No. 20-257

IN THE

Supreme Court of the United States

CHIPOTLE MEXICAN GRILL, INC., *et al.*,

Petitioners,

v.

MAXCIMO SCOTT, *et al.*,

Respondents.

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

BRIEF OF RETAIL LITIGATION CENTER, INC., AND RESTAURANT LAW CENTER AS *AMICI CURIAE* SUPPORTING PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

BRIEF OF RETAIL LITIGATION CENTER, INC., AND RESTAURANT LAW CENTER AS *AMICI CURIAE* SUPPORTING PETITIONERS

The Retail Litigation Center, Inc., and the Restaurant Law Center respectfully submit this brief as *amici curiae* in support of petitioners.*

INTEREST OF THE *AMICI CURIAE*

The Retail Litigation Center, Inc. is the only trade organization solely dedicated to representing the retail industry in the judiciary. The Retail Litigation Center 's members include many of the country's largest and most innovative retailers. Collectively, they employ millions of workers throughout the United States, provide goods and services to tens of millions of consumers, and account for tens of billions of dollars in annual sales. The Retail Litigation Center seeks to provide courts with retail-industry perspectives on important legal issues affecting its members, and to highlight the potential industry-wide consequences of significant pending cases. Since its founding in 2010, the Retail Litigation Center has participated as an *amicus* in more than 150 judicial proceedings of importance to retailers. Multiple courts, including this Court, have cited the RLC's briefs favorably. *See, e.g.*, *South Dakota* v. *Wayfair, Inc.*, 138 S. Ct. 2080, 2097 (2018); *Kirtsaeng* v. *John Wiley & Sons, Inc.*, 568 U.S. 519, 542 (2013).

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* Pursuant to Rule 37.2(a), counsel of record for all parties received timely notice of intent to file this brief, and all parties have consented to its filing. In accordance with Rule 37.6, no counsel for a party authored this brief in whole or in part, and no person or entity other than *amici curiae* or their counsel made a monetary contribution intended to fund the brief's preparation or submission.

The Restaurant Law Center is a public policy organization affiliated with the National Restaurant Association, the largest foodservice trade association in the world. The industry comprises more than one million restaurants and other foodservice outlets employing more than 15 million people. Restaurants and other foodservice providers are the nation's second-largest private-sector employers. The Restaurant Law Center provides courts with the industry's perspective on legal issues significantly affecting the industry. Specifically, the Restaurant Law Center highlights the potential industry-wide consequences of pending cases such as this one, through *amicus* briefs on behalf of the industry. *See, e.g.*, *Lewis* v. *Governor of Ala.*, 944 F.3d 1287, 1302 n.15 (11th Cir. 2019) (en banc) (citing Restaurant Law Center *amicus* brief).

The Retail Litigation Center and the Restaurant Law Center (together, "the *Amici*"), as well as their members, have a significant interest in the outcome of this case. Employers in the retail and foodservice sectors often find themselves defending collective actions under the Fair Labor Standards Act (the "FLSA"). A key consideration in these cases is the standard the court will apply in deciding whether, as trial approaches, the opt-in plaintiffs are sufficiently similarly situated to warrant collective adjudication. That single issue has an outsized effect on the litigation. An overly expansive view of similarity all but forces most defendants to settle regardless of the merits of the plaintiffs' claims, while an unduly narrow notion of similarity may be insufficient to safeguard worker protections embodied in the FLSA.

SUMMARY OF ARGUMENT

The Second Circuit appears to have found itself trapped in a false dichotomy, believing that it had only two choices available in selecting the appropriate standard for addressing FLSA decertification. The court rejected the approach of adopting the Rule 23 framework wholesale as inconsistent with the text of the FLSA. But the court then seemed to view its only other option to be a "minimal commonality" standard devoid of any consideration of litigation reality, docket management, fairness, efficiency, or the policies behind FLSA collective actions.

Three cases—*Espenscheid* v. *DirectSat USA, LLC*, 705 F.3d 770 (7th Cir. 2013); *Zavala* v. *Wal Mart Stores Inc.*, 691 F.3d 527 (3d Cir. 2012); and *Anderson* v. *Cagle's, Inc.*, 488 F.3d 945 (11th Cir. 2007)—especially illustrate why the minimal commonality approach adopted by the Second Circuit is so pernicious in practice and they highlight the practical considerations that properly lead courts to decertify collective actions. Indeed, those cases provide a telling glimpse into what litigation would have looked like if the courts had followed the Second Circuit's rule and the cases proceeded to trial.

Moreover, the Second Circuit's standard is starkly at odds with the collective action's *raison d'être*. This Court has emphasized that the main purpose of a collective action is to facilitate the fair and efficient resolution of FLSA claims. *See Hoffmann-LaRoche Inc.* v. *Sperling*, 493 U.S. 165 (1989). Where, however, adjudicating claims requires either highly individualized inquiries or evidentiary and other procedural shortcuts that would undermine litigants' substantive rights, proceeding collectively is contrary to the purpose of the FLSA.

ARGUMENT

I. APPLYING THE SECOND CIRCUIT'S STANDARD TO CASES IN WHICH COURTS HAVE GRANTED DECERTIFICATION SHOWS HOW HARMFUL THAT STANDARD CAN BE.

Courts have decertified collective actions, or affirmed decertification, in numerous published and unpublished decisions across the country. What nearly all of those cases have in common is that they probably would have come out the other way under the Second Circuit's standard. Where *any* single common issue of law or fact suffices to prevent decertification, courts would have to deny decertification in almost every case.

It is not unusual for at least one common issue to exist in an FLSA collective action, such as whether the alleged violation was willful, whether the employer acted in good faith reliance on advice of counsel, or whether a particular task or group of tasks constitutes compensable work. Nevertheless, individualized issues can and do overtake the common questions in many cases, leaving a trial court with the choice of decertifying the collective or allowing an utterly unmanageable and unfair train wreck of a case to proceed to trial. Several examples of cases in which courts have decertified collectives—and that would likely have come out differently under the Second Circuit's minimal commonality standard—illustrate the point.

A. *Espenscheid* v. *DirectSat USA, LLC*

In *Espenscheid* v. *DirectSat USA, LLC*, 705 F.3d 770 (7th Cir. 2013), technicians who install and repair residential satellite equipment sued their employer alleging, *inter alia*, that the company required them not to report time spent on certain job activities as hours worked, thereby leading to uncompensated work,

and failed to provide premium overtime pay under the FLSA. *Id.* at 772-73. The district court conditionally certified an FLSA collective, resulting in 2,341 plaintiffs. *Id.* at 772. "[W]hen it became apparent that the trial plan submitted by the plaintiffs was infeasible[,]" the district court decertified the collective.

On appeal, the Seventh Circuit noted the plaintiffs' allegation that the employer "forb[ade] the technicians to record time spent on certain tasks, such as calling customers, filling out paperwork, and picking up tools from one of the company's warehouses." *Espenscheid*, 705 F.3d at 773. The workers received piece-rate compensation, or a set amount of money per job. *Id.* at 772-73. Given the piece-rate system and the reality that "workers differ in their effort and efficiency[,]" the court observed that "some, maybe many, of the technicians may not work more than 40 hours a week and may even work fewer hours; others may work more than 40 hours a week." *Id.* at 773. Indeed, "[v]ariance would also result from different technicians' doing different tasks, since it's contended that the employer told them not to report time spent on some of those tasks, though—further complicating the problem of proof—some of them reported that time anyway." *Id.* at 773-74.

The plaintiffs proposed a trial based on "representative" testimony from 42 members of the collective. *Espenscheid*, 705 F.3d at 774. The court observed that "even if the 42 . . . turned out by pure happenstance to be representative in the sense that the number of hours they worked per week on average . . . was equal to the average number of hours of the entire class, this would not enable the damages of any members of the class other than the 42 to be calculated." *Id.* The court noted "the complication created by the piece-rate

system[,]" under which "the hourly wage varies from job to job and worker to worker." *Id.* A "further complication" involved "a worker who underreported his time, but did so, DirectSat offers to prove, not under pressure by DirectSat but because he wanted to impress the company with his efficiency in the hope of obtaining a promotion or maybe a better job elsewhere[.]" *Id.* In addition, "the technicians have no records of the amount of time they worked but didn't report on their time sheets." *Id.* at 774-75.

The court observed that on this record, "to determine damages would, it turns out, require 2341 separate evidentiary hearings, which might swamp the Western District of Wisconsin with its two district judges." *Espenscheid*, 705 F.3d at 773. The court remarked that "it's not as if each technician worked from 8 a.m. to 5 p.m. and was forbidden to take a lunch break and so worked a 45-hour week . . . but was paid no overtime." *Id.* In that scenario, "each technician's damages could be computed effortlessly, mechanically, from the number of days he worked each week and his hourly wage. . . . Nothing like that is possible here." *Id.* The court criticized the unworkability of the plaintiffs' proposed trial plan: "Essentially they asked the district judge to embark on a shapeless, freewheeling trial that would combine liability and damages and would be virtually evidence-free so far as damages were concerned." *Id.* at 776. The court warned that "if class counsel is incapable of proposing a feasible litigation plan . . . , the judge's duty is at an end." *Id.* The court affirmed the order decertifying the collective. *Id.* at 777.

Espenscheid would likely have come out differently in the Second Circuit. Applying the Second Circuit's minimal commonality framework, the single issue of

whether the company directed the workers not to record time spent on certain tasks might suffice to preclude decertification. In that case, the district court and the parties would then have had to face the stunningly burdensome prospect of more than 2,300 mini-trials to sort out the many issues related to each employee, such as hours worked and efficiency, thereby resulting in a "shapeless, freewheeling trial" that could have "swamp[ed]" the two district court judges, hardly a model of judicial economy.

B. *Zavala* v. *Wal Mart Stores Inc.*

In *Zavala* v. *Wal Mart Stores Inc.*, 691 F.3d 527 (3d Cir. 2012), employees of various cleaning companies that provide cleaning services in Wal-Mart stores sued Wal-Mart alleging, *inter alia*, that the company was their employer and owed them overtime under the FLSA. *Id.* at 530-31. Following conditional certification of the case as a collective action, more than 100 individuals opted into the case. *Id.* at 531, 534. After discovery, the district court granted Wal-Mart's motion to decertify the collective. *Id.* at 534.

On appeal, the Third Circuit noted several points of similarity in the record. For example, "Wal-Mart distributed a maintenance manual that went into exacting detail about how to clean floors, shelves, bathrooms, and other parts of the store" and "mandated procedures that all employees and contractors were to use." *Zavala*, 691 F.3d at 538. The company's store managers "had final authority to approve or disapprove members of cleaning crews[,]" and the evidence suggested that they "fired members of cleaning crews and that Wal-Mart employees regularly directed cleaning crews in conducting their work in the store." *Id.* Moreover, the plaintiffs alleged "a common scheme to hire and underpay illegal immigrant workers[.]" *Id.*

The record, however, also reflected significant dissimilarities. For example, "the putative class worked in 180 different stores in 33 states throughout the country and for 70 different contractors and subcontractors. The individuals worked varying hours and for different wages depending on the contractor." *Zavala*, 691 F.3d at 538 (quotation omitted). In addition, "different defenses might be available to Wal-Mart with respect to each proposed plaintiff, including that individual cleaners were not Wal-Mart employees, as that term is defined by the FLSA, and that it paid some of its contractors an adequate amount to support an appropriate wage for the cleaners." *Id.*

The court observed that the "common links" in the case "are of minimal utility in streamlining resolution of these cases. Liability and damages still need to be individually proven." *Zavala*, 691 F.3d at 538. Thus, "[c]onsidering the numerous differences among members of the proposed class . . . , we conclude that the Plaintiffs have not met their burden of demonstrating that they are similarly situated." *Id.* The court affirmed the order decertifying the collective. *Id.*

Under the Second Circuit's standard, however, the collective would likely have remained certified. For example, the alleged scheme to use illegal immigrant labor "potentially demonstrates . . . willfulness in violating the FLSA[,]" *Zavala*, 691 F.3d at 538, thereby apparently precluding decertification under the Second Circuit's approach. Trial would have required evidence regarding each of the 100-plus opt-in plaintiffs in the collective as to both liability and damages. The trial would have been a collective adjudication in name only, with the reality consisting of several dozen largely, if not entirely, separate trials.

C. *Anderson* v. *Cagle's, Inc.*

Anderson v. *Cagle's, Inc.*, 488 F.3d 945 (11th Cir. 2007), involved production workers of a chicken processing company alleging that they had not been compensated for donning and doffing of protective clothing, or for certain production work, under the FLSA. *Id.* at 949. The district court conditionally certified the collective, eventually leading to more than 1,800 plaintiffs joining the case. *Id.* at 950. After discovery, the defendants moved to decertify the collective, and the district court granted their motions. *Id.*

On appeal, the Eleventh Circuit affirmed. The court noted that the case presented a "wide variety of work assignments and varied compensation structures affecting the purported class." *Anderson*, 488 F.3d at 952 (quotation omitted). The defendants included various separate entities, with separate "locations" and "work forces[.]" *Id.* "Among the numerous distinctions, we find particularly important evidence that, unlike all of the named plaintiffs, many of the opt-in plaintiffs are not unionized. A key defense in this case . . . requires the existence of a collective bargaining unit." *Id.* at 954 n.8. The court cautioned that "the availability of a defense to some but not all of the putative class members 'clearly poses significant case management concerns.'" *Id.* (quoting *In re School Asbestos Litig.*, 789 F.2d 996, 1011 (3d Cir. 1986)).

The court commented that "logically the more material distinctions revealed by the evidence, the more likely the district court is to decertify the collective action." *Anderson*, 488 F.3d at 953. And "although the FLSA does not require potential class members to hold identical positions, the similarities necessary to maintain a collective action . . . must extend beyond the mere facts of job duties and pay provisions." *Id.* (quotations

omitted). Were it otherwise, the court noted, "it is doubtful that" the collective action device "would further the interests of judicial economy, and it would undoubtedly present a ready opportunity for abuse." *Id.* (quotation omitted).

As with *Espenscheid* and *Zavala*, it seems very likely that under the Second Circuit's standard, the collective in *Anderson* would have remained certified. Issues such as the appropriateness of the defendants' practices for measuring compensable production time would probably suffice to preclude decertification. Yet at trial, the case would have splintered into numerous separate mini-trials as more than 1,800 plaintiffs presented evidence regarding their various work circumstances, addressing varying practices at different locations, working for different employers, subject to different defenses.

* * *

As these three cases show, the net result of the Second Circuit's minimal commonality rule is to tie the district courts' hands, forcing trial judges to allow unmanageable, docket-clogging litigation to proceed to trial. Some federal districts would be overwhelmed, as noted in *Espenscheid*. The much better approach is, as these other courts have done, to apply common sense and sound docket management principles to the question of interpreting the similarly situated standard in the decertification context. In short, if a case is collective in theory, but in practice will require plaintiff-by-plaintiff trials, then the workers are not similarly situated for purposes of the FLSA. Federal trial judges should have the discretion to make that determination and without being bound by the Second Circuit's myopic standard.

II. THE SECOND CIRCUIT'S DECERTIFICATION STANDARD IS INCONSISTENT WITH THE PURPOSE OF AN FLSA COLLECTIVE ACTION.

This Court discussed the purposes behind the FLSA's collective action device in *Hoffmann-LaRoche Inc.* v. *Sperling*, 493 U.S. 165 (1989). Speaking in the context of an action under the Age Discrimination in Employment Act, which incorporates the FLSA's collective action procedure, the Court stated that "[a] collective action allows . . . plaintiffs the advantage of lower individual costs to vindicate rights by the pooling of resources. The judicial system benefits by efficient resolution in one proceeding of common issues of law and fact arising from the same alleged . . . activity." *Id.* at 170.

Most courts tailor their decertification analysis to serve the twin purposes of the collective action identified in *Hoffmann-LaRoche*. Thus, "courts generally consider three factors: (1) the disparity or similarity of the factual and employment settings of the individual plaintiffs, (2) the various defenses available to the defendant and whether those may be asserted collectively or individually as to each plaintiff, and (3) fairness and procedural considerations." Am. Bar Ass'n Section of Labor & Employment Law, *The Fair Labor Standards Act* at 17-178 (3d ed. 2015) (collecting cases).

The standard embraced by the Second Circuit, however, conflicts with the compelling rationale behind *Hoffmann-LaRoche*. If a collective action contains at least one issue of law or fact common to all plaintiffs, then the approach followed by the Second Circuit would lead the case to trial on a collective basis. Such a rule claims to apply no matter how minor or tangential the point of similarity may be to the case as a practical matter, so long as the issue is technically material to at least one asserted claim or defense. Nor

does the rule apparently yield when significant factual disparities among the collective demonstrate that plaintiff-specific inquiries will overwhelm the trial and in effect require mini-trials for each plaintiff.

The Second Circuit's approach therefore undermines, rather than furthers, this Court's sound teachings. A case that would require dozens, hundreds, or thousands of individual hearings, where in effect each plaintiff has a separate trial, simply does not result in "lower individual costs" for plaintiffs. *Hoffmann-LaRoche*, 493 U.S. at 170. Nor does such an unwieldy trial deliver benefits to the judicial system through "efficient resolution in one proceeding" of the claims and defenses pertinent to the collective. *Id.* *See also* *Anderson*, 488 F.3d at 953 (cautioning that too lax a standard for evaluating "similarly situated" would not "further the interests of judicial economy" and "would undoubtedly present a ready opportunity for abuse") (quotations omitted); *Espenscheid*, 705 F.3d at 773 (warning that trial involving 2,341 evidentiary hearings would "swamp the Western District of Wisconsin with its two district judges").

In short, the Second Circuit's approach is neither good law nor sound policy. Nothing in the text or legislative history of the FLSA's collective action provision suggests that Congress intended to require courts to take on unmanageable proceedings, flood their dockets, and increase cost and unfairness for all participants, upon a rudimentary showing that the members of a collective have at least a little bit in common with each other. In the absence of a clear expression of legislative intent to the contrary, there is no good reason to construe the FLSA in a manner that requires casting aside sound case management concepts and basic notions of fairness to litigants.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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