No. 08-

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Can a collective action under the Fair Labor Standards Act be maintained when the employer's liability turns on a statutory exemption that must be litigated individually based on "all the facts in a particular case" (29 C.F.R. § 541.700(a))?

PARTIES TO THE PROCEEDINGS

Petitioner Family Dollar Stores, Inc. has no parent corporation. No publicly traded corporation owns 10 percent or more of Family Dollar's stock.

The four named Plaintiffs who are Respondents here are:

Janice Morgan
Barbara Richardson
Cora Cannon
Laurie Trout Wilson

A complete list of the 1,424 Respondents is included at App. 150a–72a.

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PETITION FOR A WRIT OF CERTIORARI

The Fair Labor Standards Act sets minimum wages and maximum hours for workers employed in interstate commerce. The FLSA contains a statutory mechanism that allows one employee to sue collectively for all employees who are "similarly situated." 29 U.S.C. § 216(b). Since 1938, when Congress enacted the FLSA, this Court has never explained what "similarly situated" means or otherwise suggested what sorts of factors should govern certification of a collective action under the FLSA. As a result, certification and decertification of FLSA collective actions, particularly those involving overtime exemptions, has become increasingly unpredictable. Employers in turn have become afraid to litigate these actions to judgment. Rather than risk liability to thousands of employees based on the outcome of one collective jury trial, employers typically choose to settle—often for millions of dollars.

This case arises from one of the few FLSA collective actions to proceed through a jury trial to judgment. It involves 1,424 retail store managers who claim that Family Dollar Stores should have paid them an hourly wage plus overtime, rather than a salary. The case resulted in the largest jury verdict in Alabama in 2006. 16 ALA. L. WEEKLY No. 6, at 1 (Feb. 9, 2007). The judgment against Family Dollar exceeds $35 million. Family Dollar's petition asks the Court to decide whether this case was properly certified and maintained as a collective action under § 216(b). The specific question presented is whether an FLSA collective action can be certified where, as here, the employer's defense turns on an individualized exemption that, under the

governing FLSA regulations, must be "determined on a case-by-case basis" (29 C.F.R. 541.106(a)) based on the facts in each "particular case" (*id.* § 541.700(a)).

Most courts have held a collective action cannot be used when the employer's defense rests on an individualized exemption. But the Eleventh Circuit split from this view, holding that Family Dollar's exemption defense could be adjudicated collectively. Although the split here is between one circuit court and numerous district courts, this is a compelling case for certiorari. The Eleventh Circuit's decision sets a pro-employee precedent, making it the nationwide forum of choice for FLSA collective-action litigation. Those interested in bringing massive wage-and-hour cases will file suit in a district court within the Eleventh Circuit, rather than in one of the less hospitable district courts elsewhere. Accordingly, no traditional circuit split will develop. Instead, employees will simply file suit within the Eleventh Circuit on behalf of all supposedly "similarly situated" employees nationwide.

The Court should grant review to provide long-needed guidance to the lower courts on when FLSA collective actions should be certified or decertified. This procedural issue raises due process concerns whenever an employer like Family Dollar is held liable for millions of dollars in back wages to thousands of employees based upon the live testimony of only a handful of plaintiffs. The issue also has important practical ramifications on wage-and-hour litigation nationwide. Certiorari is warranted now.

OPINIONS BELOW

The Eleventh Circuit's opinion (App. 1a–119a) is published at 551 F.3d 1233. The District Court's collective action certification opinions (App. 124a–39a), judgment (App. 122a–23a), and amended judgment (App. 120a–21a) are unpublished.

JURISDICTION

The Eleventh Circuit entered its judgment on December 16, 2008. App. 1a. Justice Thomas granted Family Dollar an extension to file this petition until April 15, 2009. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

Section 216(b) of U.S. Code Title 29 provides in relevant part:

> An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.

Section 207(a)(1) of U.S. Code Title 29 provides in relevant part:

> [N]o employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

Section 213(a) of U.S. Code Title 29 provides in relevant part:

> The provisions of sections 206 . . . and section 207 of this title shall not apply with respect to—
>
> (1) any employee employed in a bona fide executive, administrative, or professional capacity . . . .

Two sets of regulations apply to this case. *See* App. 70a. The regulations pertinent to the FLSA's executive exemption (29 C.F.R. §§ 541.1, .102, .103 (2003); 29 C.F.R. §§ 541.100, .102, .105, .106, .700 (2006)) are set out in the Appendix (App. 140a–49a).

STATEMENT OF THE CASE

1. Family Dollar is a small-box retailer with operations nationwide. App. 5a. Through its network of more than 6,000 stores, Family Dollar sells a variety of products, including basic groceries, clothing, hardware, household items, automotive supplies, general merchandise, and seasonal goods. *Id.* Each store is a profit center generally located in a strip mall or a stand-alone building. Doc. 251 ¶5. Consequently, the stores are unique in size and configuration, with sales floors as small as 3,700 square feet to as large as 12,300 square feet. *Id.* Individual store sales vary, from $210,000 to over $4 million annually. *Id.* ¶6.

A store generally is staffed with one salaried store manager, at least one hourly assistant manager, and two or more hourly sales associates. *Id.* ¶10; DX2324. The store manager is the highest ranking employee in a store. He or she is responsible for supervising the hourly employees, ensuring the store complies with Family Dollar standards, ordering weekly inventory, completing company paperwork, responding to emergencies, maintaining customer service, and making daily bank deposits. App. 24a–27a; Doc. 715 at 117–21. Family Dollar's sales transactions are predominantly in cash, so the store manager must protect large quantities of currency. Doc. 715 at 121. The store manager must also secure store inventory, which ranges from $100,000 to $390,000. Doc. 251 ¶6. In short, the store manager is the on-site executive responsible for the daily operation of what can be a substantial retail operation. App. 23a.

Since its founding in 1959, Family Dollar has always classified its store managers as exempt under the FLSA. Doc. 226 Ex.A ¶3. The store manager is the only exempt employee paid a salary at the store level. Doc. 251 ¶11. From 1999 to 2004, store manager salaries ranged from $400 to $1,100 weekly, or $20,800 to $57,200 annually. *Id.* Store managers are also the only store-level employees eligible for additional benefits such as sick pay and a bonus. Doc. 685 at 242–43. Bonuses are based on controllable store profits and range from hundreds to thousands of dollars. *Id.*; Doc. 251 ¶ 11.

The store manager reports to a district manager. A district manager has between 10 and 30 stores in a district. App. 23a–24a. Family Dollar has only 380 district managers for more than 6,000 stores. App. 23a. Some districts cover a single metropolitan area (as small as 20 square miles), while other districts span multiple states (up to 32,000 square miles) or have stores spread as far as 200 miles apart. App. 24a; Doc. 251 ¶8; Doc. 715 at 111. A district manager may visit a particular store once a week, once a month, or less frequently. App. 43a n.22; SA-66–82. The district manager's visit can last anywhere from 15 minutes to 2 hours. Doc. 683 at 171–72; Doc. 685 at 103. Otherwise, the district manager communicates with the store manager via phone and email. App. 43a.

Like other national retail chains, Family Dollar has adopted policies and procedures to make a shopper's experience consistent from store to store. App. 24a. For instance, Family Dollar designs "schematics" keyed to store size that determine where products should be placed on the shelves. App. 30a. The store manager is

responsible for ensuring that the store is set up according to the schematic and for updating the schematic according to company directives. App. 25a. Family Dollar has also instituted comprehensive human resources policies. App. 45a–48a. Due to the extensive federal and state regulation of employment, such policies are necessary to ensure adequate corporate oversight of significant decisions such as hiring, promotion, or firing. Doc. 685 at 204–14, 232–33.

2. Two store managers in Alabama sued Family Dollar under the FLSA, claiming they were improperly classified as exempt. App. 5a. The case was filed as a "collective action" under 29 U.S.C. § 216(b), which allows plaintiffs to sue on behalf of themselves and other "similarly situated" employees. App. 6a. In contrast to a class action under Federal Rule of Civil Procedure 23(b)(3), an FLSA collective action requires any employee who wants to become "a party plaintiff" to opt into the case by giving "consent in writing." § 216(b).

The district court conditionally certified the case as a collective action and notified over 12,000 current and former Family Dollar store managers nationwide. App. 10a–11a. Ultimately, 1,424 Plaintiffs opted into the case. App. 15a n.5.

The case proceeded through discovery. The District Court allowed Family Dollar to depose only 255 of the Plaintiffs. App. 13a–14a. The court allowed Plaintiffs' counsel to designate the majority of the Plaintiffs that were deposed. App. 13a.

3. Family Dollar moved to decertify the collective action. App. 15a. It argued that the District Court had to decertify the collective action because the Plaintiffs' managerial duties varied widely and because the executive exemption is inherently individualized. App. 15a–16a. In support, Family Dollar submitted the Plaintiffs' depositions (Doc. 230), along with charts summarizing numerous factual differences among the Plaintiffs (Doc. 255 Exs.1–3).

Under the governing regulations, the FLSA's executive exemption turns on a number of individual factors that Family Dollar used to show Plaintiffs' dissimilarity. Those regulations define "management" to include:

> Interviewing, selecting, and training of employees; setting and adjusting their rates of pay and hours of work; directing the[] work [of employees]; maintaining [] production or sales records for use in supervision or control; appraising [employees'] productivity and efficiency for the purpose of recommending promotions or other changes in [] status; handling [employee] complaints and grievances[;] disciplining [employees]; planning the work; determining the techniques to be used; apportioning the work among the [employees]; determining the type of . . . merchandise to be bought, stocked and sold; controlling the flow and distribution of materials or merchandise and supplies; providing for the safety and security of the [employees] [or] the property.

29 C.F.R. § 541.102(b) (2003); *id.* § 541.102 (2006) (minor differences shown in brackets).

Family Dollar argued that the deposition testimony on these managerial duties showed that the Plaintiffs were not "similarly situated." App. 15a–16a. The Plaintiffs' testimony about their managerial duties varied significantly, depending on whether the store was small or large, was rural or urban, and had few or many employees. Charts of the deposition testimony revealed dissimilarity across all the relevant management criteria (SA-42–64) as well as the degree of oversight by district managers (SA-6–40). (These charts are included in a supplemental appendix provided with the petition.)

The depositions of two Plaintiffs illustrate these differences. *See* Doc. 250 at 25–26. Plaintiff Krista Allen was a Family Dollar store manager in a large urban store in Baltimore, Maryland. She testified that she exercised *all* of the relevant management functions of an exempt employee. *See* SA-42, line 3. She could hire, fire, and discipline employees; she made recommendations regarding hiring, firing, discipline, and promotion; she interviewed potential hires; she trained new employees; she set or adjusted the hours of work for store employees; she directed employee work; she maintained production and sales records; she appraised the productivity and efficiency of her employees; and she planned their work. *Id.*; SA-66, line 3. Allen testified that, when she was in the store, she was running the store and supervising employees all the time. Doc. 230 (K. Allen Dep.) at 59, 140.

Plaintiff Angela Turner was the manager of small rural stores in Chatham and Butler, Alabama. She testified, in sharp contrast to Krista Allen, that she exercised *none* of the relevant management functions of an exempt employee. *See* SA-60, line 229. She could not hire, fire, or discipline employees; she did not make recommendations regarding hiring, firing, discipline, or promotion; she did not interview potential hires; she did not train new employees; she did not set or adjust the hours of work for store employees; she did not direct employee work; she did not maintain production and sales records; nor did she appraise the productivity and efficiency of her employees. *Id.*; SA-81, line 229. According to Turner, only her district manager exercised managerial authority. Doc. 230 (A. Turner Dep.) at 75. She testified that, when she was in the store, she was not responsible for any other employee. *Id.* at 80–81.

Family Dollar argued that a Plaintiff like Turner, who answered "No" to every question concerning the managerial duties, could not adequately represent a Plaintiff like Allen, who answered "Yes" to the same questions. Family Dollar argued that the disparate testimony of all 255 deponents demonstrated that no one Plaintiff's testimony was truly representative of any other's. Doc. 250 at 26. Plaintiffs own expert agreed that each store manager must be examined "individually to see if the exemption applies." Doc. 230 (Belt Dep.) at 221–22. A section taken from the middle of Family Dollar's deposition chart shows the dissimilarity.[1]

[1] The entire chart can be found at SA-42–64. The deposition page references used to create the chart follow, at SA-66–82.

		Authority to:			Authority to Recommend:				Did you:						
	Opt-In Plaintiff	Hire	Fire	Discipline	Hire	Fire	Discipline	Promote	Interview	Train	Set or adjust hours of work for store employees	Direct employee work	Maintain production and sales records for use in supervision and control	Appraise employee productivity and efficiency	Plan work
125	LaBonte, James	Y		Y		Y	Y	Y	Y	Y	Y	Y		Y	Y
126	Land, Terry				Y	Y	Y								
127	Lane, Lori								Y	Y	Y		Y		
128	Lee, Alvin			Y	Y	Y	Y		Y	Y	Y	Y			Y
129	Leflore, Patricia D.				Y	Y	Y	Y	Y	Y	Y		Y	Y	Y
130	Lumley, Mark				Y	Y	Y		Y	Y		Y	Y	Y	
131	Maclane, James	Y				Y	Y	Y	Y		Y		Y		
132	Majeski, David												Y		

4. The District Court nonetheless denied Family Dollar's decertification motion. App. 131a. The court did not address Family Dollar's argument that its individualized exemption defense is incompatible with a collective action. App. 130a. The court also rejected Family Dollar's procedural and constitutional challenges to a collective jury trial. App. 130a–31a. The court stated that "plaintiffs may rely on representative testimony to establish liability and obtain relief," and concluded that "notions of due process and fairness are not offended by a collective trial." *Id.*

Consistent with its opinion allowing the case to proceed as a collective action, the District Court let the Plaintiffs to try their case using representative evidence from witnesses chosen by Plaintiffs' counsel. Doc. 384 ¶9(b); Doc. 533. The court directed the Plaintiffs to anticipate Family Dollar's exemption defense in their case in chief (Doc. 533 ¶2) and limited each side's case to 40 hours of trial time (Doc. 386 Attach.1).

5. The case proceeded to a collective jury trial. App. 21a. In the first trial, the jury deadlocked on the executive exemption. *Id.* During the second trial, the Plaintiffs offered "representative" testimony from a few Plaintiffs handpicked by Plaintiffs' counsel on behalf of all 1,424 Plaintiffs. Only 7 Plaintiffs—all from small, rural stores—testified live in the Plaintiffs' case.

At trial, Family Dollar moved to decertify the collective action and proceed only on the claims of those Plaintiffs who testified. Doc. 559. The district court denied the motion. Doc. 579. The court instructed the jury that not all 1,424 Plaintiffs needed to testify because they were relying on "representative testimony." Doc. 719 at 9. That is, the court instructed the jury to decide Family Dollar's liability to the non-testifying Plaintiffs on an all-or-nothing basis. *Id.* at 9–10.

The jury found that Plaintiffs were not exempt under the FLSA. App. 51a. The district court entered judgment on the jury's verdict and awarded liquidated (or double) damages. App. 122a–23a. After making adjustments for certain Plaintiffs who had filed for bankruptcy, the court entered judgment against Family Dollar for nearly $35.6 million. App. 121a. The final

judgment includes approximately $17 million in overtime backpay and an equal amount of liquidated damages. *Id.*

6. The Eleventh Circuit affirmed the judgment in full. App. 119a. As relevant here, the court affirmed the district court's refusal to decertify the collective action. App. 61a, 69a. The court acknowledged that it had not adopted a precise definition of "similarly situated" under § 216(b), relying instead on an *ad hoc* approach to certification of a collective action. App. 55a–57a & n.38, 59a.

The Eleventh Circuit set out the three factors it considers at the decertification stage: (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) fairness and procedural considerations. App 60a. The court then rejected Family Dollar's argument on each factor. App. 61a–69a.

The Eleventh Circuit first addressed Family Dollar's argument that the Plaintiffs' job duties varied widely from store to store. The court rejected Family Dollar's argument based on the company's own decision to classify all its store managers as exempt. App. 63a. The court held that because Family Dollar had "exempted all store managers from overtime pay requirements without regard to store size, sales volume, regions, district, or hiring and firing authority," any evidentiary distinctions among the Plaintiffs were immaterial. App. 63a–64a. In other words, the court used a business decision first made in the 1950s to reject Family Dollar's legal arguments made in the 21st Century.

For the same reason, the Eleventh Circuit rejected Family Dollar's argument that its individualized defenses precluded a collective action. Because "Family Dollar applied the executive exemption across-the-board to every store manager," the court concluded the company could not show the district court erred in "finding that its defenses were not so individually tailored to each Plaintiff as to make this collective action unwarranted or unmanageable." App. 64a–65a. The court failed to acknowledge that the District Court's decision did not mention, much less discuss, the exemption defense as one of Family Dollar's individualized defenses. *See* App. 130a.

On the third factor—fairness and procedural considerations—the Eleventh Circuit rejected Family Dollar's argument that "any collective action would be inherently unfair" given "the size of the class, the individualized application of the exemption defense, and the [District Court's] decision to allow representative testimony at trial." App. 66a. The court acknowledged Family Dollar's argument that "the store's size, sales volume, and location cause store managers' job duties to vary and preclude a collective trial," but concluded that "none of those factors had anything to do with Family Dollar's decision to exempt all store managers from overtime pay." App. 67a n.46

REASONS FOR GRANTING THE PETITION

The Eleventh Circuit's decision warrants this Court's review. The FLSA's executive exemption is both fact-specific and case-specific: It depends on "all the facts in a *particular* case." 29 C.F.R. § 541.700(a) (2006) (emphasis added). The Plaintiffs here include more than 1,400 individuals employed across 40 states, in large stores and small, in rural and urban areas, supervising workforces of varying sizes. Deposition testimony of 255 Plaintiffs showed substantial variations in the job duties that define management under the executive exemption, including the authority to hire, fire, train, interview, appraise, and set work schedules for subordinates. SA-42–64. The Eleventh Circuit nevertheless affirmed the District Court's holding that *each* of the Plaintiffs—more than 99 percent of whom did not even testify at trial—was "similarly situated" to every other Plaintiff. App. 62a.

The Eleventh Circuit's decision in this case conflicts with decisions of numerous other courts holding that litigation over an individualized FLSA exemption is incompatible with the collective-action device. These courts recognize that collective actions should not be certified where individualized inquiries are necessary to resolve application of an FLSA exemption.

If left uncorrected, the Eleventh Circuit's decision could become the *de facto* national rule. Rather than risk filing a collective action in a circuit less hospitable to such claims, employees will now race to file suit in Alabama, Florida, or Georgia on behalf of all employees nationwide. Further percolation will not solve the

problem or result in some better vehicle down the road. Now that the Eleventh Circuit has opened itself up to FLSA collective litigation, there will be little to no further development of the law elsewhere. This Court should step in now to provide the lower courts guidance on the procedural standards necessary to assure that FLSA collective actions are litigated fairly and constitutionally.

A. The Eleventh Circuit's decision conflicts with other courts' decisions that an FLSA collective action is incompatible with an individualized exemption defense.

The FLSA's executive exemption is inherently individualized. The regulations explain that the applicability of this exemption must be decided individually, plaintiff by plaintiff: "Determination of an employee's primary duty must be based on *all the facts in a particular case*." 29 C.F.R. § 541.700(a) (2006) (emphasis added). *See also id.* § 541.103 (2003) ("A determination of whether an employee has management as his primary duty must be based on all the facts in a particular case."). Especially where, as here, a manager performs exempt and nonexempt duties concurrently, the exempt status of that employee must be "determined on a case-by-case basis." *Id.* § 541.106(a) (2006).

Notwithstanding the individualized nature of the exemption defense, the Eleventh Circuit held that 1,424 exemption claims could be litigated collectively in one jury trial. According to the court, "Just because the inquiry is fact-intensive does not preclude a collective

action where plaintiffs share common job traits." App. 64a. The court also concluded that collective action treatment was justified because "Family Dollar applied the executive exemption across-the-board to every store manager." *Id.*

By contrast, other courts hold that claims over an individualized FLSA exemption cannot be maintained in one collective action. These courts hold that the fact-intensive, individualized nature of the exemption analysis fatally undermines the claim that the plaintiffs are "similarly situated." *See Aguirre v. SBC Communications*, 2007 WL 772756, at *14 (S.D. Tex. Mar. 12, 2007) ("In cases with similar variability among the members of the putative class of allegedly misclassified employees, courts have refused to certify the case for collective treatment because an individual inquiry into each plaintiff's job duties is required.") (collecting cases). *Accord Johnson v. Big Lots Stores*, 561 F. Supp. 2d 567, 586–87 (E.D. La. 2008); *Smith v. Heartland Automotive Servs.*, 404 F. Supp. 2d 1144, 1151–54 (D. Minn. 2005); *Reich v. Homier Dist. Co.*, 362 F. Supp. 2d 1009, 1013–14 (N.D. Ind. 2005); *Mike v. Safeco Ins. Co.*, 274 F. Supp. 2d 216, 220–21 (D. Conn. 2003); *Morisky v. Pub. Serv. Elec. & Gas*, 111 F. Supp. 2d 493, 498–99 (D.N.J. 2000). *Cf. Bayles v. Am. Med. Response*, 950 F. Supp. 1053, 1065 (D. Colo. 1996) ("It is oxymoronic to use a [collective action] where proof regarding each individual plaintiff is required to show liability.").

In addition, courts have recognized that a collective action over an individualized exemption is neither manageable nor superior to litigating the claims

individually. *See Reyes v. Texas EZPawn*, 2007 WL 101808, at *5–*7 (S.D. Tex. Jan. 8, 2007); *Smith*, 404 F. Supp. 2d at 1154–55; *Lusardi v. Xerox Corp.*, 122 F.R.D. 463, 466–67 (D.N.J. 1988); *Lusardi v. Xerox Corp.*, 118 F.R.D. 351, 370–71 (D.N.J. 1987), *mandamus granted on other grounds*, 855 F.2d 1062 (3d Cir. 1988). As the court in *Morisky* observed, litigating an individualized exemption collectively is not efficient because the "exempt or non-exempt status of potentially hundreds of employees would need to be determined on . . . an employee-by-employee basis." 111 F. Supp. 2d at 499, *followed in King v. West Corp.*, 2006 WL 118577, at *14 (D. Neb. Jan. 13, 2006).[2]

Such inconsistency over collective action procedure is untenable. Family Dollar itself has suffered inconsistent results on this very question in two other collective actions. *See Grace v. Family Dollar Stores, Inc.*, 2007 WL 2669699 (W.D.N.C. Sept. 6, 2007), and *Ward v. Family Dollar Stores, Inc.*, 2008 WL 199699 (W.D.N.C. Jan. 22, 2008). The district court in *Grace* and *Ward* refused to certify collective actions covering the identical claims of other store managers. The court held, "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*, 2007 WL 2669699, at *3. "Since each individual manager had

[2] Collective-action treatment is not necessary to assure that wage-and-hour claims are litigated. The FLSA's additional remedies of fee-shifting and liquidated damages (*see* 29 U.S.C. § 216(b)) give each plaintiff incentives to pursue his or her claim individually. *Cf. Castano v. American Tobacco*, 84 F.3d 734, 748 (5th Cir. 1996); *In re Rhone-Poulenc Rorer*, 51 F.3d 1293, 1300 (7th Cir. 1995).

different duties at his or her particular [Family Dollar] store," the court found it "impossible to apply one plaintiff's duties to another." *Id.* The court thus concluded that determining "whether or not the plaintiffs are similarly situated would require a[] fact-specific inquiry into the daily duties of each plaintiff," which "defeats the point of a collective action." *Id.*

This case provides an excellent vehicle for this Court to resolve the disagreement in the lower courts. The deposition testimony taken during discovery revealed the wide disparity among the Plaintiffs both on their managerial job duties and their level of oversight by district managers. See SA-1–88. Had this case arisen in any of the courts that disagree with the Eleventh Circuit's approach, Family Dollar's individualized exemption defense would have resulted in decertification of the collective action. Yet in the Eleventh Circuit, Family Dollar's decision to classify all its store managers as exempt foreordained certification of a collective action by those employees who shared common job traits.

The Court should not tolerate such inconsistent outcomes on such an important procedural issue. The Court should grant certiorari to resolve this conflict.

B. The Eleventh Circuit's decertification ruling will stunt any further circuit-level development of the issue.

The Court should address the issue now. Although the cases on the other side of the split have been decided by district courts, that does not counsel against review here. The courts of appeals have uniformly held that § 216(b) certification and decertification decisions are not appealable on an interlocutory basis. *E.g.*, *McElmurry v. U.S. Bank Nat'l Ass'n*, 495 F.3d 1136, 1141 (9th Cir. 2007) ("[C]ourts have uniformly held that they lacked jurisdiction over the appeal, both where the district court has certified and decertified the collective action"); *Comer v. Wal-Mart Stores*, 454 F.3d 544, 548–49 (6th Cir. 2006); *Baldridge v. SBC Communications*, 404 F.3d 930, 931–33 (5th Cir. 2005); *Lusardi v. Lechner*, 855 F.2d 1062, 1065 (3d Cir. 1988). Also, there is no permissive appeal under § 216(b) analogous to that for class actions under Rule 23(f).

Although § 216(b) certification decisions are reviewable on final judgment, neither plaintiffs nor defendants typically press such appeals. If the court denies certification or decertifies a § 216(b) collective action, other plaintiffs can simply file their FLSA claims somewhere else. On the other hand, when the court refuses to decertify a collective action, leaving nothing left to do but try the case collectively before one jury, defendants usually settle. Regardless of how the issue is decided, it rarely results in full review at the circuit level.

Declining to review the Eleventh Circuit's decision in this case will only make a bad situation worse. Legal experts have called FLSA collective actions "the nation's fastest growing legal battlefront between workers and companies." Stephen Franklin, *Workers Long for Overtime/Employers See More Suits Alleging They Failed to Pay for Extra Hours*, HOUS. CHRON. 1, 2006 WLNR 12769557 (July 24, 2006).[3] In 2003, Department of Labor statistics revealed that the number of FLSA collective action filed annually surpassed the number of other employment class actions filed. Brent Hunsberger, *More Wage Cases Land in Court*, PORTLAND OREGONIAN D-1, 2003 WLNR 15802543 (Jan. 1, 2003). As this case demonstrates, a collective action against a nationwide chain can just as easily be filed in Alabama, Florida, or Georgia under § 216(b) on behalf of all managers nationwide.

Left uncorrected, the Eleventh Circuit's decision could likely become the national rule. The Eleventh Circuit is already a hotbed for FLSA collective actions. *See* Mary Shedden, *Overtime Lawsuits A Budding Industry*, TAMPA TRIB. 1, 2007 WLNR 2421731 (Feb. 6, 2007) (dubbing South and Central Florida the "capitals

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[3] *See also* Kris Maher, *Workers Are Filing More Lawsuits Against Employers Over Wages*, WALL ST. J. A2 (June 5, 2006); Kay H. Hodge, *Fair Labor Standards Act and Federal Wage and Hour Issues*, SM097 ALI-ABA 435, 455 (2007) (noting "proliferation of employee collective action lawsuits"); John P. McAdams & Michael A Shafir, *Parent Company Liability Under the Fair Labor Standards Act*, 25 No. 3 TRIAL ADVOC. Q. 16, 20 (2006) ("Collective actions under the FLSA are one of the fastest-growing areas of litigation of any kind").

of this emerging industry").[4] If the Eleventh Circuit's decision stands, it will become their greenhouse.

The Court should also consider the *in terrorem* effect of FLSA collective actions. The possibility of enormous liability awards, based on a complex law that is often difficult to apply, creates enormous pressure for employers to settle. Matthew W. Lampe & E. Michael Rossman, *Procedural Approaches for Countering the Dual-Filed FLSA Collective Action and State-Law Wage Class Action*, 20 THE LAB. LAWYER 311, 315 (2005). In 2007, the top wage-and-hour collective or class action settlements exceeded $319 million; in 2008, $252 million. Karen Sloan, *Class action workplace litigation hot item in '08*, NAT'L L.J. 12 (Jan. 19, 2009). Those figures do not include Wal-Mart's decision at the end of last year to settle 63 wage-and-hour cases for up to $640 million. Miguel Bustillo, *Wal-Mart to Settle 63 Suits Over Wages*, WALL ST. J. (Dec. 24, 2008).

Continuing uncertainty over how the executive exemption applies to retail store managers forces employers to settle rather than risk their business model on litigation of one collective action on behalf of thousands of employees before one jury. *See* 7B WRIGHT, MILLER & KANE, FEDERAL PRACTICE & PROCEDURE: CIVIL

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[4] This may explain why practically all the circuit-level decisions on § 216(b) have been decided by the Eleventh Circuit. *See Anderson v. Cagle's*, 488 F.3d 945 (11th Cir. 2007); *Cameron-Grant v. Maxim Healthcare Servs.*, 347 F.3d 1240 (11th Cir. 2003); *Hipp v. Liberty Nat'l Life Ins.*, 252 F.3d 1208 (11th Cir. 2001); *Grayson v. Kmart*, 79 F.3d 1086 (11th Cir. 1996); *Haynes v. Singer Co.*, 696 F.2d 884 (11th Cir. 1983); *LaChapelle v. Owens-Ill.*, 513 F.2d 286 (5th Cir. 1975).

3D § 1807, at 503 (2005) (observing "most collective actions settle"). The Department of Labor has recognized that large-scale collective actions take advantage of such legal uncertainty, imposing a "significant cost to the economy." 69 Fed. Reg. 22,122, 22,231.

Employee wages should depend on what the law requires, not confusion over the outcome of high-stakes litigation. Further percolation of this issue will result in little to no further development outside the Eleventh Circuit. The importance of this statutory question to retailers across the country and its economic scope justify the Court's review of the issue in this case.

C. Neither this Court nor the lower courts have established meaningful standards for certification of collective actions under the FLSA.

Congress enacted the FLSA in 1938 as a centerpiece of the New Deal. 52 Stat. 1069 (June 25, 1938). The FLSA's collective-action mechanism allows one employee to sue on behalf of other employees who are "similarly situated." 29 U.S.C. § 216(b). This procedure creates "a unique species of group litigation." 7B WRIGHT, MILLER & KANE, § 1807, at 468. Although the FLSA originally allowed an uninterested representative to sue on behalf of others, Congress removed that provision in the Portal-to-Portal Act of 1947 and instead required interested plaintiffs to affirmatively opt into the litigation. 61 Stat. 84, 87–88. *See* S. Rep. No. 48, at 49 (1947); *Hoffman-LaRoche v. Sperling*, 493 U.S. 165, 173 (1989).

Unlike Rule 23, there are no representative plaintiffs in an FLSA collective action. Instead, an interested employee who wants to become a "party plaintiff" must opt in to the litigation by giving "consent in writing" that is "filed in the court." 29 U.S.C. § 216(b). Each plaintiff "has the right to be present in court to advance his or her own claim." 7B WRIGHT, MILLER & KANE § 1807, at 475. Also, the *res judicata* effect of the judgment in an FLSA collective action is more limited. A § 216(b) collective member "must opt in to be bound," while a Rule 23(b)(3) class member "must opt out not to be bound." *Woods v. New York Life Ins.*, 686 F.2d 578, 580 (7th Cir. 1982).

The FLSA does not define "similarly situated," nor does it spell out the procedure for certifying a § 216(b) collective action. This Court hasn't done so, either. The Court's only decision addressing § 216(b) is *Hoffman-La Roche v. Sperling*, which authorized district courts to facilitate notice to potential opt-in plaintiffs. 493 U.S. at 169. In *Hoffman-La Roche*, the Court recognized that FLSA collective actions present "opportunities for abuse" and discussed the federal courts' "duty and broad authority to exercise control" over such actions. *Id.* at 171 (internal quotation omitted). Having authorized federal courts to "midwif[e]" these actions (*id.* at 176 (Scalia, J., dissenting)), the Court has not taken the next step to decide what procedural standards should govern certification or decertification of § 216(b) collective actions.

Without any appellate guidance, the leading approach to certifying collective actions is an *ad hoc*

analysis developed by district courts.[5] *See Lusardi*, 118 F.R.D. at 358–59. The most remarkable feature of the *ad hoc* approach is its failure to define "similarly situated," the statutory basis for the procedure. *See Mooney v. Aramco Servs.*, 54 F.3d 1207, 1213 (5th Cir. 1995) (discussing *Lusardi* and its progeny), *overruled on other grounds by Desert Palace v. Costa*, 539 U.S. 90 (2003). All of the circuits to address the issue—including the Eleventh Circuit here—have either avoided the definitional issue or adopted the *ad hoc* approach. *See Mooney*, 54 F.3d at 1216 (avoiding decision); App. 55a–56a & n.38 (adopting *ad hoc* approach); *Thiessen v. GE Capital Corp.*, 267 F.3d 1095, 1102–05 (10th Cir. 2001) (discussing possible approaches and adopting *ad hoc*). As a result, the FLSA's powerful statutory mechanism allowing for nationwide collective actions is limited only by a particular judge's interpretation of the term "similarly situated." This

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[5] The minority approach, which applies the standards of Rule 23 to FLSA collective actions, was first developed in *Shushan v. Univ. of Colo.*, 132 F.R.D. 263 (D. Colo. 1990). The court in *Shushan* concluded that without Rule 23, § 216(b) procedures would be "practically formless":

> [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 a [§ 216(b)] class action, it has also directed them to discard the compass of rule 23 entirely and navigate the murky waters of such action by the stars or whatever other instruments they may fashion.

Id. at 266.

Court's clarification of this important procedural area is long overdue.

This case illustrates the problems caused by a failure to define "similarly situated" in the context of an FLSA collective action. This case is about whether each Family Dollar store managers is an exempt executive employee. The primary factual question under the exemption is whether the Plaintiffs' primary duty is "management." 29 C.F.R. § 541.100(a)(2) (2006); 29 C.F.R. § 541.1(a) (2003). Family Dollar conducted discovery to determine whether the Plaintiffs exercised the job duties that the FLSA regulations use to define "management." *See* 29 C.F.R. § 541.102 (2006); 29 C.F.R. § 541.102(a) (2003). It found significant dissimilarity among the Plaintiffs on those job duties.

Tabulating the managerial duties of just the 255 Plaintiffs whom Family Dollar was allowed to depose revealed widespread dissimilarity. On the authority to hire employees, for example, 54 percent of those Plaintiffs testified that they had such authority, while 46 percent testified that they did not. SA-64. When asked whether they had authority to fire employees, 33 percent said yes, and 67 percent said no. *Id.* When asked whether they had authority to discipline, 73 percent said yes, and 27 percent said no. *Id.* Similarly, 71 percent said they had responsibility for appraising or reviewing their employees' job performance, and 29 percent said they did not. *Id.* More than three-quarters of the deposed Plaintiffs admitted that they planned the work of their employees. When asked this question in their depositions, 78 percent answered yes,

while 22 percent answered no. *Id.* Such disparate testimony showed that the Plaintiffs were not similarly situated.[6]

Without a defined standard to govern how "similarly situated" employees must be, however, the Plaintiffs were able to circumvent Family Dollar's proof of dissimilarity by arguing similarity of a different—and altogether irrelevant—kind. Nothing in the FLSA or its regulations requires that an exempt manager must exercise "sole" or "independent" authority to hire, fire, discipline, or promote employees without any oversight. Nonetheless, the Plaintiffs used such a standard to paper over the differences shown by Family Dollar's chart with a chart showing that no deponent exercised such "sole authority." Doc. 295 Exs.B & P; Doc. 296 Porter Aff.; Doc. 298 at 2–3 & n.1. The District Court adopted this rationale and found the Plaintiffs similarly situated because they all "lack *independent authority* to hire, promote, discipline, or terminate *assistant managers*." App. 128a (citing Pls.' Exs.B & P) (emphasis added). Applying that standard is like finding

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[6] The Eleventh Circuit disregarded the deposition testimony on the ground that Family Dollar's chart "fail[s] to paint a full picture." App. 65a n.44. The court quibbled with whether certain boxes on the chart were appropriately checked based on one Plaintiff's deposition, but it did not find that the evidence was inaccurate. *Id.* Nor did it dispute that different Plaintiffs gave varying deposition testimony on the range of duties used to define "management." *Id.* The charts themselves refute the court's comment that they failed to address "aspects of store manager's day-to-day duties" other than the authority "to hire, fire, interview, train, and discipline other employees" (*id.*). *See* SA-42–64.

all Plaintiffs similarly situated because none of them has flown to the moon. While that may be true, it is legally irrelevant to what the FLSA and its regulations require.

The Eleventh Circuit did not apply a more meaningful standard of similarity. As it has in past decisions, the Eleventh Circuit refused to adopt a precise definition of what "similarly situated" means under § 216(b). App. 55a–56a & n.38, 59a. Instead, the court agreed with the Plaintiffs' argument 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. App. 63a, 64a, 66a, 67a n.46.

The court did not explain how a business decision made decades ago—classifying a job as exempt—could overcome current evidentiary dissimilarity among the Plaintiffs on that exemption or the individualized analysis necessary to apply the exemption or the unfairness of litigating 1,424 individualized claims before one jury. As a practical matter, businesses do not make exemption classification decisions employee by employee. But if an individual employee challenges his or her classification, the FLSA requires that decision to be made plaintiff by plaintiff, based on all the facts in a "particular case." 29 C.F.R. § 541.700(a) (2006). Just because Family Dollar classified its store managers as exempt for purposes of its business model does not mean that all of the employees who hold that job are "similarly situated" for purposes of collective-action litigation. *See Holt v. Rite Aid*, 333 F. Supp. 2d 1265, 1270–72 (M.D. Ala. 2004); *Mike*, 274 F. Supp. 2d at 220–21; *Morisky*, 111 F. Supp.

2d at 498–99. Yet the Eleventh Circuit relied on that business decision both to find the Plaintiffs similarly situated and to reject Family Dollar's procedural objections.

When application of the term "similarly situated" is this lax, it risks violating due process. Forcing Family Dollar to litigate its liability for overtime to 1,424 different employees in a collective trial before one jury raises "serious questions . . . concerning the fairness, manageability, and meaningfulness" of a collective action. *Lusardi*, 118 F.R.D. at 370–71. *See also Johnson*, 561 F. Supp. 2d at 587 ("observing "efficiency gains" from a collective action "cannot come at the expense of a defendant's ability to prove a statutory defense without raising serious concerns about due process"). The procedure used here left Family Dollar's liability to be determined all or nothing based on a handful of witnesses whose testimony was not representative of the whole. If due process would not allow such a judgment to stand in a class action (*Hansberry v. Lee*, 311 U.S. 32, 41–45 (1940)), it should not apply any differently to a § 216(b) collective action.

This Court should consider these due process ramifications in deciding the proper operation of § 216(b)'s collective-action procedure. Section 216(b) has been in place for over 70 years, and employees are invoking more often—and more powerfully—now than ever before. Guidance from this Court on the procedural standards for certifying § 216(b) collective actions is overdue. In the class-action context, this Court's recent decisions have dramatically clarified how Rule 23(b) class actions operate. *See Ortiz v. Firbreboard Corp.*, 527 U.S. 815 (1999); *Amchem Prods., Inc. v. Windsor*,

521 U.S. 591 (1997). The Court should intervene to provide similar guidance concerning the procedural standards that should govern § 216(b) class actions.

D. This is a recurring issue of national importance that affects both the procedure and the substance of FLSA litigation.

This case also raises a recurring issue of national importance. According to the Department of Labor, the FLSA's overtime provisions cover approximately 114 million workers. 69 Fed. Reg. 22,122, 22,197 & Chart 1. The wages of more than 64 million employees are affected by the FLSA's executive, administrative, and professional exemptions. *Id.* at 22,201 & Chart 3. More than 20 million employees work in the retail industry alone. *Id.* at 22,220 & Table 5.1. Employees file thousands of lawsuits under the FLSA each year, a number that is growing exponentially. Federal court statistics show the number of FLSA actions filed annually has nearly quadrupled since 2003. Administrative Office of the Federal Courts, *2007 Annual Report of the Director* 150 (Table C-2A) (2,751 cases in 2003; 7,310 cases in 2007). Between 2006 and 2007 alone, annual FLSA case filings saw a 73.8 percent increase. *Id.* (from 4,207 in 2006 to 7,310 in 2007).

Under the FLSA, collective action procedure has a significant impact on the outcome of litigation. The Eleventh Circuit's decision creates an all-or-nothing approach to high stakes litigation. Once a collective action on behalf of thousands of employees proceeds past decertification to trial, the wage claims of all the members of the collective will succeed or fail based upon

the testimony of a small fraction of plaintiffs. That is especially true if, as here, the court instructs the jury to decide the claims of the non-testifying plaintiffs based on the claims of the "representative plaintiffs who did testify." Doc. 719 at 10. The unfairness in this approach is sure; the only question is on which side of the *v.* it will fall. As the court in *Johnson v. Big Lots* recently observed, a collective verdict for the plaintiff would necessarily rest on less-than-representative proof and would impose liability to many employees who would be found exempt as a matter of law in individual litigation. 561 F. Supp. 2d at 588. On the other hand, a collective verdict for the defendant would extinguish all the plaintiffs' claims, even those who were obviously misclassified and could never be found exempt on an individual basis. *Id.*

This case epitomizes this inevitable unfairness. Within the 1,424 Plaintiffs in this case, there are some who were likely misclassified. In fact, the District Court granted judgment on behalf of 163 Plaintiffs whom payroll records showed did not supervise two or more full-time employees as a matter of law. *See* App. 89a. Yet had the verdict been in favor of Family Dollar, any misclassified employees would have lost their claims in the collective process.

On the other hand, the 1,424 Plaintiffs certainly included some who were exempt as a matter of law. In fact, two store managers who received notice in this case but filed suit in another district were held to be exempt on summary judgment. *See Fripp v. Family Dollar Stores*, No. 2:03-721-18BG (D.S.C. Sept. 27, 2004); *Davis v. Family Dollar Stores*, No. 3:03-170-22BC (D.S.C.

Sept. 28, 2004). Several other Plaintiffs—like Krista Allen discussed at p.9, above—provided deposition testimony that would have entitled Family Dollar to summary judgment had their claims been filed individually, not collectively. In fact, had Family Dollar been sued by the Plaintiffs individually in their home districts, it would have won more cases on summary judgment than it lost, given the law in the other circuits holding retail managers exempt as a matter of law. *See Donovan v. Burger King*, 672 F.2d 221, 225–27 (1st Cir. 1982); *Donovan v. Burger King*, 675 F.2d 516, 520–22 (2d Cir. 1982); *Jones v. Virginia Oil*, 69 Fed. Appx. 633, 637–39 (4th Cir. 2003); *Thomas v. Speedway SuperAmerica*, 506 F.3d 496, 502–09 (6th Cir. 2007); *Murray v. Stuckey's*, 939 F.2d 614, 618 (8th Cir. 1991) (holding FLSA entitles employer to "one designated exempt executive" at each freestanding store); *Murray v. Stuckey's*, 50 F.3d 564, 569–70 (8th Cir. 1995) (same); *Baldwin v. Trailer Inns*, 266 F.3d 1104, 1114–16 (9th Cir. 2001).

It is only because this case proceeded to trial as a collective action that Family Dollar is now liable for overtime and liquidated damages to all 1,424 Plaintiffs. This $35 million judgment against Family Dollar shows how § 216(b)'s procedure, if left unchecked, can have devastating substantive consequences.

Conclusion

For these reasons, the Court should grant the petition.

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