No. 16-204

IN THE

Supreme Court of the United States

FTS USA, LLC AND UNITEK USA, LLC,

Petitioners,

v.

EDWARD MONROE, FABIAN MOORE, AND TIMOTHY WILLIAMS, INDIVIDUALLY AND ON BEHALF OF ALL OTHER SIMILARLY SITUATED INDIVIDUALS,

Respondents.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The plaintiffs in this case are a group of cable technicians who brought a Fair Labor Standards Act suit against their employer, FTS, for improperly denying them overtime pay. The district court certified the case as a collective action, finding the technicians similarly situated. At trial, common proof in the form of testimony from corporate officials and technicians, including technicians originally selected by FTS, established that the company enforced an unlawful company-wide policy requiring technicians to underreport their hours worked. The jury found a willful class-wide FLSA violation, and the district court entered judgment in accordance with the jury's factual findings.

The questions presented are:

1. Whether the district court abused its discretion in declining to decertify the collective action post-trial or, despite not limiting FTS's ability to put on its case, violated FTS's due process rights in allowing the technicians to present representative testimony; and

2. Whether, after FTS rebuffed an offer to impanel a second jury on damages, the district court violated the Seventh Amendment by entering a damages award based on stipulated payroll records and the jury's factual findings regarding hours worked.

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INTRODUCTION

This case involves nothing more than the straightforward application of well-settled FLSA principles. Based on a fully developed factual record, the district court determined that the technicians were "similarly situated" because they all performed the same job, received wages under a uniform compensation plan, and were subject to a corporate policy of systematically requiring technicians to underreport hours worked. After trial, the jury rendered a verdict of a willful, class-wide FLSA violation, finding that the plaintiff technicians had met their burden of proving uncompensated time, whereupon the court entered a statutory damages award consistent with the jury's factual findings and the employer's uncontroverted payroll records. The Sixth Circuit's decision, applying proper standards of review to sustain the certification, verdict, and judgment, was correct and does not warrant this Court's review.

Petitioners' contrary claim, centered on an allegedly "square[]" conflict between the Sixth and Seventh Circuits, Pet. 15, rests on a misreading of a single opinion, *Espenscheid v. DirectSat USA, LLC*, 705 F.3d 770 (7th Cir. 2013). Like the decision below, *Espenscheid* affirmed a district court's discretionary certification-stage decision based on the particular facts before it. Insofar as petitioners fault the Sixth Circuit here for refusing to import Rule 23 certification requirements into the FLSA's collective action mechanism based on *Espenscheid*, they are wrong.

Petitioners' sundry claims of further "egregious" errors, Pet. 29, and "multiple" additional conflicts,

id. 14, distort settled law. Petitioners received due process: they had a full opportunity to present relevant evidence, and the district court acted entirely appropriately in permitting representative proof at trial. Nor were petitioners' Seventh Amendment rights violated: the jury in this case made all the factual findings required to support an award of statutory damages. Moreover, petitioners fail to show genuine conflict with any court's decision on either issue. In any event, as a consequence of petitioners' own litigation choices, the issues they ask the Court to decide are not properly presented here.

At bottom, the petition requests that this Court do exactly what it said it would not last Term: promulgate categorical rules for representative evidence in aggregate litigation. *See Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1046 (2016). Doing so would upend a long line of FLSA precedent dating back to *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946), just to afford petitioners yet another bite at the apple. This Court should decline that invitation.

STATEMENT OF THE CASE

Although petitioners seek to overturn a decision sustaining a jury verdict, they do not state the facts necessary to fairly evaluate their contentions. A reader of the petition would be unaware, for example, that: (1) FTS agreed to the method of selecting the subset of technicians who ultimately testified at trial; (2) half of the technicians FTS selected testified at trial; (3) the technicians who testified consistently described receiving underreporting instructions from corporate officials and managers; (4) the jury heard technicians' testimony together with other common

evidence from corporate officials, managers, and administrators verifying a top-down company-wide underreporting policy; and (5) the employer never sought to introduce testimony from any other technician nor asked for random sampling.

1. In 2008, cable technicians Edward Monroe, Fabian Moore, and Timothy Williams (respondents here) brought this Fair Labor Standards Act collective action against their employers, FTS and parent company UniTek,[1] complaining that FTS denied them required overtime compensation. They alleged that FTS "required technicians to systematically underreport their overtime hours," and when that failed, managers "falsified timesheets themselves" – all pursuant to "a company-wide time-shaving policy." Pet. App. 3a.

2. The FLSA generally requires employers to pay employees a premium for any hours worked in excess of forty per week. 29 U.S.C. § 207(a). The FLSA also requires employers to "make, keep, and preserve" accurate records of hours their employees worked. 29 U.S.C. § 211(c). When an employer willfully violates the FLSA, employees are entitled to additional remedies. *See McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133-35 (1988).

Since its enactment, the FLSA has authorized employees to bring collective actions on "behalf of . . . themselves and other employees similarly situated." 29 U.S.C. § 216(b). Unlike Rule 23 class actions, FLSA collective actions have an opt-in requirement, meaning "[n]o employee shall be a party

[1] Petitioners are jointly referred to as "FTS."

plaintiff . . . unless he gives his consent in writing to become such a party." *Id.*

Courts typically follow a two-stage process in certifying a collective action. First, the court decides whether the plaintiffs and potential opt-in plaintiffs are sufficiently "similarly situated" to warrant notifying these other employees of their opt-in right and allowing the case to proceed through discovery. Second, the court considers certification again with the benefit of discovery. If the court grants final certification, "the action proceeds to trial on a representative basis." 7B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1807 (3d ed. 2005); *see also Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, 171 (1989) (explaining courts' broad authority to manage early stages of collective actions).

FLSA plaintiffs bear the burden of proving that they "in fact performed work for which [they were] improperly compensated" and producing "sufficient evidence to show the amount and extent of that work." *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946). But in cases where the employer fails to keep accurate time records, courts use a burden-shifting framework for determining statutory damages: once plaintiffs establish the fact of uncompensated work and the amount of such work "as a matter of just and reasonable inference," the burden "shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference." *Id.* at 687-88. "If the employer fails to produce such evidence, the court may then award

damages to the employee[s], even though the result be only approximate." *Id.* at 688.

3. The district court granted conditional certification of the collective action. Pet. App. 74a. After the notification period, 293 additional current and former FTS technicians opted in, for a total of 296 plaintiffs. *Id.* 5a.

The court approved a joint motion and memorandum proposing how the case should proceed. The parties agreed to jointly select "fifty (50) Plaintiffs they believe[d] [we]re representative of the conditionally certified class," Joint Mot. & Mem. for Modification of Disc. 4, *Monroe v. FTS USA, LLC*, No. 2:08-CV-02100 (W.D. Tenn. Feb. 14, 2008), ECF 162, with the technicians choosing forty and FTS choosing ten, Pet. App. 5a. The parties' agreement expressly contemplated "a trial plan based on representative proof" -- namely, that "a certain number of Plaintiffs from the pool of fifty" would testify at trial. Joint Mot. 5.

4. At the second stage of certification, the district court reviewed the discovery the parties conducted under their agreement, determined the class members were "similarly situated," and denied FTS's motion for decertification. The court also denied FTS's motion for summary judgment. *See* Pet. App. 108a.

The district court rejected FTS's assertions that the technicians' evidence, involving different locations and supervisors, failed to show a sufficiently unified corporate policy. Pet. App. 104a. The court found that all technicians in the suit were similarly situated because they were "tasked with the same job responsibilities and subject to pay under the same

piece-rate system." *Id.* The court also highlighted that the technicians' "claims rely on a series of common methods by which [FTS] allegedly deprived technicians proper overtime pay." *Id.*

Specifically, technicians from across the company described common practices in which managers "(1) altered technicians' timesheets to eliminate or understate overtime hours; (2) directed technicians to either not report or underreport their overtime hours; and (3) discouraged the reporting of overtime by use of a piece-rate compensation system accompanied by the threat of being terminated." Pet. App. 104a. The court held the record supported an inference of a FLSA overtime violation "result[ing from] a pervasive policy within the ranks of Defendants' management to deny pay for compensable overtime." *Id.* 98a.

In allowing the case to go to trial as a collective action, the district court considered the fairness and efficiency of such a proceeding and the possibility of impairing FTS's ability to effectively litigate its defenses. *See* Pet. App. 105a-106a. The court rejected FTS's argument that "the finder of fact must assess each plaintiff's credibility," explaining that "the FLSA contemplates that representative testimony may be used to adjudicate the claims of nontestifying plaintiffs and thereby arrive at an approximation of damages." *Id.* In any event, the court observed, the parties' earlier agreement to focus discovery on fifty representative plaintiffs "manifest[ed] Defendants' acquiescence to a process by which the remaining members of the class would not have to produce evidence." *Id.* 94a.

FTS then brought a motion to "preclude representative proof at trial" raising similar

arguments. Pet. App. 109a. The district court denied that motion, explaining that accepting FTS's contention "would have the effect of decertifying the class." *Id.* 110a.

5. At trial, the technicians called twenty-four witnesses, including seventeen technicians from the pool of fifty. Pet. App. 6a. Five of the seventeen were among those FTS had originally selected for the pool.

The technicians also called managers and executives who confirmed that the underreporting policy came from the top of the company. The corporate office directed managers to ensure their technicians underreported time. Pet. App. 4a. The jury heard common evidence of conference calls and site visits where executives reinforced the policy. *See id.*; *see also id.* 16a, 80a.

Managers and technicians testified to the policy's implementation. In keeping with FTS's scheme, technicians "either began working before their recorded start times, recorded lunch breaks they did not take, or continued working after their recorded end time." Pet. App. 3a-4a. Some managers physically altered timesheets by writing over technicians' entries or using Wite-Out. *Id.* 16a-17a. Technicians, including FTS-selected plaintiffs David Lighty and Matthew Queen, testified to having complained repeatedly to managers and the corporate human resources director about the underreporting policy resulting in the loss of wages on a weekly basis, but to no effect. *See, e.g.*, Trial Tr. 1754, 1761, 1765, ECF 463.

FTS called only four witnesses, all company executives, Pet. App. 6a, who denied that technicians were unpaid for overtime work, *see, e.g.*, Trial Tr.

1215-16, 1235, ECF 459. FTS did not call any technicians – not even any of the ten they had originally selected as representative plaintiffs – nor any managers. Nor did FTS seek to call any technician who was not a party to the case. In closing argument, FTS told the jury that its timekeeping system "relie[d] on the technicians to be truthful," Trial Tr. 1797, ECF 463, and that a policy requiring accurate recording was "right in the handbook" issued to employees, *id.* 1793. FTS pointed to evidence that it had paid overtime premiums for hours recorded on timesheets as proof the company complied with the FLSA. *See id.* 1804.

6. The jury returned a verdict for the technicians on the issue of class-wide liability, finding that FTS had willfully violated the FLSA overtime requirement. The jury also determined the average number of unrecorded hours worked per week by each testifying plaintiff. The testifying technicians averaged 13.3 unrecorded hours per week. The twelve technicians respondents chose averaged 12.5 hours; the five technicians FTS chose averaged even more: 15.8. *See* Verdict Form, ECF 364-1.

7. After Judge Donald, who had presided at trial, was elevated to the Sixth Circuit, the case was reassigned for post-trial proceedings. Pet. App. 8a n.2. At a subsequent status conference, FTS argued that the verdict was legally insufficient because jurors had not determined a dollar amount for damages, but had found only the number of unrecorded hours. *See id.* 223a-224a, 228a. In response, the district court offered to convene a second jury on the issue of damages, but petitioners declined. FTS maintained: "the only thing, quite frankly, that's left and that is appropriate is an

entry of judgment . . . either for the defense or liability for plaintiffs and with zero damages." *Id.* 223a. The judge rejected FTS's contention and invited a "more constructive approach from the defense." *Id.* 229a.

Respondents moved for the district court to enter final judgment and award the technicians the overtime pay to which they were entitled by using the jury's factual findings on unrecorded hours worked and stipulated payroll records. Pet. App. 116a. The amount of overtime pay would be mathematically calculated by first determining each employee's overtime hours (hours recorded in the stipulated payroll records, plus weekly unrecorded hours determined by the jury, minus forty), multiplying the overtime hours by the regular hourly rate of pay (weekly compensation divided by hours worked), and then applying the FLSA overtime premium multiplier. *See* 29 C.F.R. § 778.111(a).[2] The court adopted that approach and accordingly entered judgment on damages in the amount sought by respondents. Pet. App. 117a.

FTS requested judgment as a matter of law and a new trial and again sought decertification. The district court denied these motions. Pet. App. 118a.

8. The Sixth Circuit affirmed the district court's decision denying decertification and upheld the jury verdict. Pet. App. 43a. The court also rejected FTS's

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[2] The parties disputed whether the statute's default premium of 1.5 times the employee's hourly rate, 29 U.S.C. § 207(a), or a 0.5 multiplier for certain "piece rate" employees, was applicable on the facts of this case. The district court concluded the larger multiplier was warranted, but the court of appeals disagreed. Pet. App. 41a-43a.

argument that the damages award violated their Seventh Amendment rights. *Id.* 40a-41a.

a. The court of appeals concluded that the district court had not abused its discretion in certifying a Section 216(b) collective action. Highlighting that the district court had ruled on petitioners' second decertification motion with the benefit of the entire trial record, the court of appeals decided that the "[t]echnicians' claims are unified by common theories: that FTS executives implemented a single, company-wide time-shaving policy to force all technicians . . . to underreport overtime hours worked on their timesheets." Pet. App. 19a.

The court of appeals rejected FTS and the dissent's contention that a collective action was inappropriate because the evidence showed "multiple policies," including falsifying timesheets and instructing employees to underreport hours. *See* Pet. App. 17a-18a. Instead, the court explained, the fact "[t]hat an employer uses more than one method to implement a company-wide work 'off-the-clock' policy does not prevent employees from being similarly situated for purposes of FLSA protection." *Id.* 18a.

The court also rejected FTS's argument that the Seventh Circuit's decision in *Espenscheid v. DirectSat USA, LLC*, 705 F.3d 770 (7th Cir. 2013), which affirmed a district court's decertification under the abuse of discretion standard, required reversal here. The Sixth Circuit noted its precedent rejected the notion FTS claimed *Espenscheid* embraced: that Rule 23 and Section 216(b) are precisely coextensive. Pet. App. 22a-23a. Moreover, the court identified a number of "legal, factual, and procedural differences" between this case and *Espenscheid*. *Id.* 24a. In *Espenscheid*,

"lack of cooperation by plaintiffs' counsel" in addressing the district court's concerns about litigating a hybrid class-collective action with more than 2300 members had left the court "with little choice but to hold as it did." *Id.* 23a (quotation marks omitted). Here, the parties had "agreed to a representative trial plan, completed discovery on that basis, and jointly selected representative members." *Id.* 24a.

b. The court of appeals also held that the common, class-wide evidence was sufficient to support the jury verdict. The record, the court concluded, had "ample evidence" of employer-mandated underreporting. Pet. App. 31a. The court recognized the *Mt. Clemens* burden-shifting framework was appropriate here given FTS's failure to accurately record hours worked. *See* 36a-37a. The defendants in *Mt. Clemens* had unsuccessfully advanced an argument similar to FTS's here -- that individual testimony was needed from each plaintiff in the class. *See id.* 12a-13a. The court of appeals invoked this Court's observation that such a rule would have "'the practical effect of impairing many of the benefits' of the FLSA." *Id.* 13a (quoting *Mt. Clemens*, 328 U.S. at 686).

c. Finally, the court of appeals rejected petitioners' Seventh Amendment challenge to the statutory damages award. Pet. App. 39a. The court concluded FTS had "abandoned and waived any right to a jury trial on damages that they may have had" by rejecting the district court's offer to impanel a second jury to calculate damages. *Id.* 40a-41a. Even if there had been no waiver, the court held, the Seventh Amendment was not violated in this case because the jury had determined that all technicians had proven their

claims and had made all "the factual findings necessary for the court to complete the remaining arithmetic." *Id.* 39a.

d. In dissent, Judge Sutton expressed disagreement with the majority's resolution of both the jury-trial and certification issues. But he rejected FTS's primary contention on appeal that a "collective action was not an option." Pet. App. 48a-49a. He clarified that his view would not require that respondents' claims be adjudicated on an individual basis, only as a collective action "with two or three sub-classes." *Id.*

9. FTS petitioned for rehearing en banc. Pet. App. 129a. While that petition was pending, this Court decided *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036 (2016). In *Tyson*, a FLSA case, the Court refused to announce general rules restricting the use of representative proof, explaining that such evidence often "is the only practicable means to collect and present relevant data establishing a defendant's liability." *Id.* at 1046 (quotation marks omitted). The Court upheld certification. *See id.* And the Court expressly reaffirmed and applied the *Mt. Clemens* burden-shifting framework for cases where the employer has violated its statutory obligation to accurately record hours worked. *Id.* at 1047.

The court of appeals denied rehearing. No judge – including Judge Sutton -- recorded a dissent or even requested a vote. Pet. App. 129a.

REASONS FOR DENYING THE WRIT

The Sixth Circuit's decision, sustaining the district court's denial of FTS's decertification motion

and upholding the jury verdict in respondents' favor, does not warrant further review. The Sixth Circuit broke no new ground and carefully reviewed a lengthy and fully developed factual trial record, correctly applying familiar legal principles to the particular facts of this case.

Petitioners' contrary assertions, of "multiple" conflicts and serial constitutional errors, *see* Pet. 14, do not withstand passing scrutiny. To be sure, the decision below rejected petitioners' suggestion, ostensibly derived from *Espenscheid*, that Rule 23's requirements for class certification be read into the FLSA's collective action regime. But no court of appeals -- including the Seventh Circuit -- has accepted petitioners' position. And for good reason: the text, structure, and purposes of the two provisions are fundamentally different. Although this Court has described Rule 23 requirements as *serving* due process purposes – especially protecting absent plaintiffs from being unfairly bound by judgments – no court has held that they are constitutionally *compelled* in every case where parties litigate jointly.

Likewise, no decision of this Court has held or intimated that due process prohibits litigants from introducing testimony of representative plaintiffs unless they are "chosen randomly." Pet. 20. To the contrary, this Court has for generations upheld verdicts in class and collective actions that relied on a small subset of the class as witnesses, whose participation at trial was not the result of a random draw.

Petitioners' final claim of an additional "square[] conflict[]" over the Seventh Amendment right to a damage determination, *see* Pet. 28, fares no better.

The district court did not increase a "zero" damages award or "substitute" its "figure" for the jury's finding. *See* Pet. 30-31. Instead, it awarded statutory damages based on the jury's findings of unrecorded hours and the employer's stipulated payroll records.

Moreover, petitioners explicitly declined the opportunity to impanel a second jury to determine these damages. And they identify no case where a party who has done so is then allowed to somehow transform such a waiver into a violation of its Seventh Amendment rights.

Finally, this case would be a poor vehicle for addressing the questions petitioners seek to raise. It would be extraordinary to decide whether Section 216(b) imposes Rule 23 requirements in a case where the party did not seek those requirements. Or to compel random sampling in a case where the party did not insist on statistical sampling and instead agreed to a plan providing for the joint selection of representative technicians. Or to find a Seventh Amendment violation where a party declined a proposal to impanel a damages jury. In the end, the issues petitioners raise are entirely fact-specific and not certworthy.

I. The Sixth Circuit's Decision Upholding Certification and the Jury Verdict Does Not Conflict with the Decision of Any Other Court.

Petitioners attempt to manufacture a conflict of authority over (1) the proper standard for certifying a FLSA collective action and (2) due process limitations on representative proof in "aggregate litigation." *See* Pet. 14. Neither claim withstands scrutiny.

A. There Is No Conflict Between the Sixth and Seventh Circuits About the Standard for Certifying a FLSA Collective Action.

The centerpiece of petitioners' request for this Court's review is a supposed "direct conflict[]" between the law of the Sixth and Seventh Circuits. Pet. 4. Specifically, petitioners assert the decision in this case conflicts with both the "reasoning and result" of *Espenscheid v. DirectSat USA, LLC*, 705 F.3d 770 (7th Cir. 2013). Pet. 3. No such conflict exists.

1. Petitioners seize on a passage in the opinion below rejecting the notion, attributed to *Espenscheid*, that the same standards apply for final certification of Section 216(b) collective actions and Rule 23 class actions, asserting the holdings of the two cases irreconcilably conflict. *See* Pet. 15-17. But that argument reads language in the Seventh Circuit opinion out of context. The district court in *Espenscheid*, confronting a hybrid case with both FLSA and state-law claims, decertified both the FLSA and Rule 23 classes. In affirming both rulings, Judge Posner, writing for the court, stated "there isn't a good reason to have different standards for the certification of" collective and class actions. 705 F.3d at 772. But *Espenscheid* did not proceed to "appl[y]" any Rule 23 requirement to the final collective action certification decision, *see* Pet. 15, nor did it cite any Rule 23 precedent.

In fact, in decisions both before and after *Espenscheid*, the Seventh Circuit has acknowledged that Rule 23 and Section 216(b) impose different certification standards. *See, e.g.*, *Alvarez v. City of Chicago*, 605 F.3d 445, 448 (7th Cir. 2010) ("A collective action is similar to, but distinct from, the

typical class action brought pursuant to Fed. R. Civ. P. 23."); *cf. McMahon v. LVNV Funding, LLC*, 744 F.3d 1010, 1017 (7th Cir. 2014) (reasoning that Rule 23 actions are "fundamentally different from collective actions under the FLSA" (quotation marks omitted)).

2. Nor do the "result[s]," Pet. 3, in this case and *Espenscheid* conflict. Petitioners' contrary assertion that the appellate decisions reached "precisely the opposite result on essentially the same facts," *id.* 17, is simply not so. In reality, both opinions upheld district court decertification decisions under the abuse of discretion standard of review.

In *Espenscheid*, the district court was confronted with a hybrid action involving more than 2300 plaintiffs and alleging violations of multiple states' laws. 705 F.3d at 771. The district court granted initial certification, but later ruled that the trial should proceed using subclasses and should be bifurcated. *Id.* at 775. The plaintiffs' attorneys responded "truculently" and "refus[ed] to suggest a feasible alternative" trial plan. *Id.* at 775-76. The district court then decertified the classes prior to trial, citing this ongoing failure to cooperate. *Id.* at 773. The Seventh Circuit concluded, under the circumstances, that the district court's decision was well within its discretion. [3]

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[3] Neither the *Espenscheid* district court nor the Seventh Circuit held, as petitioners suggest, that the claims should have been litigated in more than 2300 individual suits. *See* Pet. 16. Nor was *Espenscheid* a manifesto against representative testimony. Judge Posner endorsed litigation by the Secretary of Labor on employees' behalf, *see* 705 F.3d at 776, and such cases are generally proven with testimony from a nonrandom subset of participants.

In contrast, the final ruling on certification here was rendered after a full trial. The technicians' attorneys complied with the district court's orders and presented and followed a feasible trial plan. And unlike in *Espenscheid*, where the proposed representative witnesses were all chosen by the plaintiffs, 705 F.3d at 774, respondents and FTS *agreed* to the method by which testifying technicians would be selected, contemplating that the trial would proceed with "representative proof," Joint Mot. & Mem. for Modification of Disc. 5, ECF 162. Every technician witness called by respondents was on FTS's witness list. Indeed, five of the technicians they called were selected originally by FTS as representative plaintiffs.

These factual and procedural differences – rather than irreconcilably different legal rules -- explain why the Seventh Circuit held that the decertification order in *Espenscheid* was not an abuse of discretion, and the Sixth Circuit found no abuse of discretion in denying decertification here.[4]

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[4] Petitioner UniTek was also a party in *Espenscheid*. There, it pointed to this case as one where plaintiffs could properly be deemed similarly situated. It argued to the Seventh Circuit that it was "reasonable to believe" in this case (but not in *Espenscheid*) that "the testifying witnesses' experiences [we]re *sufficiently similar* to those of the rest of the non-testifying plaintiffs." Br. for Defendants-Appellees at 20, *Espenscheid*, 705 F.3d 770 (No. 12-1943), 2012 WL 5231578 (quotation marks omitted) (citing *Monroe v. FTS USA, LLC*, 763 F. Supp. 2d 979 (W.D. Tenn. 2011)). The very factual differences petitioners deride here as "makeweights," Pet. 17 n.4, were ones they identified as critical before the Seventh Circuit.

3. Broadening the focus beyond *Espenscheid* reinforces the absence of any conflict between the Sixth and Seventh Circuits.

In the Sixth Circuit, district courts decide whether FLSA plaintiffs are similarly situated by examining whether their claims are "unified by common theories of defendants' statutory violations." *O'Brien v. Ed Donnelly Enters., Inc.*, 575 F.3d 567, 585 (6th Cir. 2009). Sixth Circuit courts look to three factors in deciding whether a case should proceed as a collective action: (1) the factual and employment settings of individual plaintiffs; (2) the different defenses to which the plaintiffs may be subject on an individual basis; and (3) the fairness and efficiency consequences of collective litigation. Pet. App. 11a.

District courts in the Seventh Circuit examine essentially the same factors: "(1) whether the plaintiffs share similar or disparate factual and employment settings; (2) whether the various affirmative defenses available to the defendant would have to be individually applied to each plaintiff; and (3) fairness and procedural concerns." *Strait v. Belcan Eng'g Grp., Inc.*, 911 F. Supp. 2d 709, 718 (N.D. Ill. 2012) (quoting *Mielke v. Laidlaw Transit, Inc.*, 313 F. Supp. 2d 759, 762 (N.D. Ill. 2004)).

Indeed, there is every reason to conclude the Seventh Circuit would sustain a district court certification decision like the one here. In *Alvarez*, a 2010 decision, the Seventh Circuit *reversed* a district court decertification order in a collective action alleging that the employer systematically miscalculated plaintiffs' overtime in *ten* distinct ways. 605 F.3d at 446-47, 451. In reversing the decertification decision, the Seventh Circuit reasoned

that a collective action could enable "the most efficient judicial resolution of this matter." *Id.* at 451. The court emphasized that "the plaintiffs may be similarly situated even though the recovery of any given plaintiff may be determined by only a subset" of the "common questions" affecting the proposed class. *Id.* at 449.

Similarly, in *Bell v. PNC Bank, National Ass'n*, 800 F.3d 360 (7th Cir. 2015), decided two years after *Espenscheid*, a group of bank employees brought a Section 216(b) collective action and a state-law class action against their employer for failing to pay overtime. The district court certified the case after determining that the plaintiffs were similarly situated. The Seventh Circuit affirmed the certification, reasoning that collective treatment was appropriate to determine whether the bank had an "unofficial policy or practice that required employees class-wide to work off-the-clock overtime hours." *Id.* at 374. As the court observed, the "fact that the plaintiffs might require individualized relief or not share all questions in common does not preclude certification." *Id.* at 379.

B. There Is No Conflict Between the Sixth Circuit and "Multiple Federal and State Courts' Decisions" Either.

Petitioners' effort to conjure a conflict between the decision here and a grab-bag of state and federal cases addressing due process limitations in "aggregate litigation," *see* Pet. 18, also fails. None of the cases petitioners cite was a FLSA collective action. In fact, they point to only one federal decision – the Fifth Circuit's twenty-year-old *In re Chevron U.S.A., Inc.*,

109 F.3d 1016 (5th Cir. 1997) -- that even found a constitutional violation.

But there is no conflict between the decision here and *Chevron*. That case was a mass tort action involving thousands of personal injury, wrongful death, and property contamination claims featuring extraordinarily complex and individualized causation issues. 109 F.3d at 1017-18. The district court proceeded to a representative trial without making any Rule 23 findings. *Id.* at 1018. That approach was sufficiently novel to warrant mandamus. *Id.* at 1021. In contrast, the district court here proceeded within familiar bounds established by seventy years of case law involving the FLSA's congressionally created collective action mechanism. Further, unlike the district court here, the district court in *Chevron* actively prevented defendants from introducing expert testimony. *Id.* at 1017-18.

Duran v. U.S. Bank National Ass'n, 325 P.3d 916 (Cal. 2014), Pet. 19, was also not a FLSA collective action. Instead it was brought under a state analog to Rule 23, alleging violations of state wage-and-hour law. *Id.* at 920. The facts giving rise to the due process violation in *Duran* were fundamentally different from those here. There, a group of loan officers claimed they were misclassified as exempt employees under the California Labor Code. *Id.* The trial court ruled, on the basis of testimony from twenty-two plaintiffs, that the entire class had been misclassified. *Id.* at 922, 926. The employer tried to introduce testimony from seventy-five other class members who each averred they met the exemption requirements. *Id.* at 921-22. But the trial court refused to admit the evidence. *Id.* at 923-24. By contrast, here the district court placed no

limitation at all on FTS's ability to call witnesses or present evidence.

Finally, each of the cases petitioners cite, including *Espenscheid*, was decided without the benefit of this Court's decision last Term in *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036 (2016), which specifically reaffirmed the validity of representative proof in FLSA collective actions, *id.* at 1047. Indeed, *Tyson* rejected as unnecessary and unwise what petitioners urge here: the promulgation of "general rules," applicable across very different legal settings, concerning the use of representative proof. *Id.* at 1046.

II. The Court of Appeals Correctly Applied Settled Law When It Concluded the Certification Ruling Was Within the District Court's Discretion and Declined To Hold the Trial Violated Petitioners' Due Process Rights.

The Sixth Circuit did not, as petitioners assert, "contravene" the FLSA or this Court's case law in affirming the district court. Pet. 3-4. The district court had properly certified this collective action based on the particular facts before it. And the subsequent trial did not violate petitioners' due process rights.

A. The District Court Did Not Abuse Its Discretion in Certifying the Collective Action Under Section 216(b).

The district court was well within its discretion to deny decertification of a collective action challenging FTS's company-wide overtime violations harming similarly situated technicians. And the court applied the proper "similarly situated" test.

1. The issue that actually "divided," Pet. 3, the panel below was whether the district court correctly determined the technicians' claims were sufficiently "similar" to proceed as a collective action. Petitioners cannot seriously claim that this dispute warrants this Court's review. That determination was quintessentially fact-intensive, as both opinions below make clear. It is universally accepted that Section 216(b) requires plaintiffs to be similarly, not *identically*, situated. *See, e.g.*, *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1043, 1048 (2016) (holding both Section 216(b) and Rule 23 certification were appropriate for overtime claims of employees who worked in different departments, spent varying times donning and doffing protective gear, and were not all ultimately entitled to recovery).

And while Judge Sutton faulted the district court for applying the Sixth Circuit's *O'Brien* test[5] for Section 216(b) at too high a "level of generality," Pet. 24, he conceded that claims of required underreporting at the beginning and end of the day were similar enough to be adjudicated in the same collective action. It is hard to see what would be wrong with challenging in the same collective action a policy also implemented through unrecorded lunch-break work and physical timesheet alteration. In fact, the dissent did not even argue that this case was inappropriate for collective litigation; only that subclasses were appropriate. *See* Pet. App. 48a-49a.

In any event, petitioners' contentions that the technicians' "multiple distinct 'theories'" should have

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[5] *O'Brien v. Ed Donnelly Enterprises, Inc.*, 575 F.3d 567, 585 (6th Cir. 2009); *see also* Pet. App. 45a.

precluded a "similarly situated" finding, Pet. 7, ignore the theory of liability underlying the jury's verdict and the supporting evidence showing a pattern and practice of FLSA violations. Using common proof, the technicians established a unitary corporate policy articulated and enforced by FTS corporate officers and implemented through several different means. And respondents, who worked "in the same position," with "the same job description," performing "the same job duties," were "similarly situated" under the company-wide policy. Pet. App. 15a.

Importantly, these technicians' testimony of common means by which FTS imposed its policy was reinforced by compelling direct evidence from managers and executives about a single underlying policy. These witnesses testified that executives directed managers to implement the policy and consistently reinforced it themselves.

Petitioners try to distract from the actual trial record with repeated references to what *Espenscheid* termed "benign underreporting" – technicians "voluntarily underreport[ing] their own time . . . because they wanted to impress the company with their efficiency," Pet. 12 (quotation marks omitted). That is a red herring.

There was nothing "benign" about the underreporting in this case. The jury found that FTS's violation went beyond just permitting its technicians to work overtime. FTS *willfully* violated the FLSA. Pet. App. 7a. And the testimony petitioners have pointed to as evidence of purely self-directed underrecording shows no such thing. For example, technician Matthew Dyke, Def. C.A. Br. 28 n.14, testified that he was told he "need[ed] to keep [his]

hours written down to a minimum," *see* Def. Mot. for Decertification, Ex. 4, at 33, ECF 441-5. These instructions "came from corporate." *Id.* 35. Dyke "wanted to keep [his] job," and so he complied. *Id.* 33. This allegedly "voluntary" underreporting[6] is nothing but a form of corporate coercion. And every other testifying technician gave a similar account.

2. Despite the fact that "Rule 23 actions are fundamentally different from FLSA collective actions," *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1525 (2013), petitioners also argue that the Sixth Circuit should have applied Rule 23's requirements to evaluate the district court's Section 216(b) certification decision. But the Sixth Circuit was plainly correct to distinguish the two provisions.

Section 216(b) and Rule 23 have readily distinguishable textual requirements. *Compare, e.g.*, Fed. R. Civ. P. 23(a)(3) (requiring determinations of numerosity, commonality, typicality, and adequacy), *with* 29 U.S.C. § 216(b) (specifying only that plaintiffs be "similarly situated"). Had Congress meant for Section 216(b) to mirror Rule 23, it is inconceivable that their terms and structure would remain so

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[6] If voluntary underreporting had occurred here, it still would not be legally "benign" as petitioners assume. Even when an employee underreports his work hours for his own reasons and the employer officially discourages that behavior, failure to pay overtime still violates the FLSA if the employer "kn[ew] or ha[d] reason to believe" off-the-clock work was occurring. 29 C.F.R. § 785.11. Obviously, the fact that technicians fill out their own timesheets does not itself relieve an employer of its obligation to accurately record and pay for all overtime work. "The obligation is the employer's and it is absolute." *Caserta v. Home Lines Agency, Inc.*, 273 F.2d 943, 946 (2d Cir. 1959).

distinct over time. *Cf. Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, 173 (1989) (noting that while Congress has cabined certain FLSA provisions, it has "left intact the 'similarly situated' language providing for collective actions").

The difference in requirements makes sense. Rule 23 is strictly a procedural device, subject to the Rules Enabling Act prohibition against "abridg[ing], enlarg[ing] or modify[ing] any substantive right." 28 U.S.C. § 2072(b). Section 216(b) is substantive law, enacted as part of the FLSA to advance the statute's "broad remedial" policy objectives. *Tyson*, 136 S. Ct. at 1047 (quoting *Hoffmann-La Roche*, 493 U.S. at 173). The provision aims to remove "impossible hurdle[s] for the employee," lest the employer get "to keep the benefits of [his] labors without paying due compensation." *Mt. Clemens*, 328 U.S. at 687.

The different standards reflect another important distinction between the two provisions. A Section 216(b) collective action cannot bind potential class members unless they consent in writing to be parties to the action. 29 U.S.C. § 216(b). Under Rule 23(b)(3), a putative member must opt *out* in order to *not* be bound. *See* Fed. R. Civ. P. 23(c)(2)(B)(v)-(vi). The Rule's more stringent requirements ensure adequate representation for those who will be bound by a judgment. *See, e.g.*, *Hansberry v. Lee*, 311 U.S. 32, 42-43 (1940); *cf. Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809-10 (1985).

Petitioners' suggestion that Rule 23's full cadre of requirements must be imported into Section 216(b) to protect defendants, *see* Pet. 22, misunderstands the teachings of their cited cases, which center on absent *plaintiffs'* due process rights. *See, e.g.*, *Taylor v.*

Sturgell, 553 U.S. 880, 891-93 (2008) (addressing "due process limitations" on precluding successive litigation by nonparty plaintiffs); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997). Section 216(b)'s requirement that only a party plaintiff who expressly consents may be bound arguably affords plaintiffs even more protection than Rule 23.

The fact that due process also requires fairness to defendants, including allowing them to pursue defenses, does not support merging the provisions' standards. Indeed, the Sixth Circuit's test for certifying Section 216(b) collective actions requires district courts to consider "the different defenses to which the plaintiffs may be subject on an individual basis" and "the degree of fairness and procedural impact of certifying the action as a collective action." Pet. App. 11a. The district court applied that test, *id.* 102a, explicitly addressing, among other issues, whether the use of representative testimony would significantly impair FTS's ability to raise its defenses, *id.* 106a. (It did not.)

B. The Trial Did Not Deny Petitioners Due Process.

Petitioners suggest that the Due Process Clause entitled them to examine each technician plaintiff so as to vindicate their right to any individual defenses they had. *See* Pet. 24. Or, as a fallback, they ask the Court to announce a novel constitutional rule requiring that slates of witnesses testifying in "aggregate litigation" must be selected through formal, randomized statistical sampling. Pet. 14. Both contentions lack merit.

1. Petitioners' insistence that each technician plaintiff should have participated at trial contradicts decades of precedent and indeed attacks the entire enterprise of representative litigation. *Tyson* broadly reaffirmed the appropriateness of representative proof in a wide range of legal settings, including to establish liability in FLSA actions. 136 S. Ct. at 1048. In so doing, the Court took as its starting point the seventy-year-old *Mt. Clemens* precedent, in which the burden of establishing the number of overtime hours worked by 300 plaintiffs was met through the testimony of seven employees. *Id.* at 1047.

Representative proof is so unexceptional in FLSA collective actions that petitioners themselves entered into an agreement limiting discovery to a subgroup of technicians and expressly contemplating that trial testimony would be drawn from this "representative sample." Pet. App. 5a. The district court considered the effect on petitioners' individual defenses in denying decertification. And petitioners retained the most important protection the Constitution affords litigants in this situation: the right to call witnesses and introduce any relevant evidence to bolster their defense.

2. Petitioners' ostensible fallback position -- a categorical, constitutional rule requiring formal random statistical sampling for selecting testifying witnesses, *see* Pet. 18-20 – is unsupported. Even in Rule 23 class actions, the representative plaintiff must be "typical," but there is no requirement that she be selected randomly from the class. *See* Fed. R. Civ. P. 23(a)(3). *Tyson*'s emphatic rejection of "general rules" that would "reach too far," 136 S. Ct. at 1046, surely applies to petitioners' proposed constitutional rule.

The *Tyson* Court held out the representative testimony in *Mt. Clemens* as plainly permissible, without any suggestion it comported with the random selection rule petitioners urge here.

3. Nor, contrary to petitioners' drumbeat assertions of unfairness and "bias," Pet. 19, do the facts of this case give rise to a colorable as-applied due process claim. Petitioners did not ask the district court to apply random sampling in discovery, let alone argue that due process required it. On the contrary, they agreed to the selection process and actively participated in it. That alone should be fatal.

Furthermore, petitioners' arguments mischaracterize the case the technicians actually presented to the jury and the defense petitioners could have presented. To establish FTS's unlawful policy, respondents relied on common proof of technician testimony together with direct evidence and testimony from managers, administrators, and corporate executives. For their part, petitioners remained free to call any other technicians – including thirty-two others on their own witness list, five of whom they had "handpicked," *see* Pet. 3, and including nonparty technicians. Petitioners simply chose not to call any witnesses beyond corporate executives. This case is thus the polar opposite of *Duran v. U.S. Bank National Ass'n*, 325 P.3d 916 (Cal. 2014), where the employer came forward with exonerating employee witnesses, but the court prohibited them from testifying. Due process does not entitle petitioners to relief from the consequences of their trial litigation choices.

Petitioners' claims ring especially hollow in light of the facts their own originally selected witnesses established at trial. Not only do petitioners omit that

they jointly selected technicians for the representative witness pool, but also they ignore that half the witnesses they originally chose testified at trial. These witnesses all testified to being required to underreport their hours worked. And the jury found these technicians – theoretically those most likely to provide evidence favorable to the defense – worked *more* unrecorded hours than the witnesses who had been originally designated by respondents.

To the extent petitioners claim they were entitled to a formal jury finding on "representativeness," Pet. 20, that would be as plainly inappropriate as a jury finding that a Rule 23 representative was "typical." In any event, their arguments ignore the reality of the rights the parties retained at trial. Again, petitioners chose not to call a single technician at trial, and the jury rejected petitioners' contention that they paid technicians lawfully.

III. FTS's Seventh Amendment Claim Does Not Warrant This Court's Review.

Having failed to provide a credible due process challenge to the Sixth Circuit's damages rulings, petitioners attempt to raise the same objections as Seventh Amendment violations. They insist this repackaged claim of error "independently warrants this Court's intervention." Pet. 27. It does not.

A. The Decision Below Does Not Implicate Any Split Among the Circuits About the Seventh Amendment.

Petitioners cite two decisions which they say "squarely conflict[]," Pet. 27-28, with the decision below. But there is no conflict whatsoever.

1. Petitioners claim this case and the Second Circuit's decision in *Grochowski v. Phoenix Construction*, 318 F.3d 80 (2d Cir. 2003), occupy opposite sides of a conflict over whether the procedure used here "determining damages . . . violates the Seventh Amendment." *See* Pet. ii. That claim is hard to understand: *Grochowski* addresses neither damages nor the Seventh Amendment.

In *Grochowski*, nine construction workers brought a FLSA action against their employer but did not seek collective action certification and therefore were never determined to be similarly situated. The issue was whether the five testifying plaintiffs provided sufficient evidence to prove liability for the other four plaintiffs who did not appear at trial. *Grochowski*, 318 F.3d at 87. The district court granted judgment as a matter of law against the absent workers. *Id.* at 89. In affirming, the Second Circuit relied not on the Seventh Amendment but on ordinary principles of sufficiency of evidence. *See id.* at 87-89.

2. The Fifth Circuit's decision in *Cimino v. Raymark Industries, Inc.*, 151 F.3d 297 (5th Cir. 1998), did involve the Seventh Amendment – but not the FLSA. In *Cimino*, a mass tort class action, the Fifth Circuit placed special emphasis on the underlying substantive law. The court explained that, unlike the FLSA, Texas product liability law categorically requires individual proof of causation and damages, and expresses the State's "policy choices in defining the duty owed by manufacturers and suppliers of products to consumers." *See id.* at 313 & n.32 (quoting *In re Fibreboard Corp.*, 893 F.2d 706, 711 (5th Cir. 1990)). Thus, fidelity to the Rules Enabling Act and *Erie* required the court to apply

Texas's rule, even though proceeding in that manner would contribute to what the court recognized as a crisis of backlogged asbestos cases. *Id.* at 321.

3. Neither decision – and no decision respondents are aware of – holds that a party can preserve a Seventh Amendment claim after it was expressly offered a jury trial on the issue of damages and declined.

B. The Court of Appeals Was Correct To Reject Petitioners' Seventh Amendment Claim.

Petitioners assert their Seventh Amendment rights were violated when the "district court *itself* determined damages" (supposedly overruling a jury determination of "zero"). Pet. 31. This argument is not properly presented here because petitioners failed to avail themselves of the remedy the district court offered for the jury's supposed failure to find a dollar amount. In any event, regardless of the remedy, petitioners' argument fails on its merits.

1. The Sixth Circuit correctly held that petitioners failed to preserve their Seventh Amendment objection. In a post-trial status conference, petitioners objected that the jury, which found "*unrecorded hours*" but not "*damages*," Pet. 32, had not made the necessary determinations to support an award. To mollify petitioners, the district court offered to convene a second jury on damages. Petitioners rejected the offer. The district court pressed to clarify: "You would be upset if we did have a jury trial to finish up the damages question?" Pet. App. 223a. Petitioners answered, "[T]he only thing, quite frankly, that's left and that is appropriate is an entry of judgment . . . either for the defense or liability for

plaintiffs and with zero damages." *Id.* After attempting and failing to draw out a "more constructive approach" from petitioners, *id.* 229a, the district court ultimately entered judgment based on a formulaic calculation that used the stipulated payroll records and the jury's factual findings, *id.* 117a.

Petitioners insist that a new trial on damages "would have independently violated the Seventh Amendment." Pet. 35. Not so. It is common for courts to convene new juries to decide damages without raising any Seventh Amendment concern. *See* 9A Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 2391 (3d ed. 2008) ("[I]t is now quite settled that there may be a new trial before a second jury limited to [a] single issue."); *see also, e.g.*, *P.R. Aqueduct & Sewer Auth. v. Constructora Lluch, Inc.*, 169 F.3d 68, 71 (1st Cir. 1999) (remanding for a *second* new trial on damages after a first new trial awarded zero damages despite original verdict finding liability).

Petitioners' claim that there would have been a violation of their rights under the Reexamination Clause is baffling. If petitioners had sought at a second trial to relitigate the jury's findings of liability and unrecorded hours, *respondents* would rightly object on reexamination grounds. And to the extent the court might have precluded petitioners from making arguments they claimed were relevant to damages, they could then have argued that the new proceeding was insufficient. As a general rule of civil litigation, a grant of a new trial – including one limited to the issue of damages – is reviewable only after the final judgment in the second trial. *See* 7B Wright & Miller, *supra*, § 1807; *Dassinger v. S. Cent. Bell Tel. Co.*, 537

F.2d 1345, 1346 (5th Cir. 1976) (explaining this general rule applies fully to new trials solely on damages). Petitioners fail to explain why they could not have proceeded in this fashion here.

2. On its merits, the district court's judgment and damages award was consistent with the Seventh Amendment. Petitioners insist the jury's findings were constitutionally inadequate because the determinations of unrecorded hours "are not the same as damages." Pet. 32. The premise of that argument is that the jury's verdict should be treated as equivalent to a damages award of "zero" and that the district court's judgment consequently "increas[ed] the damages award." *Id.* 31. But it is inconceivable to read the jury verdict this way. The jury, after all, found a willful class-wide violation of the FLSA, meaning technicians were owed some overtime pay.

Nor did the court "substitute" a "figure" it found "persuasive" for the jury's findings. Pet. 30-31. Here, all genuinely disputed questions of fact were properly decided by the jury. *See Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525, 537 (1958). The court entered an award of damages based on the petitioners' stipulated payroll records showing recorded hours, the jury's specific factual findings on unrecorded hours worked, and the statutory formula for calculating unpaid overtime compensation.

Petitioners also object to approximating statutory damages by averaging hours. But the jury found that all 296 technicians had their rights violated, and petitioners have not identified a more fair and accurate method for approximating damages given their failure to maintain the required records. Indeed, as just explained, petitioners were offered an

opportunity to present an alternative theory to a second jury and declined. Petitioners should not "be heard to complain that the damages lack the exactness and precision of measurement that would be possible had [they] kept records in accordance with the requirements of" the FLSA. *Mt. Clemens*, 328 U.S. at 688.

IV. This Case Is a Poor Candidate for Further Review.

This case fails to squarely present any of the issues that petitioners ask the Court to pass upon. It would be extraordinary for this Court to decide whether Rule 23 standards apply to Section 216(b) in a case where the litigant did not ask the district court to apply Rule 23 – or to decide whether due process requires a random sample of plaintiffs in a case where the defendants did not seek a random sample at trial.

Moreover, petitioners forfeited or affirmatively relinquished the protections they claim to have been denied. They forfeited their objection to representative proof when they agreed to a representative discovery and trial plan. And petitioners passed up the opportunity to dispute the representativeness of witnesses called by respondents when they themselves failed to call other technicians. At trial, FTS could have called any of the fifty technicians in the sample -- including the ten they selected. Indeed, they could have called any technician who worked for the company anywhere. They called none. As this Court has recognized, litigants must not "seek[] to profit from the difficulty [they] caused." *Tyson*, 136 S. Ct. at 1050.

This case is likewise a particularly poor candidate to address any Seventh Amendment issue. Because petitioners refused the opportunity to proceed before a second jury on damages, any Seventh Amendment claim they raise would require this Court to first decide the substantial and highly case-specific waiver issue.

Further, both *Espenscheid* and this case were litigated in district courts before *Tyson*, and the opinions of the Sixth and Seventh Circuits both preceded *Tyson*. To the extent petitioners claim these issues are frequently "recurring," Pet. 35, this Court presumably will have ample opportunity to address them once lower courts have decided cases with the benefit of *Tyson*.

Finally, petitioners imply a special need for this Court's immediate intervention because they were party to cases in the Sixth and Seventh Circuits. *See* Pet. 15. But they make no claim of a conflict over their substantive FLSA obligations. All petitioners need to do to comply with the FLSA in the Sixth and Seventh Circuits is to accurately keep records and properly pay their employees for overtime work.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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