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

[redacted]

CHAMBER OF COMMERCE OF THE UNITED STATES AND BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Pursuant to S. Ct. Rule 37.2, the Chamber of Commerce of the United States of America (the "Chamber") moves for leave to file a brief *amicus curiae* in support of the Petition for a Writ of Certiorari to the Eleventh Circuit Court of Appeals in *Family Dollar Stores, Inc. v. Morgan*, 08-1822. A copy of the proposed brief *amicus curiae* accompanies this Motion. The Chamber files this Motion because counsel for Respondents have refused to consent to the filing of this brief.

1. The Chamber is the largest federation of businesses and associations in the world. It represents an underlying membership of nearly 3,000,000 businesses and organizations of every size, in every region of the country. An important function of the Chamber is to give voice to the interests and concerns of American business on important matters before the courts, the United States Congress, the Executive Branch, and independent regulatory agencies of the federal government. The Chamber has advanced those interests, *inter alia*, by filing briefs in more than 1,000 cases of importance to the business community. Those cases include one employment law case pending before the Court, *Gross v. FBL Financial Services, Inc.*, 08-441 (*certiorari* granted Dec. 5, 2008), as well as other cases dealing with various aspects of federal employment law. *See, e.g., Sprint/United Management Co. v. Mendelsohn*, 128 S. Ct. 1140 (U.S. 2008); *Federal Exp. Corp. v. Holowecki*, 128 S. Ct. 1147 (U.S. 2008); *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 550 U.S. 618 (2007).

2. Chamber members are currently facing an unprecedented increase in the number of "collective action" cases under the Fair Labor Standards Act. FLSA collective action filings now outnumber discrimination class actions filed under other federal employment laws such as Title VII.

3. Among the most troublesome aspects of this new wave of litigation is the almost total absence of meaningful standards for district courts to use in determining whether such cases can proceed to trial as collective actions. That decision is typically made by district judges under what has appropriately been called the "ad hoc" approach, which offers no fixed, reliable criteria for determining whether the individuals in the putative plaintiff group are sufficiently homogeneous to qualify as "similarly situated," the relevant statutory language. Under this approach, the results in a given case depend in large measure on the judge before whom the case is pending. Because employers value predictability and stability in the law, it is intolerable for the outcome of such important questions to depend upon the courtroom in which the motion is heard. That state of affairs, however, is likely to persist absent guidance from this Court.

4. The court of appeals in this case adopted an approach for collective action certifications that will make it all but impossible for businesses to obtain a fair hearing on the merits of most FLSA collective action cases. That approach will also materially escalate the costs and risks associated with defending those cases and, accordingly, will increase the nearly inexorable pressure on defendants to settle these cases, even when valid defenses exist.

5. For Chamber members with national operations or that do business within the Eleventh Circuit, the opinion below may establish a *de facto* nationwide standard. Because the decision would permit a plaintiff to obtain collective action status simply by proving that the employees at issue shares some job-related characteristics, plaintiffs lawyers will almost certainly choose district courts in the Eleventh Circuit for such cases in the future whenever possible, burdening those courts and delaying access to the courts by litigants with disputes of other sorts.

The Chamber submits that the views of the business community on these important issues will be helpful to the Court in determining whether to grant the Petition. Accordingly, the Chamber respectfully moves the Court to grant this Motion and allow the filing of the accompanying brief.

Respectfully submitted,

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INTEREST OF THE *AMICUS*[1]

The Chamber of Commerce of the United States of America (the Chamber) is the voice of American business. It is the largest federation of businesses and associations in the world, representing an underlying membership of nearly 3,000,000 businesses and organizations of every size, in every region of the country. As explained at greater length in the accompanying Motion for Leave to File Brief *Amicus Curiae*, Chamber members are currently facing an explosion of "collective action" suits under the Fair Labor Standards Act. These cases pose particular concern for Chamber members because there currently is no meaningful set of standards for district courts to apply in determining whether to permit such cases to proceed in the collective action format. For the reasons provided below, the Chamber joins the numerous district courts that have decried this lack of guidance, and it urges the Court to grant review.

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1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. The Petitioner has consented to the filing of this brief. Respondents have not. A monetary contribution intended to fund the preparation of this brief in part was made by Dollar Tree Stores, Inc., which is involved in similar litigation currently pending in the United States District Court for the Northern District of Alabama.

INTRODUCTION AND SUMMARY OF ARGUMENT

For more than 70 years, the lower federal courts have had a single two-word phrase — "similarly situated" — to help them determine whether plaintiffs are entitled to pursue the peculiar form of mass litigation available under Section 216(b) of the Fair Labor Standards Act ("FLSA"). 29 U.S.C. § 216(b). This Court has never considered the meaning of that phrase. Until the decision below, the courts of appeals had not meaningfully considered the phrase either due to the unique opt-in-only structure of those "collective action" cases, the unavailability of interlocutory appeals, and the "hydraulic pressure"[2] that group litigation exerts on defendants to settle. *See* discussion, *infra*, pp. 8-10.

The absence of meaningful appellate guidance on this critical question is a recurrent problem for district courts. FLSA collective action filings in the federal courts are now more numerous than any other type of collective or class action.[3] These collective action filings now *far* outnumber discrimination class actions under Title VII.[4] Thus, it is no wonder that district judges

2. *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 164 (3d Cir. 2001) ("class certification places inordinate or hydraulic pressure on defendants to settle, avoiding the risk, however small, of potentially ruinous liability").

3. *See* Emery G. Lee, et al., *The Impact of the Class Action Fairness Act of 2005 on the Federal Courts*, Federal Judicial Center 3-4 (Apr. 2008) ("Federal Judicial Center Report").

4. *See* Nancy Montwieler, *Wage-Hour Class Actions Surpassed EEO In Federal Courts Last Year, Survey Shows*, 56 DAILY LAB. REP., at C-1, Mar. 22, 2002.

throughout the country regularly lament the lack of assistance they have received on how to handle this opaque statutory standard:

> Section 216(b) does not define "similarly situated," and neither the United States Supreme Court nor the [courts of appeals] have offered [district courts] guidance as to how [they] should determine whether the representative plaintiffs are "similarly situated" to the putative plaintiffs.

Pagliolo v. Guidant Corp., No. Civ. 06-943, 2007 WL 2892400, at *1 (D. Minn. Sept. 28, 2007). The court in *Pagliolo* was complaining specifically about the absence of Eighth Circuit precedent, but identical complaints appear in reported decisions from every Circuit — and nearly every judicial district in the country.[5] *See* discussion, *infra*, on p. 7, and n.12. In the absence of controlling guidance, the phrase "similarly situated" has become a Rorschach test for every district judge who encounters it, with the fate of each collective action certification motion turning not simply upon the circuit in which the case arises, but upon the district judge who hears it.

Although there is little or no authority on the meaning of "similarly situated" in the FLSA context,

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5. One day after this case was docketed, Respondents waived their right to file an answering brief, dramatically shortening the time available for the preparation of this brief. Accordingly, *amicus* was unable to perform the district-by-district analysis that would have been necessary to confirm the statement in the text.

the phrase is a common one in other employment law cases. In discrimination and retaliation cases, every circuit has previously held, in form or substance, that "[i]n order for . . . employees to be considered similarly-situated . . . all of the relevant aspects of [the compared employees'] employment situation [must be] nearly identical."[6] The court below, however, concluded that all 1,424 of the plaintiffs in this action were similarly situated simply because they "shared a number of factual details with respect to their job duties and day-to-day work [and] share[d] common job traits." *Morgan v. Family Dollar Stores, Inc.*, 551 F.3d 1233, 1263 (11th Cir. 2008).

After concluding that a few "common job traits" were sufficient to justify collective action status, the court affirmed a trial plan by which Petitioner was held liable to all 1,424 of the plaintiffs on the basis of testimony from just seven individuals handpicked by Plaintiffs' counsel. This schematic cannot be reconciled with even the most basic notions of fairness or the FLSA's underlying exemption standards. The applicable FLSA substantive liability standard requires the finder of fact to consider a long list of individualized factors,[7] decide the relative importance of each "on a case-by-case basis,"[8] largely without regard to job titles or descriptions, and to render a decision based on the facts

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6. *Pierce v. Commonwealth Life Ins. Co.*, 40 F.3d 796, 802 (6th Cir. 1994). *See also* cases collected, *infra*, at p. 17 n.20.

7. 29 C.F.R. § 541.102.

8. *Id.* § 541.106(a).

of each "particular case."[9] A trial decided on the basis of the testimony of a handful of individuals (.005% of the "class") who need only share "a number of factual details" cannot accomplish this fact-intensive task.

This case represents a rare — indeed, unique — opportunity for the Court to correct the Eleventh Circuit's error and fill the void that has bedeviled so many district judges across the country. It is the only FLSA case in which the meaning of the "similarly situated" standard has ever been squarely presented to this Court.[10] This is true even though cases in which the phrase arises are commonplace and are consuming

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9. *Id.* § 541.700(a).

10. In *Anderson v. Cagle's Inc.*, 488 F.3d 945, 952-55 (11th Cir. 2007), *cert denied*, 128 S.Ct. 2902 (2008), the petition presented an unrelated question regarding "donning and doffing" claims under 29 U.S.C. § 203(o). The court of appeals decision in *Anderson* is the only other appellate opinion to consider the certification standard in an FLSA collective action, although it too failed to define the standard in any discernible sense. Five appellate decisions have considered certification standards in collective actions under the Age Discrimination in Employment Act which relies upon the same "similarly situated" language. *See Thiessen v. Gen. Elec. Capital Corp.*, 267 F.3d 1095 (10th Cir. 2001), *cert. denied*, 536 U.S. 934 (2002); *Hipp v. Liberty Nat'l Life Ins. Co.*, 252 F.3d 1208 (11th Cir. 2001), *cert. denied*, 534 U.S. 1127 (2002); *Grayson v. K Mart Corp.*, 79 F.3d 1086 (11th Cir. 1996), *cert. denied*, 519 U.S. 987 (1996); *Mooney v. Aramco Servs. Co.*, 54 F.3d 1207 (5th Cir. 1995); *Lockhart v. Westinghouse Credit Corp.*, 879 F.2d 43 (3d Cir. 1989). These decisions offer little if any guidance about the phrase "similarly situated" even in the context of age discrimination litigation, and nothing at all to illuminate the phrase's application in the context of FLSA cases like this one.

an ever greater share of the nation's judicial resources. District courts now regularly receive appellate guidance on the application of Fed. R. Civ. P. 23, and opportunities regularly present themselves to the Court for it to consider open questions in that arena if it chooses, but under the FLSA, there is no "next case" waiting in the wings for the Court to select. The Court should grant the writ.

REASONS FOR GRANTING THE PETITION

I. Collective Actions Now Dwarf Other Kinds Of Mass Litigation, And The Lower Courts Are Expressly, Repeatedly Lamenting The Lack Of Appellate Guidance On The Question Presented

There is no inter-circuit conflict in this case. That is not, however, because the issue presented is unimportant or because it arises infrequently. Indeed, it almost certainly is among the most important questions confronting district judges today that has evaded any meaningful appellate review. The construction of the phrase "similarly situated" arises in every FLSA collective action, and actions of that type are now *the most common* class action-type lawsuit filed in the federal courts, dwarfing all other types of class actions except perhaps those under consumer protection laws.[11] *See* Federal Judicial Center Report, at 3. The Federal Judicial Center Report characterized the rising tide of FLSA collective action filings as "striking," noting

11. This understates the regularity with which district courts are confronted with this language because the data include neither cases under the ADEA nor the Equal Pay Act.

that filings of this sort had increased in "absolute numbers . . . from 337 in the first six-month period studied to 1,104 in the last six-month period — a 228 percent increase." *Id.* at 3-4.

Neither can the absence of an inter-circuit conflict be taken as evidence that the applicable law is well-understood. In nearly 100 reported decisions, district judges have lamented the lack of appellate guidance on this critical question.[12] The judges in each such case have observed, in roughly comparable language, that the "FLSA does not define the term 'similarly situated' and neither the United States Supreme Court nor the [applicable court of appeals has] provide[d] direct guidance on determining whether potential class members are similarly situated." *Bishop v. AT & T Corp.*, ___ F.R.D. ___, No. 08-CV-468, 2009 WL 763946, at *2 (W.D. Pa. Mar. 23, 2009). These are just a few examples from the first three months of this year: *Wilson v. Guardian Angel Nursing, Inc.*, No. 3:07-0069, 2009 WL 790107, at *5 (M.D. Tenn. Mar. 24, 2009) ("As many courts have noted, 'similarly situated' has not been strictly defined by either Congress or the federal judiciary."); *Howard v. Securitas Security Servs., USA Inc.*, No. 8-CV-2746, 2009 WL 140126, at *1 (N.D. Ill. Jan. 20, 2009) ("neither the FLSA nor its implementing regulations define or provide guidance on the meaning of the term 'similarly situated [and] the Seventh Circuit has yet to provide guidance"); *Davis v. Westgate Planet Hollywood Las Vegas, LLC*, No. 208-CV-00722, 2009 WL

12. This number is likely a significant understatement given the restrictive search methodology *amicus* used. The appendix to this brief lists 87 cases containing similar language.

102735, at *9 (D. Nev. Jan. 12, 2009) ("The FLSA does not define the term 'similarly situated,' and the Ninth Circuit has not yet formulated a test for courts to determine whether putative class members are 'similarly situated.'").

There are no circuit opinions defining a usable standard for "similarly situated," but the reasons are entirely unrelated to the prevalence of the issue or its importance to the district courts. First, the courts of appeals have thus far concluded that no interlocutory "collateral order" review is possible from a "similarly situated" decision.[13] Review of a class decision in an FLSA case, then, must await final judgment. In the traditional class action context, Fed. R. Civ. P. 23(f) was added to the Federal Civil Rules, in part, precisely because the lack of interlocutory review had left many fundamental aspects of Rule 23 "poorly developed." *Blair v. Equifax Check Servs. Inc.*, 181 F.3d 832, 835 (7th Cir. 1999). The same is true with respect to FLSA cases but Rule 23(f) provides no relief.

Second, when a court denies collective action status to a plaintiff group, the easiest recourse for the plaintiffs is often to file another action rather than to appeal. The FLSA's opt-in-only design makes it unusually easy for plaintiffs' lawyers to judge-and-forum shop by filing

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13. *See McElmurry v. U.S. Bank Nat'l Ass'n*, 495 F.3d 1136, 1141 (9th Cir. 2007); *Comer v. Wal-Mart Stores, Inc.*, 454 F.3d 544, 546-49 (6th Cir. 2006); *Baldridge v. SBC Communications, Inc.*, 404 F.3d 930, 931-33 (5th Cir. 2005); *Lusardi v. Lechner*, 855 F.2d 1062, 1065 (3d Cir. 1988). In *amicus*' view, these decisions give the collateral order doctrine an unnecessarily cramped reading.

multiple actions against the same employer in different courts, searching for a single case in which the court will authorize a collective action. That is precisely what happened in this case. Counsel for Respondents here filed a number of different actions, in different districts, all seeking collective action status representing the same group of Family Dollar store managers, asserting the same FLSA claims. Collective action status was denied in several,[14] but in this case counsel obtained collective action status and the largest jury verdict in Alabama in 2006. 16 ALA. L. WEEKLY No. 6 (Feb. 9, 2007).

Because an individual is not bound by the results in an FLSA case unless he or she has affirmatively opted-in, plaintiffs' lawyers can file new cases *seriatim* until they get the answer they want; when certification is granted, the plaintiffs in any other identical actions simply file opt-in consents in the "successful" action. Plaintiffs and their counsel, then, have no incentive to pursue an appeal from an adverse collective action decision, as it is simpler and cheaper to find a new judge and file a new case. The idiosyncratic procedures and undefined standards applicable to FLSA collective actions and the unique opportunities they present for judge-and-forum shopping have combined to generate vast wealth for the plaintiffs' bar, but have generated only uncertainty for the courts and escalating costs for employers. *See* Michael Orey, *Wage Wars*, Business Week (Oct. 1, 2007), *available at http://www.businessweek.com/magazine/content/07_40/b4052001.htm* (profiling one FLSA attorney who has

14. *See Ward v. Family Dollar Stores, Inc.*, No. 3:06-CV-441, 2008 WL 199699 (W.D.N.C. Jan. 22, 2008); *Grace v. Family Dollar Stores, Inc.*, No. 3:06-CV-306, 2007 WL 2669699 (W.D.N.C. Sept. 6, 2007).

accumulated more than $458 million in settlements within a short time, at least 25% attributable to attorneys' fees.).

Finally, employers are rarely in a position to appeal because they are rarely willing or able to see such litigation through to a final judgment. For employers, the prospect of trial in a collective action case is chilling. With no settled protocol for trying these cases, and with the potentially enormous exposure, settlement is often the most prudent course (even where compelling defenses are available). This, too, was an animating rationale behind Rule 23(f). *See* Fed. R. Civ. P. 23(f), Adv. Comm. Notes (1998) ("An order granting certification . . . may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability.").

Members of this Court have previously observed that some lower court confusion over important legal questions can be tolerated for a time while various perspectives on the question develop in the lower courts, permitting the question to "mature" before ultimately reaching this Court for consideration. *See, e.g., McCray v. New York*, 461 U.S. 961, 963 (1983) (Stevens, J., respecting the denial of certiorari); *see also Gressman, Geller, et al., Supreme Court Practice* 246 (9th ed. 2007). Judicial thinking on the present question is not "maturing" or becoming more focused. After more than 70 years of litigation, the persisting lack of guidance on the question is merely becoming more intolerable.

If review is not granted in this case, it seems increasingly unlikely that another opportunity for Supreme Court review will present itself anytime soon.

The Eleventh Circuit's decision below will prove irresistible to the plaintiffs' bar. Given the largely toothless "similarly situated" standard it adopts (discussed immediately below), no employer with operations touching the Eleventh Circuit is likely to be sued anywhere else.

II. The "Similarly Situated" Standard Adopted By The Eleventh Circuit Fails Adequately To Protect The Due Process Rights Of Defendants And The Interests Of Non-Testifying Plaintiffs

Like the commonality, typicality, and predominance requirements of Rule 23, the "similarly situated" standard exists to ensure a degree of homogeneity among the members of the FLSA "class." The critical — and unanswered — questions posed by this cryptic two-word phrase, then, are: what factors must be similar and how similar must they be.

For cases like this one, in which the dispute centers on the exempt status *vel non* of retail store managers, the Department of Labor ("DOL") has largely answered the first question. DOL has provided a non-exhaustive list of activities that are considered managerial:

> Interviewing, selecting, and training of employees; setting and adjusting (or making material especially meaningful recommendations regarding) their rates of pay and hours worked; directing their work; maintaining their production or sales records for use in supervision or control; appraising their productivity and efficiency for the purpose

> of recommending promotions or other changes in their status; handling their complaints and grievances and disciplining them when necessary; planning their work; determining the techniques to be used; apportioning the work among the workers; determining the type of materials, supplies, machinery or tools to be used or merchandise to be bought, stocked and sold; controlling the flow and distribution of materials or merchandise and supplies; and providing for the safety of subordinates and property.

29 C.F.R. § 541.102. "Determination of whether an employee has management as his primary duty *must be based on all the facts in a particular case*," 29 C.F.R. § 541.103 (emphasis added), and an individual may be exempt even if he or she performs only one or a few management duties. *Id.*; *see also Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees*, 69 Fed. Reg. 22,122, 22,122-25 (Apr. 23, 2004) (there are "management" functions other than those included in § 541.102 and a "case-by-case analysis" is necessary to determine whether unlisted functions meet the requirement).[15]

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15. *See also Riley v. Town of Basin*, No. 91-8022, 1992 U.S. App. LEXIS 8621, at *9 (10th Cir. 1992) (Table) (noting that the regulations provide *examples* of what constitutes management); *Murphy v. Town of Natick*, 516 F. Supp. 2d 153, 159 (D. Mass. 2007) (DOL regulations merely provide examples of activities which are "typical management duties"); *Thomas v. Speedway Superamerica, LLC*, No. 04-CV-00147, 2006 WL 4969500, at *9-

(Cont'd)

If all of Family Dollar's store managers indisputably performed all of the listed duties, one would have to consider them "similarly situated." Likewise, if Family Dollar managers *never* performed *any* of these duties, they would almost certainly be "similarly situated."

In the real world, however, and despite the most rigorous employer efforts to *design* jobs to be performed in an exempt way, variations in the duties *actually performed* by retail managers at a large company like Family Dollar occur. This can be because of the size of the store. The manager of a small store with a long-tenured staff and minimal turnover may rarely have to interview or hire, may spend little time training, and may have less need to monitor employee performance. The manager of a large store with serious turnover and

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(Cont'd)

10 (S.D. Ohio Mar. 31, 2006), *aff'd*, 506 F.3d 496 (6th Cir. 2007) (describing the regulation as providing "guidelines" for interpreting what management means); *Beauchamp v. Flex-N-Gate, LLC*, 357 F. Supp. 2d 1010, 1015-16 (E.D. Mich. 2005) (comparing commonalities between an employee's listed responsibilities to the "regulatory examples of 'management' duties"); *see also DOL Wage & Hour Opinion Letter FLSA2009-32*, 2009 WL 649044 (Jan. 16, 2009) (Supervisory Special Agent position fit within "management" exemption where duties included only 6 of the 14 activities listed in the regulation); *DOL Wage & Hour Opinion Letter FLSA2008-4NA*, 2008 WL 1847287 (Feb. 29, 2008) (plant managers satisfy "management" definition where duties include only 7 of the 14 regulatory examples); *Donovan v. Burger King Corp.*, 672 F.2d 221, 226 (1st Cir. 1982) (assistant managers were properly treated as exempt because they supervised other employees even though they had no significant discretion in doing so).

employee discipline problems may spend significant time interviewing, selecting, training, evaluating, and disciplining subordinates. Differences also arise because higher-level managers approach their duties differently. District sales managers may cede to experienced store managers more latitude with respect to hiring and discipline than they will to rookie managers.

Given these variations, and given that "[d]etermination of whether an employee has management as his primary duty *must* be based on all the facts in a particular case," 29 C.F.R. § 541.103 (emphasis added), a finder of fact in the typical case is asked to weigh individually the mix of activities the plaintiff performed. In a collective action, where the exemption status of hundreds, or even thousands, of managers may be at stake, unless all of the managers at issue have performed the same mix of duties, the finder of fact cannot possibly decide the fate of the entire group collectively because it cannot, as the DOL has insisted, make the exemption "determin[ation] on a case-by-case basis." 29 C.F.R. § 541.106(a).

The decision below leaves no room for individualized, nuanced decision-making. The Eleventh Circuit did not require a degree of homogeneity that would have permitted a jury fairly to consider the fate of the entire group. Rather, the court concluded that every one of the 1,424 plaintiffs was "similarly situated" to every other plaintiff simply because they "shared a number of factual details with respect to their job duties and day-to-day work [and] share[d] common job traits." *Morgan*, 551 F.3d at 1263. Because the district court permitted the jury to decide the fate of all 1,424 plaintiffs on the basis

of the testimony of just seven individuals, all of the individual claims were determined by the jury's consideration of those seven individuals.[16]

A brief comparison of the procedure used below and that employed in the more familiar discrimination class action context is illuminating. A pattern or practice discrimination case is usually tried in two phases. During the first phase, the employer's liability to the class as a whole for declaratory and injunctive relief is at stake. If the employer is found liable, the case then proceeds to phase two, where the question becomes whether the

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16. This use of representative testimony was error. *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946) (*superseded in part* by the Portal-to-Portal Act), approved the use of representative evidence in FLSA cases to prove damages when the employer lacks adequate records on the question. Nothing in *Mt. Clemens*, however, suggested that representative evidence could *ever* be used to prove employer liability or to obtain collective action status. Even as to damages, the courts of appeals have imposed substantial restrictions on the use of representative evidence. *Compare Reich v. Southern Md. Hosp., Inc.*, 43 F.3d 949, 952 (4th Cir. 1995) (testimony of 54 employees on behalf of 3,368 plaintiffs in an FLSA collective action was insufficient to support a judgment for all plaintiffs) and *Secretary of Labor v. DeSisto*, 929 F.2d 789, 793 (1st Cir. 1991) (testimony of one employee cannot establish FLSA damages in a case involving 244 employees holding a variety of positions at different locations) *with Donovan v. Williams Oil Co.*, 717 F.2d 503 (10th Cir. 1983) (testimony of 19 station attendants supported an award to 34 employees); *Donovan v. New Floridian Hotel, Inc.*, 676 F.2d 468 (11th Cir. 1982) (testimony of 23 employees supported an award to 207 employees); *Brennan v. General Motors Acceptance Corp.*, 482 F.2d 825 (5th Cir. 1973) (upholding award where 16 employees testified on behalf of 37 employees).

employer is liable to *individual members of the class* and if so, for how much.[17] The employer is never obligated to pay damages of any sort to any class member unless it is first determined during phase two that the specific claimant at issue had been a victim of the pattern of discrimination found to exist at phase one; simply being a member of the class is not enough.[18]

As the courts below conceived the FLSA collective action, however, there *is* no phase two, and no opportunity for a fact finder to consider "all the facts in [each] particular case." Here, Petitioner was held liable to the entire group of 1,424 based on conclusions reached after hearing about the duties performed by seven individuals presumably handpicked by Respondents' counsel *precisely because* they performed fewer managerial duties than the rest of the group, and performed them less often.[19]

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17. *International Broth. of Teamsters v. United States*, 431 U.S. 324, 361-62 (1977).

18. *Teamsters*, 431 U.S. at 368-71 (finding of liability necessary "with respect to each specific individual at the remedial hearings"). "It is the role of courts to provide relief to claimants, *in individual or class actions*, who have suffered, or will imminently suffer, actual harm." *Lewis v. Casey*, 518 U.S. 343, 349 (1996) (emphasis added). Damages cannot be awarded based "merely [on] the status of being subjected to [an] institution that was not organized or managed properly." *Mayweathers v. Newland*, 258 F.3d 930, 934 (9th Cir. 2001) (quoting *Lewis*, 518 U.S. at 350) (emphasis added); *Bishopp v. District of Columbia*, 57 F.3d 1088, 1092 (D.C. Cir. 1995) (same; "remedial authority is limited to 'actual victims' of discrimination").

19. The court limited each side to 40 hours of trial testimony. *See Morgan*, 551 F.3d at 1278.

This process cannot be reconciled with even the most rudimentary notions of fairness. Had the district court used the standard commonly employed in other types of employment litigation, it would have insisted that "all of the relevant aspects of [the opt-in plaintiffs'] employment situation [be] nearly identical."[20] Employing such a standard would have ensured that the finder of fact could efficiently and fairly decide the fate of all plaintiffs — testifying and non-testifying alike — on the basis of representative testimony, and it would have safeguarded the most fundamental due process protections afforded litigants. Non-testifying plaintiffs would have been assured that their claims were being prosecuted by individuals with interests essentially indistinguishable from theirs. The defendant would not have been held liable to individuals whose claims were materially different from those individuals available to question at trial. *Cf. Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846 (1999) (due process implicated when the "day-

20. *Pierce*, 40 F.3d at 802. *See also Willis v. Town of Marshall, N.C.*, 275 Fed. Appx. 227, 233 (4th Cir. 2008) (to demonstrate that comparators are "similarly situated" plaintiff's evidence "must show an extremely high degree of similarity" between herself and the comparator(s)) (internal quotations omitted); *Runnels v. Texas Children's Hospital Select Plan*, 167 Fed. Appx. 377, 385 (5th Cir. 2006) (appellants failed to show that they are "similarly situated as to all the factors" to their comparators, and failed to show "nearly identical" circumstances); *Morris v. Family Dollar Stores of Ohio, Inc.*, No. 07-3417, 2009 WL 899894, at *8 (6th Cir. Mar. 21, 2009) (plaintiff's employment situation and that of his comparators must be "nearly identical" to be "similarly situated"); *Rioux v. City of Atlanta, Ga.*, 520 F.3d 1269, 1280 (11th Cir. 2008) (facts related to comparators must "be nearly identical to prevent courts from . . . confusing apples with oranges").

in-court ideal" is infringed); *Hansberry v. Lee*, 311 U.S. 32, 44-45 (1940) (due process is offended when rights of absent parties determined by testimony from those "whose interests are not necessarily or even probably the same as those [by] whom they are deemed to [be] represent[ed]"). No such protections were afforded the litigants here.[21]

III. Because The Eleventh Circuit Rejected Explicit DOL Guidance On The Merits Of The Exemption Question, The Decision Below, If Left Intact, Will Ensure That It Becomes The Circuit Of Choice For All Exemption Cases

As noted above, the feckless standard adopted by the courts below for collective action certification will draw plaintiffs from around the country, limiting further the already remote chances of developing an inter-circuit division of authority on the meaning of the "similarly situated" standard. The Eleventh Circuit will be

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21. The Eleventh Circuit also noted that, because Petitioner had classified its store managers as a group, it was not unfair to have their exempt status determined as a group. In addition to ignoring reality — employers of any size have no alternative but to classify jobs as a group — this idiosyncratic "waiver" analysis is incompatible with orthodox FLSA principles. *See, e.g., Reich v. John Alden Life Ins. Co.*, 126 F.3d 1, 10 (1st Cir. 1997) ("the particular title given to an employee is not determinative"); *Mullins v. City of New York*, 523 F. Supp. 2d 339, 351 (S.D.N.Y. 2007) (quoting 29 C.F.R. § 541.2) ("A job title alone is insufficient to establish the exempt status of an employee"); *Geer v. Challenge Financial Investors Corp.*, No. 05-1109-JTM, 2007 WL 1626494, at *2 (D. Kan. May 30, 2007) (employee's "title alone does not determine whether she meets the executive or managerial exemption to the FLSA").

particularly alluring in cases involving the FLSA's *bona fide* executive exemption because the substantive standard adopted by the Eleventh Circuit rejects (in many instances without mentioning) explicit, relatively recent DOL guidance on point and repudiates years of settled law in order to arrive at a mistakenly cramped construction of that exemption.

The Eleventh Circuit's most adventurous change to FLSA exemption law relates to the weight it placed on the time devoted by Family Dollar store managers to managerial duties. Time and again — no fewer than ten times during the course of its opinion — the court returned to the observation that Petitioner's "store managers spent only 10 to 20% of their time performing exempt work" and 80-90% of their time on non-exempt tasks. *See, e.g., Morgan*, 551 F.3d at 1269.

The underlying evidence on this point was hotly contested below, but that contest should have been irrelevant to the merits determination. DOL has confirmed that "*particularly in restaurant and retail settings*," employees may well be exempt *even if they spend up to 90% of their time on non-exempt tasks.* 69 Fed. Reg. at 22,136-37 (Apr. 23, 2004) (emphasis added). In confirming this long-understood proposition, DOL cited with approval some of the decisions adopting this approach to the exemption: *Jones v. Virginia Oil Co.*, 69 Fed. Appx. 633, 635-38 (4th Cir. 2003) (restaurant manager testified that *70-80% of her time was spent on non-exempt duties*; held manager was exempt "captain of the ship"); *Murray v. Stuckey's, Inc.*, 939 F.2d 614, 617-19 (8th Cir. 1991), *cert. denied* 502 U.S. 1073 (1992) (store managers who spend *up to 90 percent of their*

time on "routine non-management jobs such as pumping gas, mowing the grass, waiting on customers and stocking shelves" were exempt managers); *Donovan*, 672 F.2d at 223-27 (restaurant assistant managers who performed non-exempt work the majority of the time were nevertheless exempt); *Kastor v. Sam's Wholesale Club*, 131 F. Supp. 2d 862, 863-70 (N.D. Tex. 2001) (retail bakery manager was exempt even though *he performed non-exempt work 90% of the time*); and *Horne v. Crown Central Petroleum, Inc.*, 775 F. Supp. 189, 190-91 (D.S.C. 1991) (convenience store manager held exempt even though she performed management duties "simultaneously with assisting the store clerks in waiting on customers"; nonexempt tasks were "not nearly as crucial to the store's success as were the management functions").[22]

DOL and the courts agree that in most settings, the proper inquiry focuses on whether the management

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22. The DOL relied on these decisions in its new FLSA regulations addressing the "special circumstances of retail supervisors." 69 Fed. Reg. at 22,136. For instance, the new regulations recognize that separating a retail manager's exempt duties from nonexempt tasks is difficult if not impossible. Instead, the realities of the job require the manager, for example, to "supervise employees and serve customers at the same time." 29 C.F.R. § 541.106(b) (2006). Thus, the new regulations specify that "managers in a retail establishment who perform exempt executive work such as supervising and directing the work of other employees, ordering merchandise, managing the budget[,] and authorizing payment of bills may have management as their primary duty" despite spending "more than 50 percent of the time performing nonexempt work such as running the cash register." *Id.* § 541.700(c); *see also* 69 Fed. Reg. at 22,136–37, 22,185–85.

functions are "of principal importance *to the employer*," not the amount of time devoted to particular tasks. *Schaefer v. Indiana Michigan Power Co.*, 358 F.3d 394, 401 (6th Cir. 2004) (emphasis added); *accord* 69 Fed. Reg. at 22,137 (Apr. 23, 2004). The Eleventh Circuit did not meaningfully discuss DOL's view of this factor or conclude that its view was entitled to no deference under applicable principles of administrative law; it simply ignored the issue.

Similarly, although the court below conceded that Petitioner's store managers had unilateral authority to hire some hourly workers, it repeatedly emphasized that they lacked the authority unilaterally to hire or terminate assistant store managers. *See, e.g.*, *Morgan*, 551 F.3d at 1263 n.42, n.44. This suggests another sharp departure from DOL regulations and settled circuit law. First, the authority to hire cashiers should have independently satisfied the "hiring" prong of the DOL's managerial function test regardless of the manager's authority with respect to assistant managers. The Eleventh Circuit cited no law suggesting that a store manager must have the authority unilaterally to hire *everyone* who works in the store to satisfy this aspect of the test.

More fundamentally, the court was apparently under the impression that the store manager's participation in the hiring and firing processes did not "count" for purposes of the exemption test because their authority in those areas was not total: "Although store managers interview and recommend hourly associate candidates, they need district manager approval to hire them. The district manager — not the store manager — also has

the authority to terminate employees. . . ." *Morgan*, 551 F.3d at 1256.

The DOL regulations on this subject are unambiguous. An employee engages in a managerial function when she *recommends* that the employer hire, fire, or promote another person so long as those recommendations are given "particular weight." 29 C.F.R. §§ 541.100(a)(4), 541.105. The court of appeals found it significant that "Family Dollar's policies do not *require* that store managers' hiring or firing recommendations be given any particular weight," *Morgan*, 551 F.3d at 1256 (emphasis added), but the content of Petitioner's written policies should have been irrelevant if those recommendations were *in fact* given weight.

In these respects and many others, the court below re-made the law applicable to FLSA cases like this one in a way that makes it much harder than the DOL envisioned for employers to satisfy the managerial exemption. Some courts have observed that "[i]t is virtually impossible to conceive of a free standing business location without a 'manager.' [A retail enterprise cannot be] manage[d] by remote control." *Bosch v. Title Max, Inc.*, No. CIV.A.03-AR-0463-S, 2005 WL 357411, at *9 (N.D. Ala. Feb. 7, 2005); *see Murray*, 939 F.2d at 618 ("the person 'in charge' of a store has management as his primary duty, even though he spends the majority of his time on non-exempt work and makes few significant decisions.").

The Eleventh Circuit's relaxed standards of proof for plaintiffs already attract more FLSA cases, by far, than any other Circuit. The extraordinary departures from settled law represented in this case seem destined to ensure that the pace of this phenomenon will accelerate with even greater velocity, making it even less likely that an inter-circuit division of authority develops in the future. The question presented is important, the confusion over the applicable standard is intolerable, and the time has come to provide district courts with the guidance for which they have asked.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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