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., *Respondents*.

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

BRIEF OF *AMICI CURIAE* DRI–THE VOICE OF THE DEFENSE BAR AND THE INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL IN SUPPORT OF PETITIONERS

PHILIP L. WILLMAN
President
DRI–THE VOICE OF THE DEFENSE BAR
222 S. Riverside Plaza
Chicago, IL 60606
(312) 795-1101
Counsel for DRI

PHILIP S. GOLDBERG
SHOOK HARDY & BACON LLP
1800 K Street NW, Ste 1000
Washington, DC 20006
(202) 662-4860
Counsel for IADC

MATTHEW T. NELSON
Counsel of Record
Conor B. Dugan
Adam T. Ratliff
WARNER NORCROSS + JUDD LLP
1500 Warner Building
150 Ottawa Ave. NW
Grand Rapids, MI 49503
(616) 752-2000
mnelson@wnj.com
Counsel for DRI

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BRIEF OF *AMICI CURIAE* DRI–THE VOICE OF THE DEFENSE BAR AND THE INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL IN SUPPORT OF PETITIONERS[1]

INTEREST OF *AMICI CURIAE*

DRI–The Voice of the Defense Bar is an international organization of approximately 20,000 attorneys involved in the defense of civil litigation. DRI is committed to enhancing the skills, effectiveness, and professionalism of defense attorneys. Because of this commitment, DRI seeks to promote the role of defense attorneys, to address issues germane to defense attorneys and their clients, and to improve the civil justice system. DRI has long participated in the ongoing effort to make the civil justice system fairer, more consistent, and more efficient. To promote these objectives, DRI, through its Center for Law and Public Policy, participates as *amicus curiae* in cases that raise issues important to its members, their clients, and the judicial system.

The International Association of Defense Counsel (IADC) is an association of corporate and insurance attorneys from the United States and around the globe whose practice is concentrated on the defense of civil lawsuits. The IADC is dedicated to the just and

[1] Pursuant to this Court's Rule 37.6, *amici curiae* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici curiae* and its counsel made a monetary contribution to the preparation or submission of this brief. All parties have been timely notified of the filing of this brief and have consented to its filing.

efficient administration of civil justice and continual improvement of the civil justice system. The IADC supports a justice system in which plaintiffs are fairly compensated for genuine injuries, culpable defendants are held liable for appropriate damages, and non-culpable defendants are exonerated and can defend themselves without unreasonable costs. To promote its objectives, IADC participates as *amicus curiae* in cases that raise issues important to its members, their clients, and the judicial system

DRI and IADC and their members have considerable experience defending employers in litigation involving "collective actions" under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 216(b), as well as under the Age Discrimination in Employment Act ("ADEA") and the Equal Pay Act, which expressly incorporate FLSA's collective action provision, see *id.* §§ 206(d)(3), 626(b). Even though the collective action provision has been in force for the better part of a century, the application of § 216(b)'s certification procedures has created only one consistent result—confusion among the lower courts.

This unpredictability presents great threats to and imposes considerable costs on employer-defendants nationwide, and hinders the ability of DRI and IADC and their members to offer useful counsel. DRI and IADC are especially concerned about the decision below. The Second Circuit's decision—which if anything is even broader than a similarly problematic decision in the Ninth Circuit—promises a future of continued unpredictability in the law by employing a lenient standard for determining whether employees are similarly situated, imposing

the burden of answering the "similarly situated" question on employers until *after* discovery, and inviting forum-shopping by plaintiffs' attorneys. This Court should grant review to ensure that uniform rules guide the collective actions that increasingly consume judicial dockets nationwide.

SUMMARY OF ARGUMENT

Collective actions under the FLSA and ADEA are increasingly pervasive. These suits are being filed at a rate four times higher than they were in 2001. They also are increasingly speculative and expensive, especially now that most circuits have decided to delay the final determination of whether a collective action will be certified until after complete discovery on certification and the merits. Add in rising conditional certification rates with the enormous pressures to settle these cases, and FLSA collective actions present a substantial, often inappropriate, burden to employers and their counsel today.

One of the core problems with this growing litigation is that certification in collective actions under the FLSA and ADEA turns on the meaning of a single phrase that has continued to escape scrutiny from this Court for decades: whether employees are "similarly situated." Neither statute defines the phrase. Inevitably, the result has been a patchwork of lower court approaches. As the Petition explains, some courts have borrowed from Federal Rule of Civil Procedure 23's standard for class certification, some have developed multi-factor tests, and some—like the Second Circuit in this case—have adopted standards so permissive as to allow employees with but a single common issue of law or fact to join the case. These varying standards already invite forum shopping for companies operating in multiple jurisdictions and have resulted in employers and employees being treated differently based solely on the controlling circuit's law. It is time, even past time, for guidance from this Court.

The Second Circuit's answer to the "similarly situated" question in this case sharpens that need.

Despite guidance from this Court that Congress intended FLSA collective actions to prevent misuse and promote efficiency, the opinion below will do anything but. Collective actions are already administered inefficiently. They postpone the central question of whether the case will be decided for a class of plaintiffs until after discovery. These cases are also often combined with state wage-and-hour-law claims which can only be pursued on behalf of a class under the procedurally very different requirements of Rule 23. Now, under the Second Circuit's most-permissive-in-the-nation standard, the collective-action and class-action certification questions will diverge even further such that, as here, courts may certify the collective action while rejecting any Rule 23 class. Not only is this inefficient, but it invites abuse of the collective-action device that this Court has warned against; the less employee-plaintiffs are actually "similarly situated," the more the rights of employers and employees can be abused.

These concerns threaten the core purpose of the collective-action device. When combined with the dramatic increase in collective actions in the last decades, uniformity in this area has become an urgent need for employers, parties to wage-and-hour disputes, their counsel, and the lower courts.

ARGUMENT

I. The deep and enduring circuit split regarding the proper test to determine whether employees are similarly situated as required to maintain an FLSA collective action warrants review now.

The Petition aptly demonstrates how the Second Circuit's decision exacerbates a long-enduring split

among the circuits as to the proper method for determining whether employees are "similarly situated" under § 216(b) of the FLSA. (See Pet. 14-22.) Without guidance from this Court, the circuits have improvised various methods to determine whether any two employees are "similarly situated." Although creative improvisation is critical to certain forms of music and humor, it is much less desirable in the law where fairness and equity require that federal statutes apply in the same manner regardless of where plaintiffs live or work. Here, improvisation has led to confusion and disorder. Employers suffer from a lack of predictability and the uneven application of the FLSA depending on where a plaintiff brings suit. In turn, the lack of predictability and a national standard results in employees and employers being treated differently by the courts depending only on which circuit's law controls.

The Second Circuit's decision demonstrates that the confusion is not lessening. Allowing more time for the issue to percolate will do nothing but increase the inefficiencies already working against employers. The time has come to resolve the conflict and either identify a national standard or, at the very least, reduce the disparity among the circuits.

A. FLSA collective actions have massively proliferated in the last decade.

Already in 2003, commentators had characterized FLSA collective-action lawsuits as "the 'claim du jour' " of the plaintiffs' bar. Michael W. Hawkins, *Current Trends in Class Action Employment Litigation*, 19 Lab. Law. 33, 50 (2003). By 2019, "FLSA collective action litigation filings . . . far outpaced other types of employment-related class action filings." *Annual Class Action Litigation Report*,

Seyfarth Shaw LLP, at 25 (2020 ed.) And "virtually all FLSA lawsuits are filed and litigated as collective actions." *Id.* Not only is the volume of such cases up, the number of favorable certification rulings is as well. For instance, in 2016, "[f]ederal and state courts issued more favorable class certification rulings . . . than in any prior year, particularly in the wage-and-hour context." Kelly A. Lelo, *Basic FLSA Certification Strategy and Tactics*, 2017 Annual AAJ-PAPERS 3. Indeed, one commentator who has studied the issue for nearly 20 years has stated that he "keep[s] waiting . . . for the number of wage-and-hour lawsuits to crest or go down," but that everything "suggests even more filings." Aaron Vehling, *FLSA Class Actions to Hit Record High in 2016*, Law 360, available at: https://www.law360.com/articles/745603/flsa-class-actions-to-hit-record-high-in-2016; see also 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, 10–11 (2011) ("Commonly, and in increasing numbers, FLSA plaintiffs have availed themselves of the lenient standards applied by the courts to 'conditionally certify' collective actions.") In short, "[r]ecent years have witnessed an explosion in FLSA litigation. . . . Nationwide, annual FLSA filings are up over 400% from 2001." *Sakiko Fujiwara* v. *Sushi Yasuda Ltd.*, 58 F. Supp. 3d 424, 429 (S.D.N.Y. 2014).[2]

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[2] The staggering growth of collective actions was noted in one *amici*'s publications a decade ago. Paul A. Wilhelm, *Actions on the Rise: Top Five Trends in Wage & Hour Litigation*, 51 No. 4 DRI For Def. 48 (2009) (noting 120% growth in collective actions between 2004 and 2008).

The increasing number of FLSA collective actions must be viewed against the backdrop of the process by which courts determine whether employees are similarly situated under 29 U.S.C. § 216(b). Most lower courts have developed a "two-step process" for determining whether employees are "similarly situated" pursuant to § 216(b). This process is "often called the *Lusardi* [v. *Lechner*, 855 F.2d 1062, 1074 (3d Cir. 1988)] two-step, after the widely cited case that seems to have begun the practice." King, *supra*, at 8–9. The Fifth Circuit has described this two-step dance with the following:

> The first determination is made at the so-called "notice stage." At the notice stage, the district court makes a decision—usually based only on the pleadings and any affidavits which have been submitted—whether notice of the action should be given to potential class members.
>
> Because the court has minimal evidence, this determination is made using a fairly lenient standard, and typically results in "conditional certification" of a representative class. If the district court "conditionally certifies" the class, putative class members are given notice and the opportunity to "opt-in." The action proceeds as a representative action throughout discovery.
>
> The second determination is typically precipitated by a motion for "decertification" by the defendant usually filed after discovery is largely complete and the matter is ready for

> trial. At this stage, the court has much more information on which to base its decision, and makes a factual determination on the similarly situated question. If the claimants are similarly situated, the district court allows the representative action to proceed to trial. If the claimants are not similarly situated, the district court decertifies the class, and the opt-in plaintiffs are dismissed without prejudice. [*Mooney* v. *Aramco Servs. Co.*, 54 F.3d 1207, 1213–14 (5th Cir. 1995)]

The proliferation of collective actions combined with conditional certification has led to a second effect: significant pressure on employers to settle even claims of little to no merit. "[I]n increasing numbers, FLSA plaintiffs have availed themselves of the lenient standards applied by the courts to 'conditionally certify' collective actions." King, *supra*, at 10. Because "conditional certification frequently subjects employers to 'mind-boggling' discovery, the costs and resources required to defend a case, even if only 'conditionally' certified, place enormous pressure on employers to settle." *Id.*

As has been observed, "the reality" of conditional certification can cause "defendants to suffer enormous litigation costs, ranging from providing names and addresses for notice to engaging in broad discovery." William C. Martucci & Jennifer K. Oldvader, *Addressing the Wave of Dual-Filed Federal FLSA and State Law "Off-the-Clock" Litigation: Strategies for Opposing Certification and A Proposal for Reform*, Kan. J.L. & Pub. Pol'y, Spring 2010, at 433, 451. Those discovery costs—regardless of the substantive

merits—place "pressure on defendants to settle." This is the same dynamic the courts have identified in Rule 23 class-action lawsuits where plaintiffs engage in a form of "settlement extortion" by "using discovery to impose asymmetric costs on defendants in order to force a settlement advantageous to the plaintiff regardless of the merits of his suit." *Am. Bank* v. *City of Menasha*, 627 F.3d 261, 266 (7th Cir. 2010), as amended (Dec. 8, 2010). But it is not only the up-front costs of discovery that force settlement. As this Court has noted, certification of large classes ramps up the potential damages so that, when "[f]aced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims." *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 350 (2011).

But it is not just conditional certification that creates such enormous pressures. Indeed, cases like this one at the second-stage also ratchet up settlement pressures because once the case is initially certified, notice must be provided to potential opt-in plaintiffs, and the class gains additional leverage because certification "triggers a period of lengthy discovery, which can be 'prohibitively expensive' for employers." Hawkins, *Current Trends in Class Action Employment Litigation*, 19 Lab. Law. at 51. Because certification at stage one often is preordained, and a motion to decertify at stage two typically is not ripe until merits discovery has been completed, a defendant to a § 216(b) collective action must subject itself to substantial expense and inconvenience simply to have any hope of defeating certification. Defendants who run that gauntlet—especially in the Second and Ninth Circuits—then face a "similarly situated" standard that stacks the deck against them. Even when employers are willing to pay the significant upfront cost to roll the dice on that sort of risk,

decertification is unfairly denied. Thus, the combination of the proliferation of FLSA collective action lawsuits with conditional certification and overly lenient standards for determining whether employees are similarly situated ratchets up the potential *in terrorem* effect of such lawsuits.

Nor is it only employers who are burdened by the proliferation-and-conditional-certification nature of FLSA collective action lawsuits. "Courts, too, are burdened by cases that persist only because judges have deferred careful scrutiny of whether they should be tried in a representative fashion." King, *supra*, at 10–11. The discovery and notice issues require considerable attention from the courts, time that is misspent if there is no basis for certification. A uniform standard for determining when employees are "similarly situated" would aid considerably the lower courts faced with these time-consuming cases.

B. The circuits' inconsistent and varied tests invite forum shopping.

Despite more than 80 years since the passage of FLSA and the proliferation of collective-action cases in the last 20 years, this Court has never defined the "similarly situated" standard for certification under § 216(b). In the absence of a ruling by this Court, the federal circuit courts of appeals have reached no less than three different meanings for this singular term. The lack of a uniform standard has resulted in deep confusion.

Commentators have remarked that § 216(b) "provides no guidance as to what factors courts should look to when applying the 'similarly situated' standard." Hawkins, *supra*, at 47. One trial court lamented: "Unfortunately, neither the FLSA nor its

implementing regulations define or provide guidance on the meaning of the term 'similarly situated.' " *Howard* v. *Securitas Sec. Servs., USA Inc.*, No. 08 C 2746, 2009 WL 140126, at *1 (N.D. Ill. Jan. 20, 2009); see *Keef* v. *M.A. Mortenson Co.*, No. 07-CV-3915(JMR/FLN), 2009 WL 465030, at *1 (D. Minn. Feb. 24, 2009) ("similarly situated" lacks a "recognized definition"); *Shushan* v. *Univ. of Colo.*, 132 F.R.D. 263, 266 (D. Colo. 1990) (calling the provision "vague").

Into this vacuum, the various circuits have provided contradictory guidance as to how to determine whether plaintiff-employees are "similarly situated." (See Pet. 14-22.) The results, unsurprisingly, have been inconsistent. Both plaintiffs *and* defendants are subject to different standards depending on where a lawsuit is filed. Naturally, this inconsistency also invites—and indeed results in—forum shopping by plaintiffs further exacerbating such inconsistencies.

Statistics bear this out. As a recent report of class and collective actions determined, "a high predominance of cases are brought against employers in . . . judicial districts within the Second and Ninth Circuits." Seyfarth Shaw, *supra*, at 5. Indeed, the Second and Ninth Circuits, along with the Fifth and Sixth, "are the epi-centers of wage & hour class actions and collective actions." *Id.* at 6. As the 2019 statistics demonstrates, "[m]ore cases were prosecuted and conditionally certified . . . in the district courts in those circuits than in any other areas of the country." *Id.*

This results in materially indistinguishable cases being treated very differently. For instance, in the FLSA litigation in *Morgan* v. *Family Dollar Stores, Inc.*, 551 F.3d 1233, 1243 (11th Cir. 2008), cert. denied

by *Family Dollar Stores, Inc.* v. *Morgan*, 558 U.S. 816 (2009), two Family Dollar store managers who received notice in the Eleventh Circuit case but elected to file suit in a district in Fourth Circuit. The district court in the Fourth Circuit determined that the two managers were exempt from the FLSA's overtime-pay requirement. See *Fripp* v. *Family Dollar Stores*, No. 2:03-cv-721-DCN (D.S.C. Sept. 28, 2004); *Davis* v. *Family Dollar Stores*, No. 3:03-cv-170-CMC-RM (D.S.C. Sept. 29, 2004). This ruling contradicted the Eleventh Circuit's holding that all store managers were "similarly situated" with respect to their exemption status. 551 F.3d at 1265; see also *Grace* v. *Family Dollar Stores, Inc.*, No. 3:06CV306, 2007 WL 2669699, at *3 (W.D.N.C. Sept. 6, 2007) (denying certification in a parallel putative collective action filed by Family Dollar store managers because "each individual manager had different duties"). And the Eleventh Circuit also diverged on the question of exemption, upholding the conclusion that the store managers were not exempt employees. 551 F.3d at 1271. This sort of inconsistency—one court concluding that store managers are not exempt *and* similarly situated while another determining that they are exempt—is precisely the sort of inconsistent outcome that flows naturally from lack of a uniform definition of "similarly situated." Moreover, the statistics demonstrate that plaintiffs' attorneys have caught on and are beginning to file suit in those jurisdictions most amenable to their claims, in particular the Second and Ninth Circuits. See Seyfarth Shaw, *supra*, at 5.

The lack of a uniform national standard for certifying a collective action, and the attendant incentive to forum shop, places national employers in a significant dilemma. Using uniform job descriptions

and classifications is efficient and beneficial for both the companies and their employees. See generally Jane Howard-Martin & Grace E. Speights, Practicing Law Inst., No. H0-00LU, *Preventing, Defending and Settling Discrimination Class Actions and FLSA Collective Actions* 743 (2003). The company-wide job descriptions upon which these classifications are based ensure that the employer has carefully considered what tasks employees in a given position are expected to fulfill. Doing so provides an objective standard through which to evaluate employees, determine their compensation and bonuses, and to assess promotions. At the same time, these job descriptions provide employees with notice of the criteria they are expected to meet, benchmarks for assessing performance, and guidance about how to supervise employees who report to them. Additionally, these descriptions allow employees (and their employers) to monitor whether they are being treated fairly with respect to their wages, responsibilities, and opportunities for advancement because they can compare their experiences to other individuals who share their job title. Moreover, consistent company-wide job descriptions enhance employees' freedom of mobility between company locations should they desire or be required to transfer. Any alternative to their use would be impractical and inefficient.

Despite these benefits for employers *and* employees, the current circuit confusion on determining whether employees are similarly situated—and the perverse incentives to file suit in the Second and Ninth Circuits—disincentivizes the use of written job descriptions and classifications. The propriety of a routine and beneficial aspect of doing business is repeatedly called into question simply because the procedures—which employers acknowledge may be

subject to exceptions for particular employees or at specific locations—are drafted to govern the many, not the few. Employers thus run the risk that such policies will be used against them in litigation, or that, they foreclose employers from drawing upon the defenses to which they otherwise would be entitled under federal law. Their counsel are also placed in the awkward position of weighing the benefits of written policies in various legal contexts (e.g., responding to claims of discrimination based on failures to promote, etc.) versus their detriment in others like that here.

II. The Second Circuit's approach strays from the purpose of the collective-action device to promote efficient resolution of disputes.

The Second Circuit defines "similarly situated" as including "similarly situated with respect to only one issue of law or fact, and dissimilarly situated in all other respects." The most significant problem with this approach—other than its departure from the plain text of the statute—is that it effectively prohibits lower courts from considering dissimilarities between employees when assessing collective action certification. This will cause particular harm to Congress's intent and the Judiciary's interest that collective actions be efficiently resolved.

In *Hoffmann-La Roche Inc.* v. *Sperling*, 493 U.S. 165 (1989), this Court recognized Congress's dual goals in authorizing collective actions under the FLSA: to provide plaintiffs the "advantage of lower individual costs to vindicate rights," and to provide the Judiciary the benefit of "efficient resolution in one proceeding of common issues of law and fact arising from the same alleged discriminatory activity." *Id.* at 170. Layered on top of Congress's goals are the

judiciary's independent interests in "managing collective actions in an orderly fashion" and preventing "misuse" of the collective action device. *Id.* at 171-73. Courts have searched for a test that will find the right combination of common issues of law and fact to meet these goals. But at minimum, a rigid approach that ends at the first sight of a single such common issue belies Congress's and the Judiciary's goal to efficiently administer these cases.

The way collective actions are administered stretches the bounds of efficiency as it is. As discussed above, lower courts typically employ the two-step "ad hoc" certification process for determining whether a case may proceed as a collective action. See *Campbell* v. *City of Los Angeles*, 903 F.3d 1090, 1109 (9th Cir. 2018); 7B *Charles Alan Wright & Arthur R. Miller*, Fed. Prac. & Proc. Civ. § 1807 (3d ed. 2005). Under this approach, the plaintiff moves for "conditional certification" at the pleading stage under a "lenient" standard. *Id.* At the second stage, the defendant typically moves for decertification after discovery and under a higher level of proof than imposed on the plaintiff at the first stage. *Id.*

But that is not all, because these cases are often combined with state wage law class actions under Rule 23. These "hybrid" cases are common. See*, e.g.*, *Tyson Foods, Inc.* v. *Bouaphakeo*, 136 S. Ct. 1036, 1042 (2016); *William C. Jhaveri-Weeks, Austin Webbert*, Class Actions Under Rule 23 and Collective Actions Under the Fair Labor Standards Act, 23 Geo. J. on Poverty L. & Pol'y 233, 246 (2016) (observing that FLSA collective actions and Rule 23 class actions alleging violations of state wage laws are "often" brought together). Indeed, this case involves such a hybrid action. And these hybrid cases already

compound the existing procedural challenges. See *De Asencio* v. *Tyson Foods, Inc.*, 342 F.3d 301, 305-12 (3d Cir. 2003), as amended (Nov. 14, 2003) (discussing the differences between the two types of actions and the resulting administrative challenges when brought together). For example, class actions under Rule 23 undergo the certification process at the beginning of a case. On the other hand, the ad hoc approach to collective actions kicks the certification can down the road until after discovery. The question in class actions is thus typically one of certification, whereas in collective actions, it is one of decertification. See *Perez* v. *De Domenico Pizza & Rest., Inc.*, 204 F. Supp. 3d 494, 496 (E.D.N.Y. 2016) (observing the "fundamental conflicts created by the simultaneous litigation of claims under the FLSA" and state law class action claims).

Now, in addition to these procedural challenges, under the Second Circuit's test, the certification questions diverge dramatically in substance too. The permissive test applied by the Second Circuit will allow largely dissimilarly situated plaintiffs to join the collective action. As this Court and others have observed, it is not efficient to combine dissimilar cases. See *Amgen Inc.*, 568 U.S. at 470 (observing that "fatal dissimilarit[ies]" among putative class members "make use of the class-action device inefficient or unfair") (citing *Richard A. Nagareda*, Class Certification in the Age of Aggregate Proof, 84 N.Y.U. L. Rev. 97 (2009)). See also *Castano* v. *Am. Tobacco Co.*, 84 F.3d 734, 749 (5th Cir. 1996) (observing the "judicial inefficiencies" that can arise from improperly certified classes, which prevent those cases "from being [the] superior method of adjudication" they are intended to be); *Nagareda*, 84 N.Y.U. L. Rev. at 131

(observing that "what really matters to class certification" is "dissimilarity that has the capacity to undercut the prospects for joint resolution of class members' claims through a unified proceeding"). The dissent below reached this same common-sense conclusion: "[N]either plaintiffs nor the court would be significantly benefitted if plaintiffs were allowed to proceed collectively despite having drastically different material facts or different legal claims simply because they share a single common fact or legal issue." (Pet. App. 35a-36a.)

But that will be the reality in the Second Circuit. Employers will face the time and expense of full discovery, and then bear the burden—under that circuit's more expansive standard—to prove that the employee plaintiffs do not share a single common issue of fact or law. This mountain will be nearly impossible to climb, all but ensuring that collective actions will remain certified that otherwise should not be.

Therein also lies another problem. The more dissimilar the combined plaintiffs are, the more likely litigants are to be harmed by the process. When a collective action is too broadly certified, inevitably there are plaintiffs included in the class who are not actually similarly situated and who have stronger or weaker cases than their fellow plaintiffs, or present facts that require a different damages calculation. In those cases, if the plaintiffs lose, there will be employees who are entitled to backpay, but who will not recover; if the plaintiffs win, the employer will be forced to pay damages to employees who may not have actually suffered any legal injury. This fundamental unfairness is again contrary to the goal of collective action litigation to protect parties from "the potential

for misuse of the class device." *Sperling*, 493 U.S. at 171-72.

The Second Circuit's approach deviates from Congress's goals in drafting the FLSA and the Judiciary's goals in administering collective actions. The Court should thus grant the petition to resolve the circuit split and define "similarly situated" in a manner consistent with the FLSA's purpose.

CONCLUSION

Because the question of what is required to demonstrate that employees are "similarly situated" for the purposes of determining whether a collective action should be certified (or decertified) has bedeviled the circuit courts leading to divergent approaches among the circuits, the Court should grant the Petition for a Writ of Certiorari on this important issue.

Respectfully submitted,

PHILIP L. WILLMAN
President
DRI–THE VOICE OF THE DEFENSE BAR
222 South Riverside Plaza
Chicago, IL 60606
(312) 795-1101
pwillman@bjpc.com
Counsel for DRI

MATTHEW T. NELSON
Counsel of Record
Conor B. Dugan
Adam T. Ratliff
WARNER NORCROSS + JUDD LLP
1500 Warner Building
150 Ottawa Avenue NW
Grand Rapids, MI 49503
(616) 752-2000
mnelson@wnj.com
Counsel for DRI

PHILIP S. GOLDBERG
SHOOK HARDY & BACON LLP
1800 K Street NW, Ste 1000
Washington, DC 20006
(202) 662-4860
pgoldberg@shb.com
Counsel for IADC

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