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 OF DRI—THE VOICE OF THE DEFENSE BAR AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

EAMON P. JOYCE
SIDLEY AUSTIN LLP
787 Seventh Avenue
New York, NY 10019
(212) 839-5300

CARTER G. PHILLIPS*
NAOMI SCHOENBAUM
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Amicus Curiae

* Counsel of Record

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INTEREST OF *AMICUS CURIAE*

Amicus curiae DRI—The Voice of the Defense Bar is an international organization that includes more than 22,000 attorneys involved in the defense of civil litigation.[1] DRI is committed to enhancing the skills, effectiveness, and professionalism of defense attorneys. Because of this commitment, DRI seeks to address issues germane to defense attorneys and the civil justice system, to promote the role of defense attorneys, to improve the civil justice system, and to preserve the civil jury. DRI has long been a voice in the ongoing effort to make the civil justice system more fair, efficient, and—where national issues are involved—consistent.

To promote these objectives, DRI participates as *amicus curiae* in cases that raise issues of fundamental importance to its members and to the judicial system. This case implicates such issues. DRI and its members have considerable experience defending employers in litigation involving "collective actions" under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 216(b), as well as under the Age Discrimination in Employment Act ("ADEA") and the Equal Pay Act, which expressly incorporate FLSA's collective action provision, see *id.* §§ 206(d)(3), 626(b). Even though the collective action provision has been

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[1] Pursuant to Supreme Court Rule 37.2, counsel of record for all parties received timely notice of *amicus curiae*'s intent to file this brief, and the parties have consented to the filing of this brief. Letters of consent have been filed with the Clerk. Pursuant to Supreme Court Rule 37.6, *amicus curiae* DRI states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution towards the preparation and submission of this brief.

in force for the better part of a century, the application of § 216(b)'s certification procedures has created only one consistent result—confusion among the lower courts.

This unpredictability presents great threats to and imposes considerable costs on employer-defendants nationwide, and hinders the ability of DRI and its members to offer useful counsel. DRI is especially concerned about the decision below. The Eleventh Circuit has promised a future of continued unpredictability in the law by reaffirming its self-described "*ad hoc*" standard for determining whether employees are "similarly situated," which is essential to pursuing a collective action. In doing so, the court of appeals guaranteed that its district courts will become the forum of choice for FLSA collective actions. This Court should grant review to ensure that uniform rules guide the collective actions that increasingly consume judicial dockets nationwide.

REASONS FOR GRANTING THE PETITION

I. REVIEW IS WARRANTED BECAUSE THE LOWER COURTS HAVE JETTISONED ANY MEANINGFUL STANDARDS GOVERNING CERTIFICATION EVEN AS COLLECTIVE ACTIONS HAVE PROLIFERATED.

In nearly uniform fashion, the lower courts have discarded standards, existing at the time of FLSA's enactment and for years thereafter, that would have promoted predictable and efficient certification decisions. Similarly, the lower courts have swept aside this Court's instructions in *Hoffmann-La Roche Inc.* v. *Sperling*, 493 U.S. 165 (1989), that judicial economy and manageability considerations apply equally to § 216(b) as they do to Rule 23 of the Federal Rules of Civil Procedure. Instead, the courts

below have adopted a "standard" that they describe as being "*ad hoc*," and that lives up to its name by producing inconsistent results in similar cases.

Improvisation is no substitute for fairness, and thus this Court's review is essential. The arbitrariness of the *ad hoc* approach is magnified by the proliferation of collective actions, as well as the courts' increasing willingness to certify such actions. This exacts a great toll on employers. Subjecting employers and their counsel to such unpredictable litigation costs and outcomes is untenable. The current approach creates inefficiency across businesses, which may have severe repercussions for employees in these uncertain economic times.

There is, however, a better approach available. As shown below, the principles set forth in *Sperling* and in applications of § 216(b)'s certification standard before the modern Federal Rules of Civil Procedure could return predictability to collective action litigation, alleviate the inefficiencies under which employers and their counsel operate, and provide protection to non-representative plaintiffs in these proceedings.

A. Even As Collective Actions Grow At An Exponential Rate, Certification Analysis Remains Unsettled And Unpredictable.

The Petition and the brief of the Chamber of Commerce of the United States recognize that the number of FLSA collective actions is increasing dramatically. Pet. 30; Br. of Chamber of Commerce 6-7. An article that recently appeared in one of *amicus*'s publications adds that "FLSA class and collective action litigation has * * * grown at an exponential pace" since 2004, growing at a rate of over 120 percent between 2004 and 2008. Paul A.

Wilhelm, *Actions on the Rise: Top Five Trends in Wage & Hour Litigation*, 51 No. 4 DRI For Def. 48 (2009). Even before this most recent spike, commentators had characterized these suits as the "the 'claim du jour'" of the plaintiffs' bar. Michael W. Hawkins, *Current Trends in Class Action Employment Litigation*, 19 Lab. Law. 33, 50 (2003). This "surge is not expected to end soon." Wilhelm, *supra*; *accord*, Robert E. Craddock, Jr. & Kim Koratsky, *Employers Beware: Fair Labor Standards Act Collective Actions Continue to Skyrocket*, Memphis Bus. J., Nov. 7, 2008. Indeed, collective actions alleging, as here, that an employer has misclassified its employees as exempt from FLSA's overtime requirements "continue to proliferate." Wilhelm, *supra*.

Despite more than 70 years and a recent expansion in the level of judicial activity, the "similarly situated" standard for certification under § 216(b) remains undefined. Commentators have remarked that "[§ 216(b)] provides no guidance as to what factors courts should look to when applying the 'similarly situated' standard." Hawkins, *supra*, at 47.[2] One judge recently lamented: "Unfortunately, neither the FLSA nor its implementing regulations define or provide guidance on the meaning of the term 'similarly situated.'" *Howard* v. *Securitas Sec. Servs., USA Inc.*, No. 08 C 2746, 2009 WL 140126, at *1 (N.D. Ill. Jan. 20, 2009); see *Keef* v. *M.A. Mortenson Co.*, No. 07-CV-3915(JMR/FLN), 2009 WL

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[2] *Accord*, James M. Fraser, Note, *Opt-In Class Actions Under the FLSA, EPA, and ADEA: What Does It Mean to Be "Similarly Situated"?*, 38 Suffolk U. L. Rev. 95, 111 (2004); Brian R. Gates, Note, *A "Less Stringent" Standard? How to Give FLSA Section 16(b) a Life of Its Own*, 80 Notre Dame L. Rev. 1519, 1521 (2005) (same).

465030, at *1 (D. Minn. Feb. 24, 2009) ("similarly situated" lacks a "recognized definition"); *Shushan* v. *Univ. of Colo.*, 132 F.R.D. 263, 266 (D. Colo. 1990) (calling the provision "vague").

Although, as detailed below, the application of the "similarly situated" standard need not be as formless as it has become, *infra* § I.B, the majority of courts have aggravated the uneven application of the standard by consciously rejecting a consistent methodology and instead adopting an "*ad hoc*" approach to certification. See, *e.g.*, Pet. App. 54a n.36, 55a (relying on what "similarly situated" "does not mean"). Under the "*ad hoc*" approach, a court uses a two-stage analysis to decide on a case-by-case basis whether plaintiffs are "similarly situated." See *id.*; 7B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1807 (3d ed. 2005) (collecting cases). During the first stage, which often occurs prior to any discovery and certainly takes place before substantial discovery, courts make their initial certification decision. See *Thiessen* v. *Gen. Elec. Capital Corp.*, 267 F.3d 1095, 1102-03 (10th Cir. 2001); *Hipp* v. *Liberty Nat'l Life Ins. Co.*, 252 F.3d 1208, 1218 (11th Cir. 2001) (per curiam); *Mooney* v. *Aramco Servs. Co.*, 54 F.3d 1207, 1213-14 (5th Cir. 1995) (decision is "usually based only on the pleadings and any affidavits which have been submitted"), *overruled on other grounds by Desert Palace, Inc.* v. *Costa*, 539 U.S. 90 (2003). At this stage, the "similarly situated" showing is completely formless and easily satisfied by plaintiffs. As the court below summarized and the plaintiffs' bar enthusiastically has echoed, the standard is "lenient" and "'considerably less stringent'" than those required under Rule 20(a) for joinder, Rule 42 for separate trials, or Rule 23. Pet. App. 57a-58a; Laura

L. Ho, *Collective Action Basics*, 10 Employee Rts. & Emp. Pol'y J. 427, 428 (2006).

Once the collective action is conditionally certified, the putative class members are afforded notice and an opportunity to opt-in to the class action. See 29 U.S.C. § 216(b); *Sperling*, 493 U.S. at 170-71. Moreover, the case then proceeds on a certified basis *through discovery on the merits*. Only after discovery has closed does the court reach, typically upon a defendant's motion for decertification, the second stage determination as to whether discovery shows that the plaintiffs remain "similarly situated." See, *e.g.*, Pet. App. 58a-59a; *Thiessen*, 267 F.3d at 1103. This inquiry is conducted using a slightly more searching, but still arbitrary "*ad hoc*" analysis, one "remarkable" for its failure to "give a recognizable form to a[] [§ 216(b)] representative class." *Mooney*, 54 F.3d at 1213; see *Shushan*, 132 F.R.D. at 266, 268 (approach is "extraordinary" for its "formless[ness]"). In effect, the two-stage *ad hoc* approach presumes that a collective action will proceed on a certified basis, shifting the burden to the defendant at the last moment to show why the case should not be tried collectively.

Not surprisingly, as the petition and *amici* explain, outcomes under the *ad hoc* approach are chaotic. See Pet. 23-31; Br. of Chamber of Commerce 6-8; Br. of Nat'l Retail Fed. 7-9, 19-20.[3] Materially

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[3] Although as recently as 1995, the Fifth Circuit was able to declare that "no representative class has ever survived the second stage of review" under the *ad hoc* approach, *Mooney*, 54 F.3d at 1214, representative actions, like the instant one, now regularly survive the decertification stage under the *ad hoc* approach, *see, e.g.*, *Rawls* v. *Augustine Home Health Care, Inc.*, 244 F.R.D. 298, 300-02 (D. Md. 2007); *Hill* v. *Muscogee County Sch. Dist.*, No. 4:03-CV-60 (CDL), 2005 WL 3526669, at *5 (M.D.

indistinguishable cases are treated very differently. For example, two store managers who received notice in this case but filed suit in another district were found to be exempt, see *Fripp* v. *Family Dollar Stores*, No. 2:03-cv-721-DCN (D.S.C. Sept. 28, 2004); *Davis* v. *Family Dollar Stores*, No. 3:03-cv-170-CMC-JRM (D.S.C. Sept. 29, 2004), despite the Eleventh Circuit's conclusion that all store managers were "similarly situated" with respect to their exemption status, Pet. App. 62a; see also *Grace* v. *Family Dollar Stores, Inc.*, No. 3:06CV306, 2007 WL 2669699, at *3 (W.D.N.C. Sept. 6, 2007) (denying certification in a parallel putative collective action filed by Family Dollar store managers because "each individual manager had different duties"). This is precisely the sort of irreconcilable outcome that naturally flows from *ad hoc* analyses, and exactly why review is needed to establish uniform rules.

B. Under *Sperling*, Rule 23 Should Guide Certification Pursuant To Section 216(b).

The unpredictability of the *ad hoc* approach could be overcome, and greater uniformity immediately injected into § 216(b)'s "similarly situated" standard, if this Court simply were to require that lower courts incorporate well-established standards governing Rule 23 certification in the collective action analysis. To do so, the Court need only instruct that the lower courts heed its guidance from *Hoffmann-La Roche Inc.* v. *Sperling*, 493 U.S. 165 (1989).

Ga. Dec. 20, 2005); *Moss* v. *Crawford & Co.*, 201 F.R.D. 398, 411 (W.D. Pa. 2000). Thus, notably, it is not only the number of FLSA collective action filings but also the number of certifications that has proliferated as the *ad hoc* approach has taken hold.

In *Sperling* this Court held that a district court may authorize and facilitate notice to potential members of a collective action brought under the ADEA. Despite the lack of any statutory reference to efficiency in § 216(b), the Court relied on concepts imported from Rule 23 to inform its decision. *Id.* at 170 ("[t]he judicial system benefits by efficient resolution in one proceeding of common issues of law and fact arising from the same alleged [unlawful] activity"). Similarly, the Court concluded that in the collective action context, judicial intervention and oversight may be exercised as they would under Rule 23. See *id.* at 170-73 (a court must have "managerial responsibility to oversee the joinder of additional parties to assure that the task is accomplished in an efficient and proper way").

Indeed, *Sperling* made clear that Rule 23 considerations are properly adapted and applied to the management of § 216(b) collective actions. This Court observed that Rule 23 class actions "serve important goals but also present opportunities for abuse," and that to curb this abuse, "a district court has both the duty and the broad authority to exercise control over a class action and enter appropriate orders governing the conduct of counsel and the parties." *Id.* at 171 (internal quotation marks omitted). It then stated: "*The same justifications apply in the context of a[] [§ 216(b)] action.*" *Id.* (emphasis added).

Sperling properly recognized that the benefits conferred by an appropriately certified and managed Rule 23 class action are the same as those for an appropriately certified and managed § 216(b) collective action. See *id.* at 170. Furthermore, the requirements of Rule 23(a) and those governing Rule 23(b)(3) actions—the variety most analogous to the

§ 216(b) action—would advance many of the same goals in this setting. For instance, the considerations that inform Rule 23(b)(3) certification decisions are meant to ensure that "'a class action would achieve *economies of time, effort, and expense*,'" in addition to "'uniformity of decision as to persons similarly situated'" and "'procedural fairness.'" *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 615, 626 n.20 (1997) (quoting Fed. R. Civ. P. 23 advisory committee's note to the 1966 amendment) (emphasis added).

Indeed, courts frequently have acknowledged the possibility that the "similarly situated" standard might be interpreted by reference to the principles that have come to govern certification under Rule 23. See, *e.g.*, *Sperling* v. *Hoffmann-La Roche, Inc.*, 145 F.R.D. 357, 365 (D.N.J. 1992) ("it is unclear to what extent [the 'similarly situated'] requirement parallels the Rule 23 class certification requirements of commonality and typicality"), *aff'd*, 24 F.3d 463 (3d Cir. 1994); *Collins* v. *Sanderson Farms, Inc.*, 568 F. Supp. 2d 714, 721 (E.D. La. 2008) (acknowledging "significant discussion and confusion by courts about the relationship between Rule 23 and FLSA collective actions brought under § 216(b)"). However, like the court below, the majority of courts misguidedly have chosen the inherent instability of the *ad hoc* approach over the benefits of predictability that would flow from adopting the now well-developed standards that govern Rule 23 actions. See Pet. App. 54a n.36; *id.* at 55a; *Collins*, 568 F. Supp. 2d at 721. In doing so, these courts entirely ignore this Court's recognition of the importance of Rule 23 procedures in providing guidance to courts and enhancing fair outcomes in reaching certification decisions under § 216(b).

This error is compounded by the anemic standard for assessing "similarly situated" under the *ad hoc*

approach. It provides no guidance to courts, no protection to parties, no assurance of commonality, and no uniformity of result, and thus can provide no guarantee of achieving the benefits of the appropriately restrained § 216(b) collective action envisioned in *Sperling*. See 493 U.S. at 170. Without any principled basis for a decision certifying a class at the outset, there is no security that the plaintiffs certified to proceed collectively will in fact be "similarly situated." Thus, the efficiency gains that otherwise would accrue when common questions of law or fact are pursued and resolved collectively are lost. See Fed. R. Civ. P. 23 advisory committee's note to the 1966 amendment ("It is only where" "the questions common to the class predominate over the questions affecting individual members" "that economies can be achieved by means of the class-action device.").

Additionally, when a collective action is certified under the *ad hoc* approach, there inevitably are plaintiffs included in the class who are not in fact similarly situated and who have stronger or weaker cases than their fellow plaintiffs. Therefore, if the plaintiffs lose, there will be plaintiffs who are entitled to backpay, but who will not recover; if the plaintiffs win, the defendant will be forced to pay damages to plaintiffs who suffered no legal injury. This fundamental unfairness is contrary to the role this Court envisioned for managing § 216(b) collective actions to protect parties from "the potential for misuse of the class device." *Sperling*, 493 U.S. at 171-72.

In light of *Sperling*'s instruction to import Rule 23's procedural mechanisms when necessary to achieve the benefits of the collective action, there is no reason why courts are currently so rudderless in reaching

FLSA certification decisions. Indeed, this was not always the case with FLSA collective actions. The history of Rule 23(b) and § 216(b) make clear why Rule 23 was and still is an appropriate guide for FLSA certification decisions. The primary distinction between these two actions—the opt-out nature of Rule 23(b)(3) class actions resulting in a judgment binding on absent class members and the opt-in nature of the § 216(b) collective action resulting in a judgment binding only on plaintiffs who have opted-in to the action—in no way supports a conclusion that Rule 23's certification standards are fundamentally incompatible with FLSA collective actions.

As originally enacted, § 216(b) authorized employees to enforce FLSA (1) individually, (2) on their own behalf or on behalf of others similarly situated, or (3) by designating a non-employee agent or representative to sue on behalf of similarly situated employees. See Fair Labor Standards Act of 1938, ch. 676, § 16(b), 52 Stat. 1060, 1069 (codified as amended at 29 U.S.C. § 216(b)). Due to concerns regarding the manageability of FLSA suits brought by non-employees, in 1947, Congress amended § 216(b) so that only employees were proper parties to FLSA actions and that written consent was required to opt in to these actions. See Portal to Portal Act of 1947, ch. 52, sec. 5(a), § 16(b), 61 Stat. 84, 87 (codified as amended at 29 U.S.C. § 216(b)).

At that time, Rule 23 was radically different from its current iteration. Thus, far from rejecting Rule 23, the opt-in amendment to § 216(b) brought the provision *in line with* the rule, which expressly provided for "spurious" or opt-in class actions, but *not* for actions brought by non-class members. See 7A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1752 (3d ed. 2005). And,

notably, even before Congress added the express opt-in provision to § 216(b), courts had interpreted § 216(b) to mirror the spurious class action procedure of Rule 23. *E.g.*, *Pentland* v. *Dravo Corp.*, 152 F.2d 851, 853 (3d Cir. 1945). Therefore, from § 216(b)'s inception, Rule 23 guided courts making FLSA certification decisions by giving meaning to "similarly situated." See, *e.g.*, *id.*; *Kainz* v. *Anheuser-Busch, Inc.*, 194 F.2d 737 (7th Cir. 1952).

The original Rule 23 informed the "similarly situated" analysis by requiring that the representative plaintiffs "adequate[ly] represent[]" the opt-in plaintiffs and that there is a "common question of law or fact affecting the several rights and a common relief * * * sought." Fed. R. Civ. P. 23 (1938) (amended 1966); see 7A Wright & Miller, *supra*, § 1752. These requirements ensure the efficiency benefits of a class action while protecting the parties against potential unfairness. See *Amchem*, 521 U.S. at 615, 626 n.20; Fed. R. Civ. P. 23 advisory committee's note to the 1966 amendment.

With the overhaul of Rule 23 in 1966 to its modern form, "Rule 23(b)(3) 'opt-out' class actions superseded the former 'spurious' class action." *Amchem*, 521 U.S. at 615.[4] Thus, even if not every single facet of current Rule 23 applies to collective actions under § 216(b), the motivating principles underlying Rule 23 still should guide FLSA collective action

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[4] The Supreme Court's Advisory Committee notes to the amended rule parenthetically state that "[The present provisions of 29 U.S.C. § 216(b) are not intended to be affected by Rule 23, as amended.]" This note simply indicates an intent to prevent § 216(b) from being converted into an opt-out class action; moreover, the Committee did not have authority to amend the statutory class procedures. *See* Fraser, *supra*, at 115-16.

determinations. No inference can be drawn, based on the later change to Rule 23, that the congressional drafters of § 216(b) favored an entirely formless *ad hoc* approach to FLSA certification decisions or that there were no efficiency principles underlying Congress's decision to allow for FLSA collective actions. See *Woodall* v. *Drake Hotel, Inc.*, 913 F.2d 447, 451 (7th Cir. 1990) (because "[m]any of the policy reasons underlying the requirements of Rule 23(e) are applicable to [§ 216(b)] class actions," application of Rule 23's standards and concomitant "court scrutiny" are "necessary" to protect the parties in a § 216(b) collective action); *Shushan*, 132 F.R.D. at 266 ("[I]t does not seem sensible to reason that, because Congress has effectively directed the courts to alter their usual course and not be guided by rule 23's 'opt-out' feature in [§ 216(b)] class actions, it has also directed them to discard the compass of rule 23 entirely * * *.").

C. The *Ad Hoc* Approach Makes Certification Unduly Difficult To Defend And Imposes Unnecessary Costs.

The *ad hoc* approach has severe ramifications for employers. As the judgment in this case illustrates, Pet. App. 121a, collective actions under FLSA threaten employers with the risk of enormous liability, see also Pet. 22 (discussing multi-million dollar settlements); Chamber Br. 9-10 (same); Hawkins, *supra*, at 49-50 (discussing severity of risks to employers posed by FLSA collective actions). Yet, the lack of predictable standards leaves defendants with little idea which cases should be litigated through judgment, let alone which cases should be pursued in light of an initial certification at *ad hoc* stage one.

Even setting aside the expenses of settlement, which can be staggering and for some plaintiffs a complete windfall, collective action litigation is extremely costly under the two-stage *ad hoc* approach. Unlike under Rule 23, this approach allows certification under a very lenient standard at the infancy of a suit before any discovery has taken place, leaving a defendant with little meaningful opportunity to refute plaintiffs' allegations. Once the case is initially certified, notice must be provided to potential opt-in plaintiffs, and the class gains additional leverage because certification "triggers a period of lengthy discovery, which can be 'prohibitively expensive' for employers." Hawkins, *supra*, at 51. Because certification at stage one often is preordained, and a motion to decertify at stage two typically is not ripe until *merits* discovery has been completed, a defendant to a § 216(b) collective action must subject itself to substantial expense and inconvenience to have any hope of defeating certification. See Fraser, *supra*, at 121 ("When courts apply less stringent certification standards to § 216(b) actions, employers are often subject to the expense of needless discovery and are more likely to be faced with blackmail suits.").[5]

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[5] Discovery may present additional problems, as here, where courts have cherry-picked the elements of Rule 23 to import without ensuring defendants the same protections afforded by that rule. As here, Pet. App. 13a-14a, courts often deny individual discovery in § 216(b) collective actions based on decisions in the Rule 23 context that individualized discovery undermines the purpose and efficacy of the class action mechanism. *See McGrath* v. *City of Philadelphia*, No. 92-4570, 1994 WL 45162, at *2 (E.D. Pa. Feb. 10, 1994); *Adkins* v. *Mid-Am. Growers, Inc.*, 141 F.R.D. 466, 468 (N.D. Ill. 1992). But, unlike in the Rule 23 context, *there is no initial safeguard that the named plaintiffs are typical of or can adequately represent*

This starkly contrasts with the Rule 23 context. Under Rule 23, there is no possibility of certification at the outset of litigation, and thus settlement pressures are diminished. Moreover, discovery frequently is bifurcated in Rule 23 cases and limited to class issues at the beginning of the litigation. Therefore, a defendant has a far more realistic idea of the financial burden and inconvenience it will incur before a certification decision is obtained.

Finally, the lack of an appellate vehicle similar to Rule 23(f) considerably increases the expense to defendants following either a stage one or a stage two certification decision. If a defendant believes that a § 216(b) certification decision is erroneous, its only avenue of relief is to proceed through trial to judgment. Especially when combined with the availability of attorneys' fees for plaintiffs' counsel under the statute, see Hawkins, *supra*, at 55, the absence of meaningful appellate review for defendants alleviates any pressure on plaintiffs to settle a collective action even where they know the certification likely was improper.

Because these negative consequences of the current approach to § 216(b) litigation cannot be remedied through the two-stage *ad hoc* approach, this Court's intervention is essential.

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the opt-in plaintiffs for discovery purposes. Therefore, if, as here, the limited discovery is not based on a representative sample, the discovery cannot reveal anything about whether the plaintiffs are "similarly situated." *See* Pet. App. 13a ("order authorized *Plaintiffs to select* 250 opt-ins for Family Dollar to depose in-person" (emphasis added)). For the efficiency gains of Rule 23's approach to discovery to be realized, the § 216(b) certification decision must be informed by the principles underlying that rule to ensure a truly "similarly situated" class.

II. THE ELEVENTH CIRCUIT'S INDIVIDUALIZED EXCEPTION HOLDING CREATES MORE UNCERTAINTY AND PUNISHES DEFENDANTS FOR EFFICIENT BUSINESS PRACTICES.

In addition to the overarching need for this Court's review to bring clarity to the amorphous collective action certification standards that now predominate, the Eleventh Circuit's resolution of petitioner's statutory exemption defense further impairs employers' and counsel's ability to assess the likelihood that plaintiffs' claims may proceed as a collective action. In passing on the defense without undertaking the individualized inquiries required by federal regulation, see, *e.g.*, 29 C.F.R. § 541.700(a), the court below not only made defending against certification more unpredictable, it established a rule that will punish defendants for run-of-the-mill, efficient business practices. Moreover, because the resolution of petitioner's individualized exemption defenses in collective fashion so widely departs from FLSA case law to date, the Eleventh Circuit stands to become the forum of choice for collective actions. Given the ease with which plaintiffs can file nationwide (and other) collective actions within the Eleventh Circuit and the general barriers to obtaining appellate review of § 216(b) certification questions, this Court's opportunities to review the certification issues presented here likely will be rare.

Even though the *ad hoc* standard inherently increases the number of collective actions, one consistent brake on the expansion of § 216(b) has been the refusal of courts to certify a case when the defendant asserted one of the various individualized exemption defenses provided by the FLSA. See Pet. 17-18 (collecting cases rejecting certification based on

employers' reliance on defenses requiring individualized inquiries into each plaintiff's job duties). Federal law requires that a number of FLSA exemption defenses, like the executive exemption petitioner asserted, be "determined on a case-by-case basis," 29 C.F.R. § 541.106(a) (executive employees); *id.* § 541.302(c) (creative professional status); see also *id.* § 541.700(a) (requiring that "primary duty" be determined for exemption purposes "based on all the facts in a particular case"); *id.* § 541.202(b) (administrative exemption depends on analysis of "all the facts involved in the particular employment situation"). Given the necessarily fact-intensive inquiries required by the regulations, the majority of courts correctly recognize that the notion of a "collective action" based on purportedly "similarly situated" plaintiffs is irreconcilable with such individualized defenses. See Pet. 17-18 (collecting cases); *accord, Keef* v. *M.A. Mortenson Co.*, No. 07-CV-3915(JMR/FLN), 2009 WL 465030, at *2-3 (D. Minn. Feb. 24, 2009) (denying certification where defendant raised an administrative exemption defense, and recognizing that "[t]he regulations clearly contemplate an individualized inquiry into each plaintiff's job responsibilities"). Indeed, in considering a collective action involving petitioner's same business practices and exemption defenses that were before the Eleventh Circuit, another court expressly held that "[a] collective action is never appropriate for situations where a court must make an individual determination of each plaintiff's day-to-day activities." *Grace* v. *Family Dollar Stores, Inc.*, No. 3:06CV306, 2007 WL 2669699, at *3 (W.D.N.C. Sept. 6, 2007).

Consistent with these principles, the court below acknowledged that the exemption defenses presented

"'an inherently fact-based inquiry' that depends on the many details of the particular job duties and actual work performed by the employee seeking overtime pay.'" Pet. App. 64a (citation omitted). Nevertheless, the Eleventh Circuit broke from the line of authority noted above by concluding that the individualized defenses did not preclude certification. *Id.* at 64a-65a. It reasoned that because "Family Dollar applied the executive exemption across-the-board to every store manager" in the first instance, petitioner's otherwise fact-based exemption defenses instead could be resolved collectively. *Id.*

This mode of analysis will have a dramatic impact on national employers with operations in the Eleventh Circuit. As *amici* have recognized, businesses regularly classify their employees in a uniform fashion across a given job description for the purposes of FLSA eligibility. See Nat'l Retail Fed. Br. 16-18; Chamber Br. 13; *accord*, Maureen Knight, *Why Defense Counsel Should Be Aware of the Growing Trend of FLSA Collective Actions*, The Job Description, Spring 2004, at 22-23, *available at* http://www.dri.org/ContentDirectory/Public/Newsletters/0080/2004%20Employment%20Law%20Committee%20The%20Job%20Description%20Spring.pdf. Using uniform job descriptions and classifications is efficient and beneficial for both the companies and their employees. See generally Jane Howard-Martin & Grace E. Speights, Practicing Law Inst., No. H0-00LU, *Preventing, Defending and Settling Discrimination Class Actions and FLSA Collective Actions* 743 (2003).

For instance, the company-wide job descriptions upon which these classifications are based ensure that the employer has carefully considered what tasks employees in a given position are expected to

fulfill. Doing so provides an objective standard through which to evaluate employees, determine their compensation and bonuses, and to assess promotions. At the same time, these job descriptions provide employees with notice of the criteria they are expected to meet, benchmarks for assessing performance, and guidance about how to supervise employees who report to them. Additionally, these descriptions allow employees (and their employers) to monitor whether they are being treated fairly with respect to their wages, responsibilities, and opportunities for advancement because they can compare their experiences to other individuals who share their job title. Moreover, consistent company-wide job descriptions enhance employees' freedom of mobility between company locations should they desire or be required to transfer. Any alternative to their use would be impractical and inefficient.

Despite these benefits for employers and employees, the Eleventh Circuit's rule creates a perverse incentive against using written job descriptions and classifications. Under the decision below, the propriety of a routine and beneficial aspect of doing business has been called into doubt simply because the procedures—which employers acknowledge may be subject to exceptions for particular employees or at specific locations—are drafted to govern the many, not the few. Employers thus run the risk that such policies will be used against them in litigation, or that, as here, they foreclose employers from drawing upon the defenses to which they otherwise would be entitled under federal law. As a consequence, counsel are placed in the awkward position of weighing the benefits of written policies in various legal contexts (*e.g.*, responding to claims of discrimination based on

failures to promote, etc.) versus their detriment in others like that here.

The costs and inefficiencies embodied in the Eleventh Circuit's *ad hoc* approach are reason enough to warrant this Court's review. What makes review now essential is that even identically classified employees are being treated differently by different courts. Litigation that turns solely on geography is the quintessential situation that calls for intervention by this Court.

CONCLUSION

For all these reasons, and those stated by petitioner, the petition should be granted.

Respectfully submitted,

EAMON P. JOYCE
SIDLEY AUSTIN LLP
787 Seventh Avenue
New York, NY 10019
(212) 839-5300

CARTER G. PHILLIPS*
NAOMI SCHOENBAUM
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Amicus Curiae

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* Counsel of Record