweek in which they worked in excess of forty hours and were not paid overtime wages.'" App. 8a (quoting *Landers* v. *Quality Comm., Inc.*, 771 F.3d 638, 646 (9th Cir. 2014) (in turn citing *Dejesus* v. *HF Mgmt. Servs., LLC*, 726 F.3d 85, 90 (2d Cir. 2013))). Clarifying the standard, the court held, "[t]hough plaintiffs need not necessarily plead specific dates and times that they worked undercompensated hours, they must 'provide some factual context that will nudge their claim from conceivable to plausible.'" App. 8a (quoting *Hall* v. *DIRECTV, LLC*, 846 F.3d 757, 777 (4th Cir. 2017)). A plaintiff must therefore allege facts that "raise a plausible inference there was at least one workweek in which he or she was underpaid." *Id.* But here, "no plaintiff did so, even after the

district court permitted the Flight Attendants to conduct limited discovery." *Id.* Simply claiming "they worked many hours and citing several weeks in which they *were* paid the minimum wage is not enough to render their claims plausible." *Id.* The court thus affirmed the dismissal of the FLSA claim.*

REASONS FOR DENYING THE PETITION

I. THERE IS NO CIRCUIT SPLIT

Petitioners claim the circuits are divided over "whether employees must plead a specific workweek in which they were underpaid to survive a motion to dismiss." Pet. 13. On the one side, Petitioners assert, are circuits that require employees to identify the particular week in which they were underpaid. Pet. 14 n.2 (citing the Second, Sixth, Seventh, and Ninth). On the other side, Petitioners claim, are circuits that follow a "context-specific" approach. Pet. 14 n.1 (citing the First, Third, Fourth, and Eleventh).

In reality, the circuits uniformly hold that plaintiffs are required to "sufficiently allege 40 hours of work in a given workweek as well as some uncompensated time in excess of the 40 hours." *Hall*, 846 F.3d at 776 (quoting *Lundy* v. *Catholic Health System of Long Island Inc.*, 711 F.3d 106, 114 (2d Cir. 2013)), citing *Davis* v. *Abington Mem. Hosp.*, 765 F.3d 236, 241–43 (3d Cir. 2014); *Landers*, 771 F.3d at 644–45; *Manning* v. *Bos. Med. Ctr. Corp.*, 725 F.3d 34, 46–47 (1st Cir. 2013); *Secretary of Labor* v. *Labbe*, 319 F. App'x 761,

* Petitioners also brought state-law wage-and-hour claims, which the district court dismissed pursuant to the dormant Commerce Clause but which the Seventh Circuit then revived. *See* App. 8a–11a]. Those claims are the subject of SkyWest's pending petition for certiorari in No. 18-1097 (U.S.).

763 (11th 2008) (per curiam)). This standard "does not require plaintiffs to identify a *particular* week in which they worked uncompensated overtime hours." *Id.* Indeed, the court below said "plaintiffs need not necessarily plead specific dates and times that they worked undercompensated hours." App. 8a. Instead, all a plaintiff has to do is "provide some factual context that will nudge their claim from conceivable to plausible." *Hall*, 846 F.3d at 776 (quoting *Dejesus*, 726 F.3d at 90).

Even a glance demonstrates that there is no split. The Seventh Circuit opinion below, which Petitioners say required a particular workweek, relied on an opinion from the Fourth Circuit, which Petitioners say doesn't require a particular week. The Fourth Circuit, in turn, relied on opinions from the Second and Ninth Circuits, which Petitioners claim *do* require a particular week. That courts continually rely on cases from the other side of the supposed "split" fells Petitioners' theory. A deeper dive confirms the circuits' unanimity.

A. Circuits on Petitioners' "Particular Workweek" Side of the Split Do Not Impose That Requirement

Petitioners claim that the Second, Sixth, Seventh, and Ninth Circuits "have adopted a rule that any employee who cannot establish particular weeks in which they were underpaid prior to discovery cannot plausibly state a cause of action, regardless of whether or not necessary schedule and payroll information has been withheld by an employer." Pet. 21. None of the courts hold that. The opinions addressing minimum wage claims merely require a plaintiff to

plead facts that give rise to the inference that employees were underpaid during some week.

Second Circuit. Petitioners claim that in *Lundy*, 711 F.3d 106, the Second Circuit required plaintiffs to plead "a specific workweek for plausible FLSA overtime claims." Pet. 22. That is not what *Lundy* held. In *Lundy*, the court explained that "in order to state a plausible FLSA overtime claim, a plaintiff must sufficiently allege 40 hours in a given workweek as well as some uncompensated time in excess of the 40 hours." 711 F.3d at 114.

A plaintiff could meet this standard by identifying a particular week in which he was underpaid. But that is not the only way to plead a claim. Instead, "[d]etermining whether a plausible claim has been pled is a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* Of course, "context-specific" is the other side of the split, according to Petitioners. Pet. 14. In any event, the Second Circuit did not reject the claim in *Lundy* because the plaintiffs failed to identify a particular week. Instead, "the allegations ... failed because of arithmetic: tallying the plausible factual allegations, [the court] could not get beyond forty hours in any given week, and therefore to a plausible claim for overtime." *Dejesus*, 726 F.3d at 88–89 (explaining *Lundy*). The Second Circuit thus does not require plaintiffs to identify a particular week.

Sixth Circuit. Petitioners' Sixth Circuit opinion did not involve an FLSA claim. *Busk* v. *Integrity Staffing Solutions, Inc.*, 905 F.3d 387, 405–06 (6th Cir. 2018). Instead, it involved claims under Arizona law and Nevada law. To be sure, the Sixth Circuit opined that "under federal law, Plaintiffs would be required

to identify a particular workweek in which, taking the average rate, they received less than the minimum wage per hour." *Id.* at 406. But the issue in the case was whether, under Nevada law and Arizona law, wages should be measured against the workweek or if a plaintiff could point to a single day. *Id.* at 406–08. The court did not hold that plaintiffs had to identify a specific week, just that their wages had to be averaged over the workweek. Tellingly, the court did not engage with the numerous circuit court opinions addressing the question of whether plaintiffs have to identify a specific week. And lower courts in the Sixth Circuit have concluded that employees do not have to identify a particular week. *Roberts* v. *Corrections Corporation of America*, 2015 WL 3905088, at *5–*6 (M.D. Tenn. 2015); *Carter* v. *Jackson–Madison County Hospital District*, 2011 WL 1256625, at *6 (W.D. Tenn. 2011) (collecting cases).

Seventh Circuit. The Seventh Circuit in this case did not reject Petitioners' claims because Petitioners failed to identify a particular week. In fact, the court specifically said "plaintiffs need not necessarily plead specific dates and times that they worked undercompensated hours." App. 8a. The court rejected Petitioners' claims because "no plaintiff" plausibly alleged there was *any* week in which the employee was underpaid. *Id.* Petitioners only alleged "they worked many hours and cit[ed] several weeks in which they *were* paid the minimum wage." *Id.* That, the court found, was not enough to plausibly allege Petitioners had been underpaid.

Moreover, in laying out the standard, the court relied on the Fourth Circuit's opinion in *Hall*, 846 F.3d 757. App. 8a. But according to Petitioners, *Hall* is on

the other side of the split. Pet. 16–17. It would be passing strange for the Seventh Circuit to adopt a rule contrary to the opinion upon which it relied. The Seventh Circuit does not require plaintiffs to identify a particular week. Instead, plaintiffs need only "provide some factual context that will nudge their claim from conceivable to plausible." App. 8a.

Ninth Circuit. In *Landers*, the Ninth Circuit stated the same rule as the other circuits: "We further agree with our sister circuits that, at a minimum, a plaintiff asserting a violation of the FLSA overtime provisions must allege that she worked more than forty hours in a given workweek without being compensated for the hours worked in excess of forty during that week." 771 F.3d at 645. It did not impose a particular-week requirement. In fact, the court specifically identified opinions from the First and Third Circuits, courts that are on the other side of the "split." *Id.* at 643–45; Pet. 14–15. If that were not enough, in describing the Third Circuit's opinion in *Davis*, 765 F.3d 236, the Ninth Circuit recognized that "a plaintiff need not identify precisely the dates and times she worked overtime." *Id.* at 644.

In sum, none of the courts on this side of the purported split actually hold that an employee must identify a particular week in which they were underpaid to state an FLSA claim. Instead, just like courts on the other side of the "split," they hold that plaintiffs must allege facts that give rise to the plausible inference that plaintiffs were underpaid in some week.

B. Circuits on the "Context" Side Follow the Same Rule

According to Petitioners, the First, Third, Fourth, and Eleventh Circuits, along with an opinion from the District Court for the District of Columbia, apply a "context-specific pleading requirement." Pet. 13. But these courts apply the same rule that courts on the other side of the "split" follow: employees must allege enough facts to make it plausible that in some week they were paid below minimum wage.

First Circuit. In *Pruell* v. *Caritas Christi*, the First Circuit rejected employees' allegations that the employer required "unpaid work through meal-breaks due to an automatic timekeeping deduction." 678 F.3d 10, 13–14 (1st Cir. 2012). That "described a mechanism by which the FLSA *may have been violated*," but the plaintiffs may still have been properly compensated. *Id.* at 14. In particular, the court chided plaintiffs for not "provid[ing] examples (let alone estimates as to the amounts) of such unpaid time for either plaintiff or describ[ing] the nature of the work performed during those times." *Id.* This standard is precisely the same one that the Second, Fourth, Seventh, and Ninth Circuits follow. In fact, in *Dejesus*, the Second Circuit found the "First Circuit's reasoning … persuasive" and rejected a complaint that was "similar to the one that the First Circuit recently confronted" in *Pruell*. 726 F.3d at 89. The Ninth Circuit too was "persuaded by the rationale espoused in" *Pruell*. *Landers*, 771 F.3d at 638; *see also Hall*, 846 F.3d at 776 (citing a more recent First Circuit case). The First Circuit thus does not differ from the Second, Seventh, or Ninth Circuits.

Third Circuit. The same is true of the Third Circuit. In *Davis*, the court rejected employees' overtime claim because "[n]one of the plaintiffs has alleged a single workweek in which he or she worked at least forty hours and also worked uncompensated time in excess of forty hours." 765 F.3d at 241. That is almost word for word what the Second Circuit said in *Lundy*: "a plaintiff must sufficiently allege 40 hours of work in a given workweek as well as some uncompensated time in excess of the 40 hours." 711 F.3d at 114. In fact, the Ninth Circuit found that *Davis* was "[c]onsistent with *Lundy*." *Landers*, 771 F.3d at 644. There is no daylight between the Third Circuit and the cases on the other side of Petitioners' imaginary divide.

Fourth Circuit. The Fourth Circuit too has held, quoting the Second Circuit, that "to state a plausible FLSA overtime claim, plaintiffs 'must provide sufficient detail about the length and frequency of their unpaid work to support a reasonable inference that they worked more than forty hours in a given week.'" *Hall*, 846 F.3d at 777 (quoting *Nakahata* v. *N.Y.–Presbyterian Healthcare Sys., Inc.*, 723 F.3d 192, 201 (2d Cir. 2013)). It is true that the Fourth Circuit "emphasize[d] that the standard we today adopt does not require plaintiffs to identify a *particular* week in which they worked uncompensated overtime hours." *Id.* But the Fourth Circuit still requires facts that establish there was *some* week employees were underpaid. *Id.*

Eleventh Circuit. Even though it does not matter for purposes of establishing a circuit split, the unpublished opinion from the Eleventh Circuit follows the same rule as the other circuits. *Cooley* v. *HMR of Alabama, Inc.*, 747 F. App'x 805, 807 (11th Cir. 2018).

Though the opinion is curt, it lays out the same standard: "To state a valid FLSA overtime claim, the employees must allege, among other things, that they each actually worked more than a 40-hour workweek." *Id.* Because the employees alleged they "routinely worked more than 40 hours a week without full compensation," identified specific tasks they were required to perform, and gave time details, plaintiffs had "plausibly suggest[ed] that they [were] entitled to relief." *Id.*

D.C. District Court. In *Galloway* v. *Chugach Government Services, Inc.*, the court did not state any general rule for minimum wage claims, but did deny the motion to dismiss. 199 F. Supp. 3d 145, 150 (D.D.C. 2016). That ruling—which matters even less than *Cooley* in assessing Petitioners' purported circuit split—was correct and consistent with the approach taken by circuit courts. In *Galloway*, the plaintiffs claimed their employer did not credit them for working during meal breaks, which occurred three to five times a week; did not pay them for time worked after their shift, which happened four to five days per week; and regularly required them to work more than five shifts per week. *Id.* Those specific allegations would pass muster in any of the circuit courts.

Finally, Petitioners fret that "nearly identical cases (at times against the same employer) [have been] dismissed in one [district] court while surviving dismissal on the pleadings in another." Pet. 21. But Petitioners can't be bothered to offer a single example of this supposedly widespread phenomenon. And with the rule being "context specific" as Petitioners acknowledge, each complaint must be judged on its own. Some employees will be able to make out a claim;

others will not. That doesn't demonstrate conflicting rules, just differing allegations.

In sum, all the circuits that have addressed this issue are in agreement. An employee need not identify a particular week that he was underpaid to state an FLSA claim. But he must allege facts that make it plausible that there is some week in which he was underpaid.

C. This Case Would Be a Bad Vehicle for Addressing Workweek Allegations Anyway

Even if there were disagreement about what a plaintiff must allege to state an FLSA violation, the nature of Petitioners' claims would make this case a poor vehicle for resolving it. In particular, Petitioners argue that their minimum wages must be calculated based on their flight pairings—that is, their one- to four-day set of trips departing from and returning to their base airport. If their hourly wages over even a one-day pairing fall below the minimum wage, then they must receive the minimum wage during that time, no matter what their wages look like for other pairings later in the week. *See* Pet. 26–37.

That argument is both splitless and meritless. *See infra* Part II. It also, however, needlessly complicates (or even prevents) review of the proper pleading standards for ordinary employees. If their theory of the case were correct, then Petitioners presumably don't need to allege anything about their wages during seven-day work weeks, let alone a particular week in which their wages dropped below the requisite amount. Instead, they need only allege facts about the nature of airline pairings, the work they did during pairings, and the amount they were paid. In other

words, if Petitioners are correct about the proper unit of measurement, then their claims do not even implicate the alleged split regarding allegations about particular work weeks. That disconnect alone makes certiorari improper.

II. WORKWEEK AVERAGING IS THE APPROPRIATE MEASUREMENT FOR MINIMUM WAGE CASES

As just noted, Petitioners spend much of their time arguing about whether workweek averaging is the appropriate measure for Petitioners' type of work in the first place. Even if Petitioners successfully smuggled that distinct issue into their Question Presented, it is splitless and meritless. Workweek averaging has been the standard for eighty years, and it is followed by every circuit to have opined on the issue. There is no reason for this Court to intervene.

A. Circuits Have Followed Agency Guidance and Applied the Correct Standard

Petitioners assert that the "[c]ircuits that require pleading based on a specific workweek truncate longstanding administrative agency guidance." Pet. 26. As explained above, courts do not apply such a requirement, so Petitioners' assertion is wrong out of the gate. But Petitioners never explain how any court has ignored agency guidance, nor even identify a case that does so. Instead, Petitioners cite a raft of cases that all follow that guidance. Pet. 27.

Petitioners' real argument is that their work should be measured by a shorter period of time. Pet. 33. But using any measurement shorter than a workweek would abandon eighty years of practice and require this Court to overrule nearly every circuit court.

In 1940, about two years after the FLSA was enacted, the Department of Labor adopted the workweek as "the standard period of time over which wages may be averaged to determine whether the employer has paid [the minimum wage]." Wage & Hour Release No. R-609 (Feb. 5, 1940), *reprinted in* 1942 WAGE AND HOUR MANUAL (BNA) 185. Though not a regulation, the Department has never deviated from this policy. *See* App. 6a. For its part, Congress has never changed the law. And "circuits have uniformly adopted the Department's per-workweek measure." App. 7a (collecting cases).

Petitioners, however, want their time measured by a different standard—their flight pairings. They identify no case adopting this standard. Instead, they merely guess that "half of the circuits that have weighed in on the FLSA pleading standard would allow four-day averaging." Pet. 34. According to Petitioners those are the "context-specific" courts. But the "context-specific" language in these cases refers to the allegations about work, not about how to measure the amount of time. *See, e.g.*, *Pruell*, 678 F.3d at 13–14. And there is no indication that those courts would adopt Petitioners' measure. *See Hall*, 846 F.3d at 777 (applying the per-workweek standard); *Olson* v. *Superior Pontiac-GMC, Inc.*, 765 F.2d 1570, 1576 (11th Cir. 1985), *modified on other grounds*, 776 F.2d 265 (11th Cir. 1985) (same). In fact, the Fourth Circuit applied the workweek standard in the very case Petitioners say the court would apply a shorter standard. *Hall*, 846 F.3d at 777.

B. Petitioners' Gripes About Discovery and Recordkeeping Do Not Suggest a Different Outcome

Finally, the petition contains scattershot complaints about discovery and SkyWest's recordkeeping. *E.g.*, Pet. 7, 11, 32. These complaints are irrelevant; Petitioners never explain how any of them bear on the correctness of the judgment below or the answer to the Question Presented.

These complaints are also meritless. As to discovery, it is far from clear what Petitioners are trying to say. They were *granted* discovery so that they could amend their complaint, and they do not allege that SkyWest violated a court order or otherwise failed its legal obligations. Indeed, they do not even explain what more they want from SkyWest or how it would entitle them to relief.

As to recordkeeping, Petitioners complain that SkyWest "does not track the 'total hours' any flight attendant works in any given workweek" and that SkyWest does not regularly calculate "any flight attendants' straight time earnings." Pet. 32. But they don't allege any SkyWest practice violates the recordkeeping requirements of the FLSA. Moreover, petitioners are just as well situated to know how much time they worked. As the Second Circuit explained, "[w]hile this Court has not required plaintiffs to keep careful records and plead their hours with mathematical precision, we have recognized that it is employees' memory and experience that lead them to claim in federal court that they have been denied overtime in violation of the FLSA in the first place." *Dejesus*, 726 F.3d at 90. It is not a defendant's job to make a plaintiff's case.

Instead, plaintiffs should draw on their own "resources in providing complaints with sufficiently developed factual allegations." *Id.*

* * *

The circuits agree that an FLSA plaintiff must allege facts that make it plausible to believe the employee was paid less than minimum wage during some week. The circuits also agree that the proper unit of measurement for such claims is the seven-day work week, not some smaller unit of the plaintiff's preference. There is no reason for this Court to overrule eighty years of practice and numerous circuit court cases.

CONCLUSION

The Court should deny the petition for writ of certiorari.

Respectfully submitted.

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