No. 08-1287

IN THE

Supreme Court of the United States

FAMILY DOLLAR STORES, INC.,

Petitioner,

v.

JANICE MORGAN, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF

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RULE 29.6 STATEMENT

Family Dollar's Rule 29.6 statement is contained in the petition. Pet. ii. There have been no changes.

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Respondents' brief in opposition does not answer the powerful arguments for certiorari raised by the petition. Although this case does not present a standard-run circuit split, it presents an extraordinarily important procedural issue that has generated widespread uncertainty among lower courts and that has enormous impact on complex litigation. The Eleventh Circuit's decision sets too lax a certification standard under 29 U.S.C. § 216(b) and, as a result, it will become a haven for nationwide FLSA collective actions. This Court should intervene.

1. Family Dollar and the *amici* have predicted that the Eleventh Circuit will become the forum of choice for nationwide collective actions. *See* Pet. at 21–22; Chamber Br. 10–11, 18–23; DRI Br. 3–4, 18–20. Rather than answer this argument, Respondents call it baseless "speculation." Opp'n 18–20. The statistics show otherwise.

In general terms, the impact of collective actions under the FLSA is big and getting bigger. The Federal Judicial Center's recent study of class actions found the increase in FLSA collective actions "striking, "both in absolute numbers and as a proportion of all class action activity in the federal courts." Emery G. Lee III & Thomas E. Willging, *The Impact of the Class Action Fairness Act of 2005 on the Federal Courts* 3 (Fed. Judicial Ctr. April 2008). The study found that "[i]n absolute numbers, labor class actions increased from 337 in the [July–December 2001] period to 1,104 in the [January–June 2007] period—a 228 percent increase." *Id.* Collective actions increased from "almost one-quarter of all class actions identified, 24.6 percent,"

in 2001, to "almost one-half of all class actions identified, 46.9 percent," in 2007. *Id.* at 4. As the Federal Judicial Center observed, "these are remarkable trends." *Id.*

Statistics also show a disproportionate increase of FLSA cases within the Eleventh Circuit. Although the Administrative Office of the Federal Courts does not publish caseload data isolating FLSA cases, statistics on the general category of "Private Labor Suits" (which includes FLSA cases) show the Eleventh Circuit has almost twice as many of these suits commenced and pending than the next closest circuit, the Ninth Circuit (which has nearly three times the Eleventh Circuit's population). *See* Administrative Office of the Federal Courts, *2008 Annual Report* 149–60 (Tables C-3 & C-3A); Administrative Office of the Federal Courts, *2007 Annual Report* 151–62 (Tables C-3 & C-3A).[1] For instance, 2007 caseload statistics show that 5,570 cases were commenced within the Eleventh Circuit, which amounts to over 30 percent of the 18,233 total cases filed. The Ninth Circuit came in second, with 2,294 cases filed, only 12 percent. RA-1, 19.

There is no evidence that this trend will stop. The Eleventh Circuit issued its opinion in this case in late December 2008. Pet. App. 1a. The Eleventh Circuit contains 11 percent of the nation's population (WORLD ALMANAC 589 (2009)), and its district courts share about the same percentage of the federal civil caseload. *See* RA-3, 7 (23,119 of 223,093 private cases in 2008).

[1] Charts of the caseload statistics are included in the Reply Appendix at RA-1. The referenced tables follow at RA-2–25.

Yet from January 1 to June 30, 2009, **40 percent** of all FLSA cases filed were filed in district courts within the Eleventh Circuit.[2]

District	2009 Filings	Percentage
DC	13	0.424%
1st	33	1.077%
2nd	359	11.720%
3rd	167	5.452%
4th	154	5.028%
5th	357	11.655%
6th	149	4.864%
7th	179	5.844%
8th	76	2.481%
9th	243	7.933%
10th	119	3.885%
11th	**1,214**	**39.634%**
Total Filings	3,063	100.000%

In the six months since the Eleventh Circuit's decision, nearly **1,000** more FLSA cases were filed within the Eleventh Circuit than in any other circuit. These statistics cannot be easily dismissed.

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[2] The source for these statistics are reports generated by Monitor Suite, proprietary software (run by Thomson Reuters) that can track district court filings according to the categories listed on the civil cover sheet. The code for FLSA cases is 710. The reports are included at RA-26–73.

2. Respondents claim that the question presented, as framed by Family Dollar, is a "categorical" argument that was not raised or litigated below. Opp'n i, 10–11, 14, 16–18. The record refutes this claim. All the arguments presented in the petition were litigated and decided in the district court and the court of appeals. The question presented focuses on the individualized nature of the FLSA's executive exemption—as a matter of fact and law. Pet. i. Family Dollar argues that certification was improper *both* because of the facts presented at decertification *and* the legal requirement that the executive exemption be decided "on a case-by-case basis" (29 C.F.R. § 541.106(a) (2006)). Pet. 26–29. These issues were litigated at every stage and decided below. *See* Doc. 250 at 7–24; Pet. App. 126a–30a; 11th Cir. Br. 39–45; 11th Cir. Reply 6–12; Pet. App. 62a–65a. The question presented also includes whether adjudicating the executive exemption in a collective action is superior to individual litigation and whether such an action can be manageably and fairly tried in one collective jury trial. Pet. 29–32. Both the District Court and the Eleventh Circuit addressed these questions raised by Family Dollar. *See* Doc. 250 at 25–29; Pet. App. 130a–31a; 11th Cir. Br. 46–49; Pet. App. 65a–69a. These questions encompass not only the due process limits on certification of a § 216(b) collective action (Pet. 29), but also DRI's *amicus* argument that Rule 23 principles should apply to this statutory procedure (DRI Br. 7–13). Family Dollar also raised these questions and arguments at every stage. *See* Doc. 250 at 27–28 (citing Rule 23 decisions by analogy), 29 (due process); Pet. App. 131a (decertification opinion rejecting due process argument); 11th Cir. Br. 48–49 (Rule 23 decisions), 54–57 (due process); 11th Cir. Reply Br. 5 (Rule 23 decisions), 12–13 (due process).

The question presented fairly encompasses all the arguments raised in the petition (and those of the *amici*). Family Dollar preserved all of these arguments for review by this Court. *See Nelson v. Adams USA*, 529 U.S. 460, 469 (2000) (certiorari "does not demand the incantation of particular words; rather, it requires that the lower court be fairly put on notice as to the substance of the issue."); *Harris Trust & Sav. Bank v. Salomon Smith Barney*, 530 U.S. 238, 245 n.2 (2000) ("Once a federal claim is properly presented, a party can make any argument in support of that claim.") (internal quotation and citation omitted); *United States v. Williams*, 504 U.S. 36, 44 (1992) (a party need not "demand overruling of a squarely applicable, recent circuit precedent" as a precondition "to our granting certiorari upon an issue decided by a lower court").

3. The question presented is certworthy notwithstanding the absence of a traditional circuit split. The Eleventh Circuit's decision conflicts with numerous lower court decisions holding that § 216(b) cannot be used to certify a collective action where each plaintiff's duties must be examined individually to determine whether an exemption applies. Pet. 16–18. The few published circuit decisions that exist fail to meaningfully engage the language of § 216(b). Instead, they (like the Eleventh Circuit) have adopted an *ad hoc* analysis that assures *ad hoc* results. This has caused widespread confusion among the district courts. The Chamber of Commerce's *amicus* brief lists nearly 100 district court cases complaining about the lack of direction from the appellate courts. Chamber Br. 3 & App. The few cases Respondents cite in support of the Eleventh Circuit's decision (Opp'n 27 & n.20) only underscore how wide

the split of authority is in the lower courts. Perhaps most tellingly, Family Dollar itself has suffered inconsistent outcomes within two different circuits on the exact same procedural issue. *Compare Grace v. Family Dollar Stores*, 2007 WL 2669699, *3 (W.D.N.C. Sept. 6, 2007) ("A collective action is never appropriate for situations where a court must make an individual determination of each plaintiff's day-to-day activities.").[3]

The paucity of circuit decisions addressing § 216(b) procedure in the 71 years since Congress enacted the FLSA shows how infrequently this issue receives appellate review. Without interlocutory review available to appeal § 216(b) certification decisions, the issue almost never reaches the appellate courts.[4] The litigation against Family Dollar illustrates why. If the district court denies certification of a collective action, the plaintiffs are more likely to file suit elsewhere, not appeal. Losing defendants, by contrast, cannot immediately appeal § 216(b) certification. Pet. 20 (collecting cases). An interlocutory appeal of either decision via 28 U.S.C. § 1292(b) is purely discretionary. Although they now laud § 1292(b) (Opp'n 20–21), Respondents *in this case* defeated Family Dollar's motion for § 1292(b) certification by arguing that the

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[3] The district court in *Grace* recently granted Family Dollar summary judgment on the executive exemption. *See Grace v. Family Dollar Stores*, No. 3:08 MD 1932 (W.D.N.C. July 9, 2009) (Doc. 172).

[4] This phenomenon also hindered the development of meaningful standards under Rule 23 until Rule 23(f) was adopted. *See* FED. R. CIV. P. 23, advisory committee notes to 1998 Amendments.

certification question was purely factual and that appellate review of this procedural issue would not lead to "the ultimate termination of the litigation." Doc. 377 at 1–6. And mandamus review is extraordinary, as the Eleventh Circuit's denial of Family Dollar's pretrial mandamus petition in this case (Doc. 398) shows.

This case thus presents the Court the rare opportunity to review certification of an FLSA collective action. As the *amici* have shown, this case presents the ideal vehicle to decide what standards should govern § 216(b) certification. Nat'l Retail Fed'n Br. 2–7; DRI Br. 13–15; Chamber Br. at 6–11. Family Dollar has withstood enormous pressure to litigate this case to a multi-million-dollar judgment and appeal the issue all the way up to this Court. Retailers facing similar litigation in the future may not have the wherewithal to bring the issue here.

Given the significance of § 216(b) to federal class litigation, the conflicting results reached in similar cases in the lower courts, and the barriers to regular appellate review, this Court's intervention is warranted. *See Heffron v. Int'l Soc. for Krishna Consciousness*, 452 U.S. 640, 646 & n.9 (1981); *Murphy Bros. v. Michetti Pipe Stringing*, 526 U.S. 344, 349 & n.2 (1999).

4. The decision below is wrong. The Eleventh Circuit's holding that a collective action may be certified "where plaintiffs share common job traits" (Pet App. 64a) sets far too lax a standard for such a powerful class device. The Eleventh Circuit's use of Family Dollar's uniform classification of all store managers as exempt to justify § 216(b) certification compounded the court's

error. *See* Pet. App. 63a–69a. That justification is not only out of touch with business realities, it is in serious tension with two recent Ninth Circuit decisions holding that an employer's uniform classification decision could not justify certification of a Rule 23(b)(3) class action due to the predominance of individual exemption issues. *In re Wells Fargo Home Mortgage Overtime Pay Litigation*, __ F.3d __, 2009 WL 1927711 (9th Cir. July 7, 2009); *Vinole v. Countrywide Home Loans*, __ F.3d __, 2009 WL 1926444 (9th Cir. July 7, 2009).[5]

The Eleventh Circuit's decision also threatens the national retail business model. Most nationwide retailers use the same structure to manage stores spread across the country. Each store has a store manager who protects the money on hand, ensures the inventory is not shoplifted or stolen by the employees, responds to emergencies, and supervises the employees on a daily basis. A remote district manager overseeing the operations of dozens of stores cannot do any of this. The need for someone in charge of each freestanding store explains why virtually every retailer classifies its store managers as exempt and pays them a salary. Yet that uniform classification decision—which makes good business sense—now makes every retailer vulnerable to nationwide collective actions. Although small mom-and-pop retailers may be immune, every national retailer with a presence in Alabama, Florida, or Georgia will be subject to high-stakes litigation if the Eleventh Circuit's decision stands.

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[5] *Wells Fargo* and *Vinole* were diversity cases under California's wage and hour laws, so Rule 23, not § 216(b), governed those class actions.

5. Finally, Respondents misconstrue the factual record. Drawing on the representative evidence presented at *trial* (which the Eleventh Circuit viewed in the light most favorable to the plaintiffs), Respondents have portrayed Family Dollar store managers as monolithic. *See* Opp'n 4–16. But the issue is whether this case should have been decertified before trial. The record for this issue is the evidence Family Dollar presented at the decertification stage. That factual record shows substantial divergence among the Plaintiffs on the management duties that determine the executive exemption. Family Dollar has given the Court the charts of the 255 depositions it was allowed to take. SA-6–40; SA-42–64. Those charts did not "cherry pick" (Opp'n 33–34) the relevant management duties. Comparing the 14 column headings (SA-42) with 29 C.F.R. § 541.102(b) (2003) and *id.* § 541.102 (2006) shows that the charts covered virtually all the duties the FLSA regulations use to define "management." The charts also refute any suggestion that the Plaintiffs are "similarly situated."

Rather than respond to the decertification evidence, Respondents falsely claim that the Eleventh Circuit found Family Dollar's charts "misleading." Opp'n 33. It did no such thing. Although full transcripts of all 255 depositions were in the record (Doc. 230) and Family Dollar included deposition page references for every answer charted (SA-66–82), the court merely quibbled with three of the chart's 3,570 cells based on one plaintiff's deposition. Pet. App. 65a n.44. The court did not dispute the deeply inconsistent testimony given by 255 plaintiffs on their managerial duties.

In a last-ditch effort to avoid the decertification record, Respondents return to the evidence at trial and claim that Family Dollar should have called more witnesses to prove its exemption defense. Opp'n 36. This ignores the fundamental procedural error at the core of this case. What happened at trial is irrelevant if the case should have been decertified before trial. Under the FLSA, the exempt status of a retail manager "*must* be based on all the facts in a *particular case*" and determined "on a *case-by-case* basis." 29 C.F.R. §§ 541.700(a), 541.106(a) (2006) (emphasis added). Family Dollar had the legal right to examine each plaintiff individually to determine his or her exempt status. Allowing 1,424 exemption claims to proceed in one collective action abridged Family Dollar's substantive right to defend itself against each claim individually.

This is where due process comes in. The conflict in this case is between the FLSA's executive exemption, which requires that each plaintiff's claim be decided separately, and its procedural collective action device, which allows "similarly situated" plaintiffs to be treated the same. Superficial similarity cannot justify a collective action where there are irreconcilable differences on the only issue to be adjudicated. If the certification procedure under § 216(b) means anything, the plaintiffs must be so "similarly situated" that their testimony is interchangeable on the facts that lead to liability. A class or collective action leads to judicial efficiency only where liability to the many can be fairly imposed based on representative testimony from the few. This is only possible where the facts dispositive of each plaintiff's legal claim are so similar that it doesn't matter which plaintiff testifies.

Not so here. And no trial procedure or jury instruction could change the plaintiffs' heterogeneity. Even though the District Court ordered plaintiffs' counsel to select the "representatives" who would testify (Doc. 384 ¶ 9(b)) and instructed the jury that their testimony was "representative of other employees who perform substantially similar work" (Doc. 719 at 9), those instructions hid the true facts revealed at decertification. And by charging the jury to render an all-or-nothing verdict for 1,424 plaintiffs based on the testimony of the 7 "representative plaintiffs who did testify" (*id.* at 10), the instruction ensured that the outcome would be unfair regardless of who won. *See* Pet. 30–32. Refusing to decertify the collective action thus sacrificed the individual adjudication necessitated by the true facts and required by the FLSA. Instead, the testimony of very few determined the fate of all plaintiffs, regardless of how different they really are.

Due process does not permit such rough justice. Liability for so many cannot be imposed based on the testimony of so few where all of their testimony is so inconsistent. *See Hansberry v. Lee*, 311 U.S. 32, 44–45 (1940).

To avoid these problems, the Court should read § 216(b) in a way that is consistent with its Rule 23(b)(3) jurisprudence. Such a reading would assure that the plaintiffs share common questions of fact or law, that individual issues of liability do not predominate, that a collective action is superior to case-by-case litigation, and that a collective trial can be managed fairly and efficiently without devolving into a series of mini-trials.

Under that approach, Family Dollar would not have been forced to try 1,424 different claims in one collective trial before one jury. Instead, the case would have been decertified so that Family Dollar could defend itself against each exemption claim individually.

The Court should grant certiorari, vacate the judgment, and decertify the collective action so the plaintiffs' claims may be litigated individually as the FLSA requires.

Respectfully submitted,

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