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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether collective actions under the Fair Labor Standards Act are categorically prohibited for cases in which an employer raises the executive exemption affirmative defense under 29 U.S.C. § 213(a)(1)?

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STATEMENT OF THE CASE

Family Dollar frankly admits that its petition presents a novel question of first impression in the courts of appeals. Pet. 2. Its insistence that certiorari is nonetheless warranted in the absence of a circuit split — because, it says, the decision below will draw all future collective action litigation to the Eleventh Circuit — is premised upon baseless speculation. Moreover, petitioner's construction of the Fair Labor Standards Act's collective action provision is meritless and has been accepted by no court, district or appellate. To the contrary, courts uniformly understand that collective actions are available, even in exemption cases, so long as the plaintiffs are "similarly situated" with respect to the facts relevant to their claims and the employer's defenses.

Of course, petitioner strenuously disagrees with the concurrent findings of the district court and the court of appeals that the plaintiffs in this case were similarly situated, and invites the Court to review for itself 82 pages of defense exhibits purporting to summarize thousands of pages of deposition testimony. *See* Pet. Supp. App. That invitation betrays the petition for what it really is — a plea for fact-bound error correction masquerading as a request to review a general question of law upon which there is no conflict in the lower courts. The petition should be denied.

I. Statutory Background

1. The Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 *et seq.*, requires covered employers to pay their workers time-and-a-half overtime wages for all work in excess of forty hours per week. *Id.* § 207(a)(2). This general rule is subject to several exceptions, including the so-called "executive exemption," which excludes from overtime coverage "any employee employed in a bona fide executive . . . capacity." *Id.* § 213(a)(1). As an exception to FLSA liability, the executive exemption operates as an affirmative defense upon which the defendant bears the burden of proof, *see Idaho Sheet Metal Works, Inc. v. Wirtz*, 383 U.S. 190, 209 (1966), and is narrowly construed against the employer, *see Auer v. Robbins*, 519 U.S. 452, 462 (1997).

The Department of Labor has issued regulations elaborating the executive exemption. As relevant here, the regulations provide that the executive exemption extends to any employee:

> [w]ho is compensated on a salary basis at a rate of not less than $250 per week . . . and whose primary duty consists of the management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof, and includes the customary and regular direction of the work of two or more other employees therein . . . .

29 C.F.R. § 541.1(f) (2003).[1]

Factors to consider in determining whether management is a worker's "primary duty" include:

> the relative importance of the exempt duties as compared with other types of duties; the amount of time spent performing exempt work; the employee's relative freedom from direct supervision; and the relationship between the employee's salary and the wages paid to other employees for the kind of nonexempt work performed by the employee.

29 C.F.R. § 541.700(a).

2. Section 216(b) of the Act authorizes an "action to recover" unpaid overtime wages "by any one or more employees for and in behalf of himself or themselves and other employees similarly situated." 29 U.S.C. § 216(b). Unlike traditional class actions, a "collective action" under Section 216(b) includes only those similarly situated individuals who "consent in writing to become such a party." *Id.*

In *Hoffmann-La Roche, Inc. v. Sperling*, 493 U.S. 165 (1989), this Court held that in appropriate circumstances district courts may facilitate notice to potential opt-in plaintiffs. *Id.* at 169. In subsequent

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[1] A more elaborate test (known as the "long test") applies to workers who earned not less than $150 per week. *Id.* § 541.1(a)-(f) (2003); *see* Pet. App. 70a & n.48. A subsequent version of the regulation was in effect during a portion of the claim period in this case. *See* 29 C.F.R. § 541.100 (2006) (effective Aug. 23, 2004); Pet. App. 71a. Petitioner does not argue that the differences between the two regulations are material. *See* Pet. 28; Pet. App. 80a n.56.

cases, most courts have employed a two-stage procedure for deciding whether to allow a case to proceed to trial as a collective action. Pet. 57a-59a; 7B WRIGHT, MILLER & KANE, FEDERAL PRACTICE & PROCEDURE: CIVIL 3D § 1807 (2005). At the first stage, courts decide whether to "provisionally certify" the collective action, thereby authorizing discovery and other actions to facilitate notice and the gathering of opt-in consents. *Id.* At the second stage, the court decides whether the case may be maintained as a collective action for trial, generally in response to the defendant's motion to "decertify" the action. *Id.*

II. Factual Background

Petitioner operates a chain of small, highly automated dollar stores with a skeletal on-site staff. Each store has a salaried store manager, a non-salaried assistant manager, and one or more hourly employees. Pet. App. 127a. Most of the time, the manager is in the store with only one or two other employees.[2] The store manager, in turn, is overseen by a district manager who is the "head [of] the 'store team.'" Pet. App. 43a (quoting petitioner's operations manual).

Although given a title that implies managerial duties and discretion, "[t]he overwhelming evidence showed that Plaintiff store managers exercise little discretion and spend 80 to 90% of their time

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[2] The company-wide average was 1.43 hourly employees in the store at a time, in addition to the store manager. Doc. 716 at 96-97, 107-108, 121.

performing manual labor tasks, such as stocking shelves, running the cash registers, unloading trucks, and cleaning the parking lots, floors, and bathrooms." Pet. App. 28a. This is because "[a]lmost all of the store manager's job is standardized and controlled by superiors," Pet. App. 36a, and because staffing budgets imposed by corporate headquarters left stores so woefully understaffed that store managers were required do the jobs of the cashiers, stock clerks, and janitors, Pet. App. 35a.

A. Store Managers' Lack Of Managerial Duties

The district court found that "[v]iewed as a whole, the primary duty of the named and opt-in Plaintiffs is non-managerial." Pet. App. 129a. Petitioner's corporate policies ensured that almost all meaningful management decisions were made either by corporate headquarters (often through detailed operational manuals) or by the district managers. Pet. App. 24a, 36a, 43a.

For example, "[s]tore managers lack discretion over the store's merchandise selection, prices, sales promotions, and layouts." Pet. App. 30a. Corporate headquarters decides what products to sell and sets their prices. The company's computers then decide what items to re-order, on what date, and when they will be delivered. Pet. App. 30a-31a n.9. Company manuals — which "apply uniformly to all stores nationwide," Pet. App. 24a — then dictate "(1) where each shelf must be, (2) what product goes on each shelf, (3) how all merchandise is to be displayed, (4) how all signs, merchandising, and display information is to be used, (5) how each "end cap" (the

end of an aisle or gondola) should be displayed, and (6) what promotional product goes on the end cap." Pet. App. 30a.

The day-to-day activities of store employees are likewise governed in detail by corporate policies and the district managers. Corporate headquarters sets store hours and holidays, and requires district manager approval to close the store even in the event of a weather emergency. Pet. App. 48a. The manuals dictate what must be done to prepare the store for opening and what must be done at the end of the day to prepare it for closing, down to who must help clean the store and how the garbage cans are to be emptied. Pet. App. 28a-29a. While the store is open, the manuals govern "[t]he tiniest of details" of store operation, from the handling of money, to the appliances allowed in the employee break room, to the organization of store clip boards and filing cabinets. Pet. App. 30a-31a.

"Even as to the assigned management tasks, such as paperwork, bank deposits, and petty cash, the store manual strictly prescribes them." Pet. App. 28a. Store managers must for example, "follow strict rules regarding store keys, bank deposits [and] petty cash," Pet. App. 32a, and operate in all respects under the constant supervision of the district managers who "uniformly run their stores through strict payroll budgets, to-do lists, daily emails with instructions to store managers, telephone calls, store visits, electronic execution reports, and electronic data flowing from the store's cash register on a real-time basis," Pet. App. 43a.

While store managers are involved in personnel matters to a degree, their power is strictly limited.

The district managers "interview and approve the hiring of assistant managers." Pet. App. 46a. And while store managers may recommend hourly associate candidates for hire, the district manager makes the final hiring decision and is not required to give the store manager's recommendation "any particular weight." Pet. App. 46a, 48a. The district manager then sets all employees' pay rates and must approve any pay increase. Pet. App. 48a. Moreover, it is the district manager — not the store manager — who completes performance evaluations for each hourly worker. Pet. App. 48a. And it is the "district manager — not the store manager — [who] has the authority to terminate employees." Pet. App. 46a.

Nor does the store manager have significant control over workers' hours. The corporate office decides "how many hours a week each employee should work and the total weekly labor hours for the store." Pet. App. 40a. The store managers' authority to alter that schedule is "substantially constrained." Pet. App. 41a. They may not increase a worker's overall hours per week without district manager approval. Pet. App. 41a. And they are absolutely forbidden to authorize overtime. Pet. App. 35a.

So insignificant are store managers' managerial duties that petitioner routinely runs stores without a store manager present, leaving operations in the hands of hourly workers under the supervision of the district manager. *See* R.685-157-159, 163-167.

B. Predominance Of Store Managers' Manual Labor Duties

Although they have no control over the store staffing budget, store managers are required to

ensure that the many daily tasks demanded by corporate policy are completed, even if "the payroll budget does not allocate enough hourly employees to get the job done." Pet. App. 35a. Thus, the "Essential Job Functions" of a store manager, as defined by the official company-wide job description, include working as a cashier or stock clerk "when needed." Pet. App. 25a, 27a. Store managers also must "routinely perform janitorial duties." Pet. App. 29a.

Store managers not only spend the vast majority of their time doing the same work as their hourly subordinates, but they must spend inordinate amounts of time at those tasks. While the company officially schedules store managers to work 52 hour weeks, Pet. App. 40a, in practice managers "routinely work 60 to 70 hours per week and spend 80 to 90% of their time on manual labor," Pet. App. 45a. For this work, they received on average less than $600 per week during the time relevant to this case. Pet. App. 49a.

C. Petitioner's Policy Of Refusing To Pay Overtime To Any Store Manager Or To Examine The Specific Duties Of Individual Workers

Although it emphasizes in this Court that its store managers' entitlement to overtime pay under the FLSA turns on the specific facts of their day-to-day duties, petitioner admits that it has never undertaken to make that individualized determination for any of its managers. Pet. 28; Pet. App. 37a. To the contrary, petitioner's top executives testified that "Family Dollar classified store

managers as executives, across the board, without ever determining how store managers spent their time" and that its "exemption policy did not turn on any individual factors" but was "a company wide decision that applied regardless of store size, location, sales volume, or any other individual factors." Pet. App. 33a-39a.

As a result, petitioner has never paid any of its store managers overtime. Pet. 6. That pattern of uniform treatment led to this litigation.

III. Procedural History

In January 2001, two store managers filed a complaint on behalf of themselves and "all other similarly situated persons" alleging that petitioner was willfully violating the FLSA by failing to pay store mangers overtime compensation. Pet. App. 5a. Petitioner, in response, claimed that all of its store managers fell within the executive exemption. Pet. App. 6a.

A. Provisional Certification

In April 2001, respondents moved the district court to provisionally certify their case as a nationwide collective action to facilitate notice to potential opt-in plaintiffs. Pet. App. 7a. The district court twice denied the motion without prejudice in order to allow further discovery before making its decision. Pet. App. 7a-9a. During that time, petitioner agreed to jointly send opt-in notices to store managers in the seven states where the named plaintiffs had worked. Pet. App. 8a. Respondents received 142 responses and sent each opt-in plaintiff an extensive questionnaire asking about the details

of store operations and their management responsibilities. Pet. App. 9a.

In October 2002, respondents renewed their motion to facilitate nationwide notice based on the completed questionnaires and the results of extensive discovery. After reviewing the accumulated evidence, the district court found that the named plaintiffs and the potential opt-in plaintiffs were similarly situated and that nationwide notice was justified. Pet. App. 134a-139a. Respondents' counsel then sent the authorized notice to more than 12,000 current and former store managers. By March 2003, approximately 2,500 workers had opted in to the case. Pet. App. 11a.

B. Decertification Motion

In May 2004, petitioner moved to decertify the collective action. After reviewing the extensive evidentiary record, the district court denied the motion. Pet. App. 124a-131a.

In its motion, petitioner did not claim, as it does here, that collective actions may never be brought in a case in which the employer's liability turns on an exemption defense. Instead, petitioner argued to the district court that the individualized nature of its defense was one factor, among several, favoring decertification. Relying on the standard initially developed in *Lusardi v. Xerox Corp.*, 118 F.R.D. 351 (D.N.J. 1987), petitioner argued that "the factors relevant to the stage-two analysis in a FLSA case" were: "(1) the disparate factual and employment settings of the individual plaintiffs, (2) the various defenses available to the defendant that are individual to each plaintiff, and (3) the practical and

procedural fairness of trying the case[s] individually, case by case, as opposed to collectively."[3] With respect to the second factor, petitioner argued only that "highly individualized defenses weigh heavily in favor of decertification,"[4] not that they preclude a collective action as a matter of law.

The district court accepted that *Lusardi* provided the governing legal analysis, *see* Pet. App. 126a, but disagreed with petitioner's view of the facts. With respect to the first factor, the court found that the "evidence confirms that substantial similarities exist in the job duties of the named and opt-in Plaintiffs." Pet. App. 127a. Looking at the facts relevant to petitioner's executive exemption defense, the court found, among other things, that:

- "Although classified as store managers, all of the named and opt-in Plaintiffs lack independent authority to hire, promote, discipline, or terminate assistant managers."
- "Additionally, they all lack the authority to grant pay raises to employees."
- "Nor are the named and opt-in Plaintiffs authorized to change the weekly schedules of the hourly employees in their stores; rather, these schedules are set by the corporate office."

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[3] *See* Defendants' Brief in Support of Its Motion to Decertify the Collective Action, Doc. 250, at p. 7.

[4] *Id.* at 24.

- "Most of the named and opt-in Plaintiffs spend only a small fraction of their time performing managerial duties."
- "They spend the vast majority of their time on essentially non-managerial duties such as unloading trucks, stocking shelves, working as cashiers, and performing janitorial duties."
- "Even some of their managerial functions are shared with nonexempt, hourly employees. These shared functions include ordering merchandise, controlling the keys to the store, opening and closing the store, making bank deposits, approving checks, refunds, and returns."
- "[T]he basic pay rates of the named and opt-in Plaintiffs are also similar."
- "[M]ost (90%) of the named and opt-in Plaintiffs interview and train new employees."
- "Most of them direct the work of the employees in their stores, and maintain production and sales records."

Pet. App. 127a-129a.

The court further found that the "relative time the Plaintiffs spend in performing non-managerial duties *does not significantly differ* from store to store, district to district, or region to region." Pet. App. 129a (emphasis added). "Likewise," the court continued, "the relative importance of the non-managerial duties over the limited number of managerial duties for which the named and opt-in

Plaintiffs were responsible, *did not vary significantly* according to store, region, or district." Pet. App. 129a (emphasis added).

In light of these factual similarities, the court further concluded that petitioner's defenses were not "sufficiently individually tailored to each plaintiff such that a collective action is unmanageable." Pet. App. 130a. For the same reason, the court concluded that collective action proceedings were not unfair to petitioner. Pet. App. 130a-131a.

C. Trial

Trial was held over eight days in 2006.[5] The jury heard from 39 witnesses, including store managers, district managers, corporate executives, payroll officials, and expert witnesses. The jury thus heard testimony from the store managers of 50 different stores, the district managers in charge of more than 130 stores, Family Dollar executives who oversaw 1,400 stores, and an Executive Vice President in charge of all store operations throughout the country. The parties also submitted thousands of pages of manuals, policies, emails, and payroll records. Pet. App. 21a-22a.

After deliberations, the jury returned a verdict in favor of the plaintiffs.[6] The district court entered

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[5] An initial trial in February 2005 ended in a deadlock. Pet. App. 21a.

[6] Separately, the district court entered judgment as a matter of law in favor of 163 plaintiffs who, according to petitioner's own records, were categorically ineligible for exemption under the Department of Labor regulations because

judgment in the amount of the unpaid overtime wages and an equal amount in liquidated damages, as permitted by the Act for willful violations. *See* Pet. App. 51a, 120a-123a.

D. Appeal

On appeal, petitioner challenged, among other things, the district court's rejection of its motion to decertify the collective action. As it had in the district court, petitioner argued that the decertification decision was governed by the three-factor *Lusardi* analysis. *See* Def. C.A. Br. 38. Applying that standard, the Eleventh Circuit found no error in the district court's conclusion that plaintiffs were sufficiently "similarly situated" to warrant collective action treatment.

First, the court found that "ample evidence supports the district court's fact-findings that the Plaintiff store managers were similarly situated under § 216(b)." Pet. App. 62a. It acknowledged petitioner's "assertion that the duties of store managers varied significantly," but concluded that "there was scant evidence to support this argument." Pet. App. 63a. To the contrary, the court found substantial evidence to support the district court's findings that "the opt-in store managers were factually similar in a number of respects," including:

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they did not customarily or regularly direct the work of two or more employees. *See* Pet. App. 89a-90a; 29 C.F.R. § 541.100(a) (2006); 29 C.F.R. § 541.1 (2003). Petitioner does not challenge that ruling here.

> (1) their universal classification as store managers with the same job duties; (2) the small fraction of time they spent on managerial duties; (3) the large amount of time they spent on non-managerial duties such as stocking shelves, running the cash registers, unloading trucks, and performing janitorial work; (4) the restrictions on their power to manage stores as compared to the district manager's sweeping managerial discretion; (5) the amount of close district manager supervision of store managers; (6) the lack of managerial discretion that Family Dollar corporate policies afforded to store managers; (7) their day-to-day responsibilities; (8) their receiving base salaries regardless of the hours worked and no overtime pay; (9) their sharing certain managerial duties with hourly employees; (10) their maintaining production and sales records; (11) their inability to authorize pay raises; (12) their power to train subordinates; (13) their restricted authority to close stores in the event of emergencies; and (14) their inability to select outside vendors without district manager approval.

Pet. App. 62a-63a.

Second, the court held that the fact-specific nature of the exemption defense did not in itself preclude a collective action where, as in this case, the plaintiffs were similarly situated with respect to the relevant facts. "Just because the inquiry is fact-intensive," the court explained, "does not preclude a collective action where plaintiffs share common job

traits." Pet. App. 64a. In this case, the court held, petitioner failed to show that the district court clearly erred in finding respondents similarly situated with respect to its defense. Pet. App. 64a.

Third, the court rejected petitioner's claim that collective litigation was procedurally unfair on the facts of this case. "There is nothing inherently unfair about collectively litigating an affirmative executive-exemption defense where the district court has made well-supported and detailed findings with respect to similarity." Pet. App. 66a.

REASONS FOR DENYING THE WRIT

Although petitioner and its amici complain about a variety of aspects of the trial in this case and the collective action procedures developed by the lower courts — including, for example, the use of a two-stage certification process,[7] the standards employed by courts in making the provisional certification decision,[8] the use of representative testimony at trial,[9] and the substantive standards for evaluating the executive exemption defense[10] — petitioner does not ask this Court to pass upon any such objections here.

Instead, petitioner asks the Court to grant certiorari to decide a narrow question: whether

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[7] *See* DRI Br. 14-15; Nat'l Retail Fed'n Br. 19-23.

[8] *See* Nat'l Retail Fed'n Br. 12-14.

[9] *See* Pet. 12, 29; Chamber Br. 15-18.

[10] *See* Pet. 28-29; Chamber Br. 19-23.

collective actions are categorically precluded whenever a defendant's liability turns on a statutory exemption. Pet. i, 15.[11] No court has ever accepted that view, and there is no reason for this Court to consider petitioner's novel theory in the absence of a circuit conflict.

I. There Is No Circuit Conflict Over The Question Presented.

Certiorari is unwarranted first and foremost because there is no conflict in the circuits regarding the question presented, nor any reason to believe that denying review will prevent other courts from considering petitioner's novel legal theory in the future.

A. Petitioner Acknowledges The Lack Of A Circuit Split.

Petitioner frankly admits that the decision below does not conflict with the decision of any other court

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[11] Petitioner's question presented could be read as asking this Court simply to decide whether a court may allow a collective action when the particular plaintiffs before it are so *differently* situated that each exemption defense must be litigated individually. The answer to that question is plainly "no," and no court (including the Eleventh Circuit here) has held otherwise. Nor is that question presented on the facts of this case, where the court of appeals and the district court both found that the plaintiffs were similarly situated with respect to the facts relevant to petitioner's exemption defense. Pet. App. 61a-69a. To the extent the petition seeks review of that case-specific factual finding, it presents a fact-bound question wholly unworthy of the Court's review.

of appeals. Pet. 2. To the contrary, the circuit decisions that have addressed the standards for allowing cases to proceed as collective actions are in accord, generally approving the three-factor *Lusardi* analysis petitioner advocated, and the courts applied, in this case. *See* Pet. App. 60a, 126a; *Ruehl v. Viacom, Inc.*, 500 F.3d 375, 388-89 & n.17 (3d Cir. 2007); *Anderson v. Cagle's*, 488 F.3d 945, 953 (11th Cir. 2007); *Thiessen v. GE Capital Corp.*, 255 F.3d 1221, 1228, 1230-31 (10th Cir. 2001); *Lockhart v. Westinghouse Credit Corp.*, 879 F.2d 43, 51-52 (3d Cir. 1989). And under that analysis, rather than being determinative, "the various defenses available to defendant which appear to be individual to each plaintiff" is simply one of several factors to consider. *Thiessen*, 255 F.3d at 1228.

Consequently, *no* court of appeals has ever adopted petitioner's novel contention that exemption cases are categorically ineligible for collective action treatment. Indeed, the decision here is the first to even consider that proposition. That in itself is reason enough to deny the petition.

B. Petitioner Has No Basis For Its Speculation That No Further Percolation Is Likely To Occur.

Petitioner nonetheless urges this Court to abandon its traditional certiorari criteria because, it says, no other court of appeals is likely ever to consider the question presented. This is so, petitioner claims, for two reasons, neither of which withstands scrutiny.

1. Petitioner asserts that courts in other circuits will never hear appeals from certification decisions in

future cases because from now on every collective action suit will be filed in the Eleventh Circuit to take advantage of the decision below. Pet. 15-16. This speculation is baseless.

First, petitioner's argument is premised on the assertion that the Eleventh Circuit has adopted a more "pro-employee precedent" than would be applied in other circuits. Pet. 2. But as shown above, the court here applied the same *Lusardi* analysis approved in every other circuit that has reviewed a decertification decision.

Second, even if plaintiffs *wanted* to bring every collective action in the Eleventh Circuit,[12] in a great many cases they would be unable to do so. Many collective action defendants — including state and local governments[13] or small regional companies[14] —

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[12] This in itself is a doubtful proposition, given the inconvenience and expense of litigating a case far from the named plaintiffs' and their counsel's homes. Nor has the Eleventh Circuit shown itself to be particularly hospitable to collective action claims as a general matter. *See, e.g., Fox v. Tyson Foods, Inc.*, 519 F.3d 1298, 1301-05 (11th Cir. 2008) (affirming district court's denial of certification and motions to intervene); *Anderson*, 488 F.3d at 951-54 (affirming decertification); *Cameron-Grant v. Maxim Healthcare Servs., Inc.*, 347 F.3d 1240, 1244-49 (11th Cir. 2003) (refusing to hear workers' decertification appeal after named plaintiff settled own case); *Hipp v. Libert Nat'l Life Ins. Co.*, 252 F.3d 1208, 1244-45 (11th Cir. 2001) (overturning jury verdict in favor of plaintiffs in collective action case); *Haynes v. Singer Co., Inc.*, 696 F.2d 884, 885-87 (11th Cir. 1983) (affirming denial of provisional certification).

[13] *See, e.g., Gonzalez v. City of Deerfield Beach, Fla.*, 549 F.3d 1331 (11th Cir. 2008) (collective action against local fire

operate in only one state or region, and for that reason could not be sued in the Eleventh Circuit. *See, e.g.*, *Aviles v. Kune*, 978 F.2d 201, 203-05 (5th Cir. 1992). Yet these defendants are just as likely to raise exemption defenses, giving the courts of appeals across the nation an opportunity to confront the question presented here.

2. Petitioner next suggests that even if future collective action suits are filed in other circuits, they are unlikely ever to result in another appellate decision.

First, petitioner says, appeals are unlikely because "courts of appeal have uniformly held that § 216(b) certification and decertification decisions are not appealable on an interlocutory basis." Pet. 20. This is only partly true. While certification decisions are not appealable as of right under the collateral order doctrine, district courts may certify them for interlocutory review under 28 U.S.C. § 1292(b), and a number of appellate decisions have come about that

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department); *Barfield v. N.Y. City Health & Hosps. Corp.*, 537 F.3d 132 (2d Cir. 2008) (city hospital); *Archer v. Sullivan County, Tenn.*, Nos. 95-5214 & 95-5215, 1997 WL 720406 (6th Cir. 1997) (local sheriff's department); *Hamilton v. Tulsa County Pub. Facilities Auth.*, 85 F.3d 494 (10th Cir. 1996) (county agency).

[14] *See, e.g.*, *Jonites v. Exelon Corp.*, 522 F.3d 721 (7th Cir. 2008) (regional utility); *Pennington v. Frisch's Rests., Inc.*, 147 Fed. Appx. 463 (6th Cir. 2005) (regional restaurant chain); *Ballaris v. Wacker Siltronic Corp.*, 370 F.3d 901 (9th Cir. 2004) (factory in Oregon); *Partlow v. Jewish Orphans' Home of S. Cal., Inc.*, 645 F.2d 757 (9th Cir. 1981) (California charity).

way.[15] Moreover, defendants remain free to appeal certification orders upon final judgment, as petitioner did here.

Petitioner nonetheless insists that certification creates such pressure to settle that few cases will ever reach final judgment, much less a court of appeals. Pet. 22-23. Petitioner provides little to support this assertion. *See id.* (citing solely to a treatise that notes in passing that "most collective actions" — like most civil suits generally — "settle"). In any event, as this case and others demonstrate, numerous employers remain willing to litigate collective action cases to judgment after certification.[16] While petitioner focuses on the asserted pressure to settle large nationwide collective actions, many cases involve only a small number of plaintiffs.[17]

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[15] *See, e.g.*, *Hoffmann-La Roche, Inc. v. Sperling*, 493 U.S. 165, 169 (1989); *Ruehl v. Viacom, Inc.*, 500 F.3d 375, 380, 388-90 (3d Cir. 2007); *Grayson v. K Mart Corp.*, 79 F.3d 1086, 1093 (3d Cir. 1996); *United States v. Cook*, 795 F.2d 987, 990 (Fed. Cir. 1986); *Dolan v. Project Constr. Corp.*, 725 F.2d 1263, 1265-66 (10th Cir. 1984); *Partlow*, 645 F.2d at 758.

[16] *See, e.g.*, *In re Farmers Ins. Exch.*, 481 F.3d 1119 (9th Cir. 2007) (appeal of collective action judgment after trial); *Smith v. Aztec Well Servicing Co.*, 462 F.3d 1274 (10th Cir. 2006) (same); *Hipp v. Liberty Nat'l Life Ins. Co.*, 252 F.3d 1208 (11th Cir. 2001) (same); *Archer*, 1997 WL 720406 (same); *Lockhart*, 879 F.2d at 47 (same).

[17] *See, e.g.*, *Gonzalez*, 549 F.3d at 1332 (collective action of twelve employees); *Walker v. Ryan's Family Steak Houses, Inc.*, 400 F.3d 370, 372-73 (6th Cir. 2005) (twenty-one employees); *Harkins v. Riverboat Servs., Inc.*, 385 F.3d 1099, 1101 (7th Cir.

In addition, plaintiffs may bring class certification questions to the courts of appeals even if defendants do not. As petitioner has shown, a great many collective actions are never certified or are eventually decertified. Pet. 17-18. And plaintiffs as well as defendants are entitled to challenge those decisions either on certified interlocutory appeal or after final judgment.[18]

Thus, while collective action certification issues do not arise regularly in the courts of appeals, it is not because of any insurmountable practical barrier. If the question presented here is as recurring and important as petitioner and its amici claim, then there is every reason to expect that it will be raised again in other circuits.

II. There Is No Basis For Granting Certiorari In The Absence Of A Circuit Split.

Unable to assert a division among the courts of appeals, petitioner is reduced to arguing that certiorari is warranted in light of an asserted conflict between the decision here and a handful of district court opinions, and because of the lack of appellate

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2004) (twenty-one); *Thiessen v. GE Capital Corp.*, 267 F.3d 1095, 1099 (10th Cir. 2001) (twenty-three); *Hipp*, 252 F.3d at 1215 ("over twenty"); *Hamilton*, 85 F.3d at 496 n.2 (four); *Lockhart*, 879 F.2d at 47 (five).

[18] *See, e.g.*, *Anderson*, 488 F.3d at 951-54 (plaintiff appeal from decertification order); *Thiessen*, 267 F.3d at 1099 (same); *Montoya v. Rescue Indus., Inc.*, No. 97-1560, 1999 WL 240247, at *1 (10th Cir. 1999) (unpublished) (same).

guidance in an area of increasing litigation. These arguments are meritless as well.

A. There Is No Conflict Between The Decision In This Case And The Decision Of Any District Court.

Petitioner claims that numerous district courts have rejected the Eleventh Circuit's conclusion that just because an exemption defense is "fact-intensive does not preclude a collective action where plaintiffs share common job traits." Pet. 16-17 (quoting Pet. App. 64a). Instead, petitioner asserts, these district courts "hold that claims over an individualized FLSA exemption cannot be maintained in one collective action." Pet. 17.

Even if this claim were true, it would provide no basis for certiorari. This Court is not in the habit of granting certiorari to resolve conflicts between a court of appeals and the unreviewed decisions of district courts in other circuits.

But in any event, petitioner's asserted conflict is a mirage. None of the cases cited applied a categorical prohibition against collective actions when liability turns on an exemption defense. Instead each court, like the courts here, examined the facts of the case before it to determine whether the particular employees at issue were sufficiently "similarly situated" to warrant collective litigation:

- *Aguirre v. SBC Commc'ns*, No. H-05-3198, 2007 WL 772756, at *12 (S.D. Tex. Mar. 12, 2007) ("The evidence in the record, however, shows that the [plaintiffs] had significant variation in the tasks they are required to perform and the amount of time they spend

on different tasks, but also have significant variation in the amount of discretion each [plaintiff] exercises.");

- *Johnson v. Big Lots Stores, Inc.*, 561 F. Supp. 2d 567, 578-79 (E.D. La. 2008) ("[T]he evidence of opt-in plaintiffs' job experiences presented at trial . . . reveals substantial variations among the opt-in plaintiffs. . . . Such diversity in individual employment situations inhibits Big Lots from proving its statutory exemption defense . . . .");
- *Smith v. Heartland Auto. Servs.*, 404 F. Supp. 2d 1144, 1152 (D. Minn. 2005) ("The Court . . . finds significant [ ] discrepancies between and among the named plaintiffs and the opt-in class members with respect to a Store Manager's ability to exercise discretion, perform management tasks, and act independently of the district manager.");
- *Reich v. Homier Distrib. Co.*, 362 F. Supp. 2d 1009, 1014 (N.D. Ind. 2005) (denying certification where "all of the potential plaintiffs shared the same position but had differing job duties");
- *Mike v. Safeco Ins. Co. of Am.*, 274 F. Supp. 2d 216, 221 (D. Conn. 2003) (denying certification where the plaintiff's claim did not depend "upon any . . . company policy or decision" but instead only upon the evidence relating to the particular plaintiff's "day-to-day tasks"); *see also id.* at 218 (noting decisions in other cases had "varying results as applied to specific factual scenarios");

- *Morisky v. Pub. Serv. Elec. & Gas*, 111 F. Supp. 2d 493, 498 (D.N.J. 2000) (denying collective action because the "[p]laintiffs have made no showing that the job responsibilities of the named plaintiffs are the same or similar to those of the remaining members of the proposed class");
- *Bayles v. Am. Med. Response of Colo.*, 950 F. Supp. 1053, 1061 (D. Colo. 1996) (denying certification where the "[p]laintiffs vary dramatically in their accounts of whether defendant followed the stated policy"); *id.* at 1062 (describing in detail "several factors [that] are unique to each plaintiff");
- *Reyes v. Tex. EZPawn*, No. V-03-128, 2007 WL 101808, at *5 (S.D. Tex. Jan. 8, 2007) ("As discussed at lengths above, the degree of discretion and authority each [plaintiff] exercised varied depending on store management and store demographics, making this case particularly unsuitable for collective treatment when applying exemption analysis.");
- *King v. West Corp.*, No. 8:04CV318, 2006 WL 118577, at *15 (D. Neb. Jan. 13, 2006) (declining certification where the "differences among [plaintiffs] in terms of managers, team policies and philosophies, client interactions, and factual situations overwhelmingly predominate over their similarities and will require individual inquiry at trial.");

- *Lusardi v. Xerox Corp.*, 118 F.R.D. 351, 361 (D.N.J. 1987) (denying certification because "members of the sample group represent disparate employment situations" and the "differences among the individual plaintiffs are significant not only to plaintiffs' claims but as well to the ability of Xerox to defend against the claims"), *mandamus granted on other grounds*, 855 F.2d 1062 (3d Cir. 1988).

Not only did these courts *not* apply petitioner's categorical rule, a good many of them applied precisely the same three-factor *Lusardi* analysis the district court and court of appeals applied in this case. *See Big Lots Stores*, 561 F. Supp. 2d at 573; *Heartland Auto. Servs.*, 404 F. Supp. 2d at 1150; *Bayles*, 950 F. Supp. at 1066; *Lusardi*, 118 F.R.D. at 370-71.[19]

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[19] There is also no conflict between the decision in this case and the decisions in Family Dollar's favor in *Ward v. Family Dollar Stores, Inc.*, No. 3:06CV441, 2008 WL 199699 (W.D.N.C. Jan. 22, 2008) and *Grace v. Family Dollar Stores, Inc.*, No. 3:06CV306, 2007 WL 2669699 (W.D.N.C. Sept. 7, 2007). The court in both cases simply decided that the plaintiffs there had failed to adequately allege in their pleadings that managers in other stores were similarly situated. *See Grace*, 2007 WL 2669699, at *2 (noting that "there is no allegation that the assignment of the duties was Family Dollar's policy, and therefore applicable to each Plaintiff"); *Ward*, 2008 WL 199699, at *1 (same). In this case — decided on the basis of extensive evidence, not simply the pleadings — the district court found that the assignment of duties was, in fact, governed by Family Dollar's policies. *See* Pet. App. 24a-32a.

The cases petitioner cites thus are consistent with the numerous decisions from other district courts (which petitioner does *not* cite) that have permitted collective actions in exemption cases. *See, e.g.*, *Doornbos v. Pilot Travel Ctrs.*, No. 04CV00044 BEN (BLM), 2005 WL 6166032, at * 3 (S.D. Cal. 2005) ("In spite of the fact-specific nature of the exemption inquiry, courts allow collective action treatment if Plaintiffs can demonstrate that they held identical or similar positions.") (collecting cases); *Scott v. Aetna Servs., Inc.*, 210 F.R.D. 261, 265 (D. Conn. 2002) (noting that "several courts have held that it is appropriate to bring an FLSA exemption claim as a class action with regard to employees who perform similar, but not identical, duties, notwithstanding the highly fact-specific nature of the exemption inquiry" and denying motion to decertify in case before it) (collecting cases).[20]

In the end, district courts reviewing different facts in exemption cases have sometimes found workers "similarly situated" and sometimes not. But none has adopted petitioner's categorical rule in conflict with the decision here.

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[20] *See also Wilson v. Guardian Angel Nursing, Inc.*, No. 3:07-0069, 2009 WL 790107, at *4-*9 (M.D. Tenn. Mar. 24, 2009) (denying motion to decertify in exemption case); *Nerland v. Caribou Coffee Co., Inc.*, 564 F. Supp. 2d 1010, 1018-26 (D. Minn. 2007) (same); *Wilks v. Pep Boys*, No. 3:02-0837, 2006 WL 2821700, at *7 (M.D. Tenn. Sept. 26, 2006) (same), *aff'd on other grounds*, 278 Fed. Appx. 488 (6th Cir. 2008); *Moss v. Crawford & Co.*, 201 F.R.D. 398, 410-11 (W.D. Pa. 2000) (same).

B. Certiorari Is Not Warranted To Short-Circuit Ventilation In The Lower Courts In The Name Of Providing "Appellate Guidance."

Attempting to convert a vice into a virtue, petitioner argues that the very lack of circuit precedent that prevents it from asserting a circuit conflict is a reason to grant certiorari to fill a gap in "appellate guidance." Pet. 24, in an area of increasing litigation, Pet. 30.

This reasoning has it completely backwards. The fact that certification questions are not regularly decided on appeal suggests that the petition fails to present an issue of recurring importance, not that the Court should reach out to decide a novel question before it has been ventilated in the courts of appeals. And the fact that collective actions are increasing is a reason to believe that if there is need for appellate guidance, it should be forthcoming from the courts of appeals without intervention by this Court.

Ironically, petitioner acknowledges that even "[w]ithout any appellate guidance," the district courts are moving toward consensus on an approach to resolve certification questions. Pet. 24-25. Nonetheless, petitioner insists that this Court's immediate intervention is required because that consensus, in its view, is headed in the wrong direction, with courts "refus[ing] to adopt a precise definition of what 'similarly situated' means." Pet. 28. That is no reason to grant certiorari and is untrue in any event. While the multi-factor *Lusardi* analysis petitioner embraced below may not dictate results with mathematical precision, it nonetheless

provides significant guidance, as demonstrated by the lengthy and careful decisions by the district court and court of appeals in this case. *See* Pet. App. 61a-69a, 125a-139a. Moreover, the *Lusardi* approach is no more indeterminate than other analyses this Court has developed to elaborate legal concepts that defy distillation into a simple test. *See, e.g., Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (holding, without further explication, that individual could show Equal Protection violation by establishing that "she has been intentionally treated differently from others *similarly situated* and that there is no rational basis for the difference in treatment") (emphasis added).[21] And in any event, petitioner does not offer any more precise definition of its own. Instead, it simply asks this Court to declare what "similarly situated" does *not* include, namely actions involving exemption defenses.

Amicus DRI, on the other hand, urges this Court to import the legal standards governing class actions under either the current (or perhaps the superseded) version of Rule 23 of the Federal Rules of Civil Procedure. *See* DRI Br. 8, 10-13. Petitioner has not made this argument, either in its petition or to the Eleventh Circuit, and the courts of appeals have uniformly declined to accept it. *See Thiessen*, 255 F.3d at 1230-31; *Grayson*, 79 F.3d at 1096 n.12. In any case, DRI makes no effort to explain how the

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[21] *See also, e.g., Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978) (noting that in context of regulatory takings claims, the Court has adopted an "essentially ad hoc" approach that takes into account "several factors").

standards for certification under Rule 23 are different from, or more precise than, the standard applied in this case. *See* DRI Br. 12 (noting only that Rule 23 requires adequate representation and "common question[s] of law or fact"); *Thiessen*, 255 F.3d at 1231 (concluding that "there is little difference in the various approaches"). Nor can DRI credibly claim that any purported difference would change the result in this case.

In fact, DRI seems mostly interested in having the Court rely on Rule 23 to reject the two-stage certification approach adopted by most courts. *See* DRI Br. 14-15; *see also* Nat'l Retail Fed'n Br. 19-23. But that objection falls outside the scope of the Question Presented, is not made in the petition, and was not pressed or passed upon below.[22] Thus, if anything, amici's briefs provide an additional reason to deny certiorari here and await a case presenting the issues and arguments that seem to be the real concern for businesses facing collective action litigation.

III. The Decision Below Is Correct.

Finally, certiorari is unwarranted because the court of appeals correctly rejected petitioner's novel interpretation of Section 216(b) and did not err in

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[22] In the court of appeals, petitioner did not raise any challenge to the two-stage process or to the district court's provisional certification decision. *See* Def. C.A. Br. 1 (Statement of Issues) (asking court to do decide only "Did the District Court err in *refusing to decertify* this FLSA collective action . . . ?") (emphasis added).

affirming the district court's certification decision on the facts of this case.

A. The FLSA Permits Collective Actions In Exemption Cases When, As Here, The Plaintiffs Are "Similarly Situated" With Respect To The Defense.

Nothing in the language or history of Section 216(b) supports categorically excluding exemption cases from its purview. Section 216(b) provides that "[a]n action to recover the liability prescribed [by the Act] may be maintained against any employer . . . by any one or more employees for and in behalf of himself or themselves and other employees similarly situated." 29 U.S.C. § 216(b). This encompassing language includes *all* actions for overtime violations, and admits of no exclusion except for cases in which the employees are not, in fact, "similarly situated."

Had Congress believed, as petitioner does, that exemption cases are so *inherently* individualized that collective actions are *never* appropriate, it presumably would have made that clear by carving out exemption cases in the text of the statute. Congress's failure to do so cannot have been an oversight. Congress surely was aware that much of the litigation authorized by the statute would involve exemption defenses. As demonstrated in this case, the plaintiff's case-in-chief will rarely be the focus of minimum wage or overtime litigation, turning as it does on facts ordinarily not subject to genuine dispute. *See* Pet. App. 97a & n.68. Accordingly, the vast majority of actual FLSA litigation involves the kinds of exemption defenses petitioner says cannot be resolved in collective actions. Yet if Congress did not

intend collective actions to play a meaningful role in FLSA litigation, it presumably would have simply eliminated them altogether.

Nor is there anything inherent in the term "similarly situated" that necessarily precludes all collective actions in exemption cases. As the court of appeals noted, even fact-intensive legal tests can be applied collectively when the material facts of each case are substantially similar. Even petitioner must admit that if two or more employees are *identically* situated in every respect material to an employer's exemption defense, then trying the cases together would not prejudice the employer and would result in substantial efficiencies. The fact that Congress enacted a "similarly situated" rather than an "identically situated" standard reflects that Congress did not intend to limit collective actions to the rare (perhaps nonexistent) cases in which there was no variation at all among employees.

Of course, deciding whether a group of plaintiffs is similarly situated *enough* to warrant collective action treatment in a particular case may sometimes require tough judgment calls. But that is no reason to substitute judge-made categorical rules for a congressionally-mandated flexible standard.

B. Petitioner's Objections To The Application Of The "Similarly Situated" Requirement To The Specific Facts Of This Case Are Meritless And Do Not Warrant Review.

Finally, petitioner objects to the district court's conclusion, based on its view of the evidence, that the plaintiffs were "similarly situated" in this case. But

that disagreement about the proper view of the evidence and the facts of this particular case is no basis for certiorari. And, in any event, petitioner's fact-bound challenge to the district court's findings is meritless.

1. The court of appeals held — and petitioner does not dispute here — that the district court's certification decision is reviewed for abuse of discretion and its finding that the plaintiffs were similarly situated is subject to reversal only for clear error. Pet. App. 61a, 64a. As described in the court of appeals' meticulous opinion, petitioner's own actions — its corporate policies, its micromanaging operational manuals, and its division of responsibilities between store managers and district managers — generated a fundamental similarity among its store managers with respect to the aspects of their jobs material to their claims and petitioner's defenses. *See* Pet. App. 61a-69a.

To be sure, petitioner presented the district court with various charts purporting to demonstrate a degree of variation in plaintiffs' deposition testimony regarding a handful of relevant duties. *See* Pet. 26-27. At the same time, however, respondents contested the charts' accuracy and submitted their own summary exhibits. *See* Pet. App. 65a n.44. On appeal, the Eleventh Circuit agreed that petitioner's charts were misleading and held that the district court was not required to accept their accuracy. Pet. App. 65a n.44.

In addition, petitioner's charts were badly incomplete. Although the pertinent regulation lists more than twenty management activities to consider, 29 C.F.R. § 541.102, defense counsel cherry picked

only a few to summarize in their charts. Pet. App. 65a n.44. As a result, the charts said nothing to undermine the district court's conclusion that although store managers may perform some management activities, "[v]iewed as a whole, the primary duty of the named and opt-in Plaintiffs is non-managerial." Pet. App. 129a. Because the "primary duty" element is a prerequisite for the successful assertion of an executive exemption defense, any variation in the *kinds* of management activities respondents occasionally undertook was ultimately immaterial. *See* 29 C.F.R. § 541.700(a).

2. Petitioner also asserts that the court of appeals held that "none of the factual differences among the Plaintiffs mattered because Family Dollar had decided to classify its store managers as exempt across the board." Pet. 28. This is simply untrue.

To be sure, in response to petitioner's complaint that collective litigation would be unfair, the court of appeals noted that petitioner itself seemed to believe that all of its store managers were similarly situated for purposes of their entitlement to overtime compensation; otherwise its decision to deny overtime across the board would show a blatant disregard for the requirements of federal law. Pet. App. 66a. But the court made clear that it did not rely on that fact to ignore otherwise material differences among employees. To the contrary, the court explained that there was "nothing unfair about litigating a single corporate decision in a single collective action, *especially where there is robust evidence that store managers perform uniform, cookie-cutter tasks mandated by a one-size-fits-all corporate manual*."

Pet. App. 66a-67a (emphasis added). And the court expressly acknowledged that

> Just because a business classifies all employees in a particular job category as exempt does not mean that those employees are necessarily 'similarly situated' for purposes of a 29 U.S.C. § 216(b) collective action. Rather, it is necessary to review the actual job duties of those in that job category to determine whether they are similarly situated and whether the exemption defense can be collectively litigated.

Pet. App. 67a n.46.

Thus, the district court's denial of decertification was affirmed not simply because of petitioner's universal classification decision, but also because the district court found that respondents were similarly situated with respect to their actual job duties. *See* Pet. App. 69a.

3. Petitioner's objection to the use of representative testimony, *see* Pet. 12, 29, is both entirely unrelated to the questions presented — which asks *whether* a collective action was permitted, not *how* it should have been tried — and meritless.

Petitioner states that liability was established on the basis of the testimony of "a few Plaintiffs handpicked by Plaintiffs' counsel" and that "[o]nly 7 Plaintiffs . . . testified live" at trial, Pet. 12, giving the impression that the defense was unable to call witnesses of its own choosing to establish its executive exemption affirmative defense. Any such impression is false.

First, respondents did not use representative testimony to prove their case. In fact, petitioner stipulated to the elements of respondents' case-in-chief, which were proven, in any event, by petitioner's own records. Pet. App. 97a.

Second, although petitioner complains about the amount of testimony from the plaintiffs, it actually *opposed* petitioner's motion to submit the deposition testimony of 238 opt-in plaintiffs petitioner had deposed before trial. Pet. App. 98a-99a. This included the testimony of Krista Allen upon which petitioner now attempts to rely. *See* Pet. 9.

Third, petitioner was not limited to relying upon the testimony of seven plaintiffs, "handpicked by Plaintiffs' counsel," to establish its exemption defense. Of course, respondents chose their own witnesses in presenting their case-in-chief. That is hardly surprising. But when the plaintiffs rested, petitioner was allowed to choose its own additional witnesses to establish its defense. In fact, petitioner called a number of the plaintiffs to the stand, as well as other non-plaintiff store managers, district managers, company executives, and experts.[23] And it could have called many more. "Although Family Dollar itself had the opportunity to present a great deal more testimony from Plaintiff store managers, or its own district managers, it chose not to." Pet. App. 100a-101a. For whatever reason, petitioner chose to

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[23] *See* Doc. 715 at 156-237; Doc. 716 at 4-305; Doc. 717 at 4-318; Doc 718 at 66-113. In addition, petitioner submitted the deposition testimony of twelve more opt-in plaintiffs. *See* Pet. App. 98a.

use "only 10 of its allotted 40 hours for its defense, even though it bore the burden of proving the executive exemption defense." Pet. App. 101a.

4. Finally, petitioner's concluding plea for review *in light of the "devastating" financial consequences of* its loss in this particular case, Pet. 32, is difficult to take seriously.

Even though it insists that its store managers' entitlement to overtime pay must be considered on an individual basis, petitioner acknowledges that it has been denying overtime compensation to each and every one of its store managers for many years. Pet. 6. During that time, petitioner has illegally retained *hundreds of millions of dollars, only a small portion* of which was disgorged by the verdict in this case.[24]

Moreover, even while acknowledging that its policy necessarily resulted in systematic violations of federal law,[25] petitioner makes no apologies. *See* Pet.

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[24] Even with its liquidated damages provision, FLSA's three year statute of limitations provision effectively limited the judgment to the equivalent of six years' of unpaid overtime for the opt-in plaintiffs. *See* 29 U.S.C. §§ 216(b), 255(a). Given that less than twelve percent of those sent notices opted into the case and received damages, *see* Pet. App. 11a (12,145 notices sent); Pet. App. 15a n.5 (claims of 1,424 workers tried), the judgment effectively requires petitioner to give up less than nine months' worth of unpaid overtime. And even that estimate is generous to petitioner. *See* Pet. App. 52a & n.34.

[25] *See* Pet. 31 (admitting that "there are some who were likely misclassified"). If this were not so — if petitioner agreed that either all or none of respondents were entitled to overtime — then it would have no grounds to complain that the case was tried as a collective action.

28 (insisting that "[a]s a practical matter, businesses do not make exemption classification decisions employee by employee"). Instead, petitioner seems to take the position that it is entitled to adopt a policy it knows will result in the persistent violation of workers' FLSA rights, secure in the knowledge that the millions of dollars saved over time can be claimed by workers only through individual actions for relatively small amounts of money.

That is precisely the set of perverse incentives Congress intended the FLSA's collective action provision to avoid. Its use in this case was consistent with the terms and purposes of the statute, as well as the decisions of other courts.

CONCLUSION

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

Respectfully submitted,

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July 6, 2009