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

REPLY BRIEF FOR PETITIONERS

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RULE 29.6 STATEMENT

The corporate disclosure statement included in the petition for writ of certiorari remains accurate.

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REPLY BRIEF FOR PETITIONERS

The decision below expressly cemented a recognized circuit conflict on the legal standard governing FLSA collective actions—reaching the opposite result as the Seventh Circuit in a nearly identical suit involving the same defendant—and said explicitly that its disagreement with the Seventh Circuit over that standard was the "controlling" factor explaining the divergent outcomes. App. 23a. That conflict—on an undeniably important, undisputedly recurring, legal issue that the court of appeals explained drove its decision—suffices by itself to merit review.

Respondents implausibly deny that stark, explicit split and its significance here, but offer no credible way to reconcile the circuits' view of the *legal* standards that both circuits, the district court below, and even respondents themselves previously acknowledged were in conflict. Respondents likewise proffer no way to square the approach the Sixth Circuit approved—in which representativeness is *assumed* based solely on counsel's *assertion* rather than proven by any reliable methodology—with other federal and state-court cases recognizing due-process limits on proof-by-proxy. Respondents write off these other cases because they did not involve the same *statute*, but never confront the *constitutional* strictures these other courts enforced but the panel majority here disregarded.

Unable to refute these direct conflicts, respondents hide behind spurious assertions of forfeiture that not even the Sixth Circuit credited. Their contentions that petitioners failed to preserve their objections are pure fiction: Petitioners opposed certification of a collective action and trial by representa-

tive proof at every turn, as the district court itself acknowledged: It expressly rejected "any inference that [petitioners] have at anytime waived anything." App. 190a.

Respondents' attempt to evade review of the Sixth Circuit's abridgment of petitioners' Seventh Amendment rights is equally misguided. Respondents offer no substantive defense of the panel's independent error of approving the trial judge's unilateral determination of damages. Critically, they fail to explain how the judge's calculation was possible without the error that Judge Sutton condemned: improperly assuming additional facts that a jury never found. Respondents deny the lower-court conflict because the other cases involved different causes of action, but elide the *constitutional* principle applicable in each one. They ultimately urge the Court to overlook the Sixth Circuit's error as supposedly invited, when in reality petitioners merely opposed a belatedly offered procedure that would have independently violated the Seventh Amendment.

This Court should accordingly grant certiorari as to both issues presented.

I. THIS COURT SHOULD RESOLVE THE CONFLICT THE DECISION BELOW CREATES WITH LOWER-COURT RULINGS ON REPRESENTATIVE PROOF.

The Sixth Circuit explicitly acknowledged that the legal standard it applied conflicts with Seventh Circuit precedent regarding the standard for certifying an FLSA collective action. And as petitioners demonstrated, the decision below departs as well from other precedents delineating the due process limits on collective litigation. Respondents' effort to refute these conflicts is unavailing.

A. Respondents are alone in refusing now to recognize the direct conflict between the legal standards applied by the Sixth Circuit below and the Seventh Circuit in *Espenscheid v. DirectSat USA, LLC*, 705 F.3d 770 (7th Cir. 2013). Opp. 15. The Sixth Circuit expressly recognized and cemented an already-existing circuit conflict on the "standard for collective actions" and found it "controlling" here. App. 22a-23a. *Espenscheid* had acknowledged the same conflict, citing the precedent (*O'Brien v. Ed Donnelly Enterprises*, 575 F.3d 567 (6th Cir. 2009)) on which the Sixth Circuit here relied. 705 F.3d at 772. Indeed, so did respondents, who argued below that *Espenscheid* was "contrary" to Sixth Circuit precedent. Resp. C.A. Br. 50. Having succeeded in that contention below, respondents cannot claim the opposite now. *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001).

Respondents also try to obscure the explicit conflict in legal standards by quibbling over whether the standard the Seventh Circuit applied is really identical to Rule 23. But that rearranging of deck chairs misses the point: The Seventh Circuit expressly held that would-be FLSA plaintiffs *cannot proceed* based on putatively representative proof without any reliable method that accounts for divergences in their theories of liability and wide variation in damages. Judge Posner described this test as mirroring Rule 23 because there is no "good reason to have different standards." 705 F.3d at 772. *That* is the test the Sixth Circuit rejected.

Espenscheid holds, moreover, that to "get around the problem of variance by presenting testimony" from a "'representative'" sample of plaintiffs, plaintiffs must show that the representatives "were cho-

sen" in a manner that makes the sample "genuinely representative" of the class—which generally requires using "sampling methods used in statistical analysis" to "create a random sample." 705 F.3d at 774-75. Respondents consistently rejected any obligation to make a comparable showing, and the Sixth Circuit agreed with them. Indeed, to this day respondents have never explained how they selected 17 testifying plaintiffs from the already unrepresentative 50-plaintiff sample used for representative discovery.

Respondents are left to speculate that the Seventh Circuit did not mean what it said in *Espenscheid* (and what the Sixth Circuit understood it to mean here), Opp. 15-16, but that conjecture is unfounded. Respondents' reliance on *Alvarez v. City of Chicago*, 605 F.3d 445 (7th Cir. 2010), is badly misplaced. As *Espenscheid* recognized, 705 F.3d at 772, that case actually *applied Rule 23(b)(3)'s predominance requirement* to an FLSA collection action, concluding that plaintiffs "may be similarly situated" "[i]f common questions predominate." 605 F.3d at 449. The one "princip[al] difference" *Alvarez* noted between the FLSA and Rule 23—that FLSA collective actions are "opt-in," *id.* at 448—does not implicate certification, as *Espenscheid* explained, 705 F.3d at 771-72. Respondents' second case, *McMahon v. LVNV Funding, LLC*, is even further afield: It addressed mootness, not the standard for certification. 744 F.3d 1010, 1017 (7th Cir. 2014). Neither remotely supports respondents' self-serving prediction (at 18-19) that the Seventh Circuit would abandon *Espenscheid*'s explicit holding in some hypothetical future case. The Sixth and Seventh Circuits' own express, reciprocal acknowledgments of the conflict

over the legal standards tells the Court everything it needs to know.

Having failed to refute the legal conflicts that both the Sixth and Seventh Circuits have acknowledged, respondents try to change the subject by resorting to the Sixth Circuit's purported factual distinctions from *Espenscheid*. Opp. 16-17. Those distinctions are irrelevant to the explicit conflict as to the applicable *legal* standard. In any event, they are illusory. Like the Sixth Circuit, respondents cite the number of claimants—though class size "had no bearing on the Seventh Circuit's analysis," App. 55a (Sutton, J. dissenting). But they disregard the key commonalities that lead Judge Sutton to conclude that the panel could simply "adopt the Seventh Circuit's opinion as [its] own in this case" (App. 48a): technicians in the same industry and paid through the same piece-rate system alleging the same hodgepodge of theories based on the divergent practices of different managers in different field offices, with no method proffered to overcome those differences. The *Espenscheid* plaintiffs' "'truculen[ce]'" (Opp. 16) is present here as well: Respondents disclaimed any duty to show representativeness through any of the methods the Seventh Circuit identified. D.C. Dkt.

249, at 16. The only difference is that the Sixth Circuit allowed them to do that.[1]

B. Respondents likewise fail (at 19-21) to refute the Sixth Circuit's broader split with *In re Chevron U.S.A., Inc.*, 109 F.3d 1016 (5th Cir. 1997), and *Duran v. U.S. Bank National Association*, 325 P.3d 916 (Cal. 2014), on the fundamental due-process limits on representative proof. Both hold that even where it is "appropriate" to try "common issues … through … selected individuals' cases," "the sample must be … randomly selected" to meet the "minimal level of reliability" required by due process. *Chevron*, 109 F.3d at 1020-21; *Duran*, 325 P.3d at 941 ("A sample must be randomly selected for its results to be fairly extrapolated to the entire class."). The Sixth Circuit did not pretend that respondents' proof satisfied this requirement, but concluded instead that the requirement does not exist.

Respondents dismiss those cases as not involving FLSA actions, Opp. 19, but these courts applied *constitutional* limits derived from due process; the particular *statutes* underlying the claims in each case are irrelevant. Respondents further try to diminish those decisions by noting that the trial courts there

[1] Respondents are also wrong (at 16-17) that these cases' postures distinguish them. Respondents note that both decisions applied an abuse of discretion standard in opposite circumstances (the majority here affirmed certification, while *Espenscheid* affirmed decertification), but *Espenscheid*'s categorical premise—that "[n]othing like [representative proof] is possible" given the variations among technicians, 705 F.3d at 773—compels the same result in either posture. And though the district court here forged ahead with a full trial over petitioners' objections, that was part of its error, not proof that the trial was properly "representative."

failed in other respects, but those additional shortcomings cast no doubt on *Chevron* and *Duran*'s unqualified holding that reliable sampling is a prerequisite for representativeness.

Respondents finally implore the court to stay its hand because the decisions giving rise to the conflict predated *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036 (2016). Opp. 21. Respondents' contention that *Tyson* merits further percolation is disingenuous given respondents' own insistence elsewhere that *Tyson* established no new rules. Opp. 12. In any event, far from casting doubt on other circuits' approaches, *Tyson* only reinforces them: Like *Espenscheid*, *Chevron* and *Duran*, it *rejects* "statistically inadequate" evidence and explains that trial by representative sample is permissible only if "each class member could have relied on that sample to establish liability" in "an individual action." 136 S. Ct. at 1046, 1048. That the Supreme Court's latest word bolsters *other courts*' approach is hardly grounds for withholding review of the Sixth Circuit's increasingly outlier stance. And while *Tyson* declined to prohibit "categorical[ly]" *all* "representative evidence," *id.* at 1046, that hardly means there are *no* rules governing such evidence.

C. Respondents' merits arguments do nothing to diminish the need for this Court's review. Both the FLSA properly construed and due process precluded letting respondents try the case based on the testimony of a handful of hand-picked witnesses without any showing or jury finding that their claims and relevant circumstances were representative of the class—whether based on evidence showing that they are in fact representative or were chosen by some reliable method that allows drawing that kind of in-

ference. Neither the Sixth Circuit nor respondents offer any authority permitting a court to presume that a hand-picked sample of plaintiffs is representative and extrapolate findings about those plaintiffs to the rest of a class without any proof or jury finding on that issue.

Respondents double down on the Sixth Circuit's meritless conclusion that the FLSA collective-action standard is less stringent than Rule 23, but the reasons they offer—that FLSA collective actions are "opt-in" and the provision authorizing them is "substantive law" that "'modif[ies] [individual plaintiffs'] substantive right[s],'" Opp. 25—are insubstantial. *Tyson* rejects any suggestion that the evidentiary burden in FLSA collective actions should differ "merely because the claim is brought on behalf of a class." 136 S. Ct. at 1046. And the opt-in mechanism has nothing to do with whether proof is sufficiently representative to meet that burden.

Respondents also claim that the bare allegation of "a single underlying policy" obviates any showing of representativeness. Opp. 23. But the point, again, is that the trial court and Sixth Circuit lowered the standard for certification, because respondents never were required to prove a unified policy that affected the representatives and the absent class members in the same way. The supposed "policy" was simply "the theory—at a dizzying level of generality—that the defendants violated the overtime provisions of the FLSA." App. 49a (Sutton, J. dissenting). Nor did respondents justify the use of representative proof as to other elements required by respondents' own cases: "which class members were actually adversely affected by the policy" and "what loss each class

member sustained." *Bell v. PNC Bank, Nat'l Ass'n*, 800 F.3d 360, 379-80 (7th Cir. 2015).

Respondents' remaining arguments are side shows with no bearing on the central legal dispute over the applicable legal standard. They claim that any problems with representative proof could have been solved through "subclasses," Opp. 22, but subclasses were not used and respondents never proposed a way to use them. And they contend that petitioners could have called their own "exonerating employee witnesses," Opp. 28, but fail to explain how that excuses respondents' own failure of proof as to representativeness.

D. Unable to defend the panel's decision on certification and representative proof, respondents argue that petitioners "forfeited" those issues in their "trial plan" and by agreeing to "representative discovery." Opp. 34. That contention ignores petitioners' *repeated* objections to certification and representative proof at every stage, Pet. C.A. Reply 21-23, *including* in the parties' joint trial plan, D.C. Dkt. 241, at 2. Moreover, as Judge Sutton pointed out, the purpose of representative discovery was to ascertain *whether* the witnesses were representative, which petitioners could not have done without discovery. App. 53a (Sutton, J. dissenting). The district court's finding expressly rejecting "any inference that [petitioners] have at anytime waived anything" is thus beyond question, App. 190a, as the panel evidently agreed: Rather than find those issues waived, it addressed them on their merits.

Petitioners' objections fully encompassed the issues presented here. Petitioners sought decertification based on *Espenscheid*, D.C. Dkt. 441, arguing explicitly that "Rule 23 considerations may apply in

certain FLSA collective actions," D.C. Dkt. 443-1, at 5. Petitioners similarly challenged respondents' reliance on a "hand-picked" sample, arguing that the sample was not "'scientifically or statistically appropriate,'" so representative proof would "offend … due process." D.C. Dkt. 246-1, at 8, 12. On appeal, petitioners reasserted these arguments, invoking "the commonality, typicality, and representativeness requirements of Rule 23(a)," Pet C.A. Reply 13-14, and challenging respondents' reliance on a "hand-picked, non-random" sample as "in contravention of settled due-process principles." Pet. C.A. Br. 1-2. Respondents thus cannot seriously deny—without blinding themselves to the record—that petitioners preserved these issues.

II. THE CIRCUIT CONFLICT ON THE SEVENTH AMENDMENT INDEPENDENTLY WARRANTS THIS COURT'S REVIEW.

Respondents also offer no good reason to withhold review of the Sixth Circuit's independent Seventh Amendment error in letting the district court determine damages.

A. Respondents' cursory argument (at 29) that "there is no conflict" with *Cimino v. Raymark Industries, Inc.*, 151 F.3d 297 (5th Cir. 1998) and *Grochowski v. Phoenix Construction*, 318 F.3d 80 (2d Cir. 2003), lacks merit.

Respondents claim to distinguish *Cimino* because it involved claims under state tort law, "not the FLSA." Opp. 30. But the issue here is *constitutional*, and the FLSA claims at issue are undisputedly covered by the Seventh Amendment, so the specific statute is irrelevant. The court invoked state law only in addressing *other*, independent flaws in the

trial court's methodology; by straining to conflate the issues, respondents only prove that *Cimino*'s Seventh Amendment holding is not distinguishable.

Respondents similarly miss the point on *Grochowski*: its recognition that the key predicate to damages—"the number of hours worked by the nontestifying employees"—is "for a jury to determine," not, as the Sixth Circuit held, for the judge to calculate. 318 F.3d at 88. *Grochowski* thus held that failure to present evidence of those employees' hours means that the court should direct a verdict against those employees for failure to prove damages. *Id.* at 89. That is directly at odds with the decision below, which allowed the trial court to cure the failure of proof by averaging testifying employees' hours.

B. On the merits, respondents principally assert that the jury decided "all genuine disputed questions," Opp. 33, but that is impossible to square with the trial record. The jury's *only* findings addressed each *testifying plaintiff's unrecorded hours* (not damages) in an *average week*. That finding alone would not permit the court to calculate damages as to *anyone*, let alone as to the *nontestifying plaintiffs*, about whom the jury made *no* findings. Calculating damages would require not *averages*, but the actual, week-to-week breakdown of each plaintiff's unrecorded hours. The district court assumed those hours were constant each week, ignoring inevitable fluctuations that would have altered the damages for each unrecorded hour. To calculate the *nontestifying* plaintiffs' damages, moreover, the district court averaged the testifying plaintiffs' unrecorded hours, based on the court's own assumption that *all* plaintiffs' unrecorded hours were comparable—an assumption that petitioners repeatedly challenged and

the jury never found justified, but rather *rejected* by making unrecorded hours findings for the testifying plaintiffs that varied by up to 300 percent from one plaintiff to another. App. 218a.

C. Respondents fall back on the panel's attempt to insulate its decision from review by holding that petitioners waived their jury-trial right when they refused a partial retrial on damages. Opp. 31-33. Like the Sixth Circuit, however, respondents fail to explain how petitioners could have waived their Seventh Amendment objection by rejecting a proposal that would have independently violated that Amendment. This is not a circumstance where the district court could have "convene[d] [a] new jur[y] to decide damages" alone. Opp. 32. Respondents do not dispute that damages depended on—and the verdict form did not disclose—*which* of respondents' multiple theories of liability the jury credited. Damages and liability were thus far too "interwoven" to retry damages separately "without confusion and uncertainty," *Gasoline Prods Co. v. Champlin Ref. Co.*, 283 U.S. 494, 500 (1931), and potentially inconsistent verdicts. Petitioners waived nothing by opposing that unconstitutional approach.

Respondents' only retort is directly contrary to *Gasoline Products*, which respondents do not even mention. Respondents assert, without citation, that the Seventh Amendment would have instead *forbidden* petitioners from "relitigat[ing] the jury's findings of liability" in a new trial. Opp. 32. The remedy to which respondents "object" is precisely the remedy this Court ordered in *Gasoline Products*—a "new trial of *all the issues*"—*even though* it found no independent fault with the jury's prior liability finding

against the petitioner. 283 U.S. at 501 (emphasis added).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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