Case No. 22A164

IN THE SUPREME COURT OF THE UNITED STATES

SHAREY THOMAS *et al.*,
individually and behalf of all others similarly situated,

Respondents,

v.

MAXIMUS, INC.,

Applicant.

RESPONDENTS' OPPOSITION TO APPLICANT'S EMERGENCY APPLICATION FOR A STAY OF AN ORDER ENTERED BY THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

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INTRODUCTION

By any measure, Applicant Maximus Inc.'s request is extraordinary. It asks this Court to stay a district court's discretionary case-management order in an unexceptional labor-law dispute. And it makes that request so that it can seek certiorari, before judgment in the court of appeals, to ask this Court to overrule its settled precedent and override the circuits' uniform application of that precedent. Maximus's application should be denied.

This Court long ago established that district courts may use their case-management authority to send notice to similarly situated employees in Fair Labor Standards Act (FLSA) collective actions. *Hoffman-La Roche v. Sperling*, 493 U.S. 165, 170 (1989). Since then, courts have "coalesced" around a two-step framework for managing collective actions. *Myers v. Hertz Corp.*, 624 F.3d 537, 555 (2d Cir. 2010). Where, as here, the named plaintiff makes a preliminary showing that the challenged policy affects similarly situated workers, district courts "conditionally certify" a collective action and direct "notice concerning the pendency of the [case], so that [similarly situated employees] can make informed decisions about whether to participate." *Id.*; *Hoffman-La Roche*, 493 U.S. 165 at 170. Later in the litigation, "on a fuller record," courts determine whether the employees "who have opted in are in fact 'similarly situated' to the named plaintiffs." *Myers*, 624 F.3d at 555.

Like other matters of case management, district courts enjoy broad discretion to manage collective actions. Courts are not required to follow specific criteria when determining whether to send notice. *See Ison v. MarkWest Energy Partners, LP*, No. 3:21-0333, 2021 WL 5989084, at *3 (S.D.W. Va. Dec. 17, 2021). Courts determine the timing, content, and scope of the notice based on the facts of each case. *Id.*

That's exactly what the district court did here. Testimony from a dozen Maximus employees employed across ten different states demonstrated that Maximus maintains a company-wide policy of unlawfully withholding overtime compensation. D.E. 29–29-12. Based on that evidence, the district court concluded that it was appropriate to send notice of this lawsuit to similarly situated employees. D.E. 63 at 11, 20.

Maximus sought interlocutory review under 28 U.S.C. § 1292(b), but the Fourth Circuit denied review. Maximus now seeks to stay the district court's order while it pursues certiorari before judgment in this Court.

Maximus has not shown it is entitled to a stay.

First, Maximus has not sought a stay in the lower courts. It has only received an email from the district court indicating that the court does not intend to enter a stay. App. at 74. Maximus also filed a motion in the Fourth Circuit to stay that Court's mandate, but that motion was a non-sequitur. The Fourth Circuit never agreed to take this case. It therefore had no mandate to issue—let alone stay. Maximus could have

asked the district court for a stay. It could have, if necessary, asked the Fourth Circuit for a stay. It did neither. This Court should not step in when a party has failed to exhaust its remedies in the lower courts.

Second, Maximus is unlikely to succeed in obtaining certiorari or convincing this Court to reverse the district court's discretionary case-management order.

Certiorari before judgment is "an extremely rare occurrence," *Coleman v. PACCAR, Inc.*, 424 U.S. 1301, 1304 n.* (1976) (Rehnquist, J., in chambers). And for good reason: certiorari before judgment will be granted "only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." Sup. Ct. R. 11. This case, a work-a-day dispute about overtime compensation, lands miles short of that standard.

Neither do the standard measures for certiorari favor Maximus. There is no circuit split over how district courts exercise their discretion under *Hoffman-La Roche*. What Maximus sees as a difference of opinion is instead a heterogeneous exercise of discretion across a wide range of cases—each with its own allegations, facts, and evidence.

This case also presents no issue of exceptional importance. This case does not concern the substantive rights of any party. It does not implicate an interpretive dispute over an important provision of federal law. Maximus instead complains about how the district court exercised

its discretion on a quintessential question of case management. That is not a point warranting this Court's review.

Maximus faces an even greater uphill battle on the merits. Maximus asks this Court to overrule *Hoffman-La Roche*. Petition at 16. But this Court may not overrule a decision without a "special justification." *Gamble v. United States*, 139 S.Ct. 1960, 1969 (2019). *Hoffman-La Roche* was correctly decided. District courts have broad discretion to manage their dockets. This case-management authority includes sending notice to potential class members "in any manner" not inconsistent with the "federal or local rules." *Hoffman-La Roche*, 493 U.S. at 173.

Maximus also comes up short in demonstrating any irreparable harm. The "sole consequence" of the district court's decision is "the sending of court-approved notice to employees," *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 75 (2013), "so that they can make informed decisions about whether to participate," *Hoffmann-La Roche*, 493 U.S. at 170. That won't affect Maximus's legal rights or force it to take some course of action that can't be undone. It merely requires Maximus to passively tolerate the district court's dissemination of information about this case. That hardly amounts to irreparable harm.

The employees, however, would face irreparable harm if a stay is issued. There is no guarantee that the district court will continue to equitably toll the statute of limitations for employees who wish to join

this case. And more to the point, notice delayed is often notice denied. People move, change their names, and pass away. They become harder to locate based on stale employment records. With each passing day, the effectiveness of any notice to affected employees is diminished.

For these reasons, this Court should deny Maximus's application for a stay.

STATEMENT OF THE CASE

I. DISTRICT COURTS ENJOY BROAD DISCRETION TO SEND NOTICE IN FLSA COLLECTIVE ACTIONS.

The FLSA permits employees to sue for unpaid minimum wages and overtime compensation on behalf of "themselves and other employees similarly situated." 29 U.S.C § 216(b). Congress adopted this collective-action mechanism to minimize individual costs and "vindicate [employee] rights" through the pooling of resources. *Hoffman-La Roche*, 493 U.S. 165 at 170.[1]

Unlike absent class members in class-action cases governed by Rule 23, similarly situated employees must affirmatively opt into an FLSA case by filing written consent forms with the court. 29 U.S.C. § 216(b). Another critical difference: unlike under Rule 23, "the statute of limitations" for the claims of putative class members "continues to run"

[1] *Hoffman-La Roche* involved claims brought under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621–34, but "the same rules govern judicial management of class actions under both" the ADEA and the FLSA. *Shaffer v. Farm Fresh, Inc.*, 966 F.2d 142, 147 n.5 (4th Cir. 1992).

until they opt into the suit. *Houston v. URS Corp.*, 591 F. Supp. 2d 827, 831 (E.D. Va. 2008).

In *Hoffman-La Roche*, this Court affirmed "the propriety, if not the necessity," of court intervention to monitor and facilitate the timely sending of notice to similarly situated employees. *Hoffman-La Roche*, 493 U.S. at 168, 172. The FLSA provides no hard-and-fast rules addressing when or how notice should be sent. *Halle v. W. Penn. Allegheny Health Sys. Inc.*, 842 F.3d 215, 224 (3d Cir. 2016). District courts, therefore, may make these determinations "in any manner" not inconsistent with the "federal or local rules." *Hoffman-La Roche*, 493 U.S. at 173. *Hoffman-La Roche* nevertheless endorsed early "judicial intervention" in the interest of "better" case management. *Id.* at 171–72.

In the decades following *Hoffman-La Roche*, courts have "coalesced" around a flexible two-step framework for managing collective actions. *See, e.g., Myers*, 624 F.3d at 555; *Morgan v. Family Dollar Stores Inc.*, 551 F.3d 1233, 1261 (11th Cir. 2008); *Branson v. All. Coal, LLC*, No. 4:19-CV-00155-JHM, 2021 WL 1550571, at *4 (W.D. Ky. April 20, 2021). This approach, originally articulated in *Lusardi v. Xerox Corp.*, 118 F.R.D. 351 (D.N.J. 1987), is applied "uniformly" around the country. *Winks v. Va. Dept. of Transp.*, No. 3:20-cv-420-HEH, 2021 WL 2482680 at *2 (E.D. Va. June 17, 2021); *Houston*, 591 F. Supp. 2d at 831.

At the first step, called "conditional certification," courts typically require a "modest factual showing" that the named plaintiff and the

putative class members "together were victims of a common policy or plan that violated the law." *Enkhbayar Choimbol v. Fairfield Resorts, Inc.*, 475 F. Supp. 2d 557, 564 (E.D. Va. 2006). If the named plaintiff carries her burden, the court directs the parties to send a court-approved notice to similarly situated employees. *Hoffman-La Roche*, 493 U.S. at 170. The second step is more demanding. After discovery is virtually complete, an employer may move to decertify the collective. *Enkhbayar*, 475 F. Supp. 2d at 563. Armed with a "much thicker record," courts can make a "more informed factual determination of similarity" using a more exacting review. *Morgan*, 551 F.3d at 1261 (citing *Thiessen v. Gen. Elec. Capital Corp.,* 267 F.3d 1095, 1103 (10th Cir. 2001)). At this second stage, courts define the precise scope of the collective action for trial. *Cramer v. Arkesia, Inc.*, 311 F. Supp. 3d 733, 832 (E.D. Va. 2018).

At both stages, courts consider a variety of non-exhaustive factors, including "the factual and employment settings of the [potential]…plaintiffs," "the different defenses to which the plaintiffs may be [individually] subject," and "the degree of fairness and procedural impact of certifying the action as a collective action." *Yerger v. Liberty Mutual Group, Inc.*, No. 5:11–CV–238–D, 2011 WL 5593151, at *4 (E.D.N.C. November 15, 2017).

This two-step framework appropriately balances the competing interests of employees, employers, and courts. It protects plaintiffs' interest in pooling resources and vindicating their substantive rights. *See*

Hoffman-La Roche, 493 U.S. at 171. If courts demanded years of discovery and massive evidentiary records to inform their notice decisions, employers would win every case by simply running out the clock. "Because the statute of limitations continues to run on unnamed class members' claims until they opt into the collective action," courts must send notice—if at all—"early in [the] proceeding" to preserve "the objectives [of] a collective action." *Houston*, 591 F. Supp. 2d at 831. The two-step framework likewise vindicates defendants' interest in avoiding spurious notice by requiring plaintiffs to come forward with "more than mere allegations" of a common unlawful practice. *Morgan*, 551 F.3d at 1262. And, not least, the two-step approach upholds courts' interest in efficient and effective case management through early and active intervention. *Hoffman-La Roche*, 493 U.S. at 171.

Although courts have taken to calling this process "certification" and "decertification," these terms are misnomers. "[C]ertification" is "not a true certification," *Halle*, 842 F.3d at 224, but "only the district court's exercise of the discretionary power, upheld in *Hoffman-LaRoche*, to facilitate the sending of notice to potential class members," *Myers*, 624 F.3d at 555 n.10. Unlike class certification in Rule 23 actions, "conditional certification" does not create "a class with an independent legal status…or join additional parties." *Genesis*, 569 U.S. at 75. The "sole consequence of conditional certification" is "the sending of court-approved notice to employees," *id.* at 75, "so that they can make informed

decisions about whether to participate," *Hoffmann-La Roche*, 493 U.S. at 170.

II. THE DISTRICT COURT ORDERED NOTICE TO BE SENT TO SIMILARLY SITUATED EMPLOYEES BECAUSE MAXIMUS MAINTAINS A COMPANY-WIDE POLICY OF FORCING EMPLOYEES TO WORK OFF THE CLOCK.

Respondents Sharey Thomas, Jennifer Gilvin, Laura Vick, Shannon Garner, Nyeshia Young, and Olga Ramirez filed a complaint seeking to recover unpaid overtime wages from Maximus. D.E. 1 at 1–2. Respondents maintain that Maximus enforced a company-wide policy illegally requiring its hourly call-center employees, who answer customer phone calls and provide general customer assistance, to work off-the-clock and without pay. *Id.* at 2.

Respondents contend that Maximus requires its hourly call-center employees to boot up their computers and log into computer programs to be "call-ready" the moment their shifts begin—a process that takes up to thirty minutes per day and for which employees receive no compensation. D.E. 1 at 9. Respondents similarly allege that employees must finish ongoing calls without compensation after the end of their scheduled shifts. *Id.* at 11.[2] As a result, Respondents regularly work one to two hours of unpaid, off-the-clock time each workweek beyond their scheduled hours. *Id.* at 3, 8. Respondents brought their suit on behalf of

[2] Respondents contend that these same policies extend to meal breaks, which means that employees are not paid for time worked at the beginning and end of breaks. *Id.* at 10.

themselves and similarly situated Maximus employees. D.E. 1 at 2. They also asserted state-law class claims under Rule 23. *Id.* at 1–2.

Respondents moved for conditional certification and court-authorized notice. D.E. 28. Their motion was supported by twelve detailed declarations from Maximus employees working in ten different states. D.E. 29-1–29-12. This testimony proved that Respondents, and the similarly situated employees they sought to represent, were subject to an unlawful company-wide policy of requiring unpaid, off-the-clock work. *Id.*

The district court granted in relevant part Respondents' motion for conditional certification and notice, D.E. 64, finding Maximus's "hourly customer service representatives" similarly situated in light of consistent employee declarations showing a "corporate-wide policy" resulting in uncompensated overtime. D.E. 63 at 11. The court stayed the notice, though, to give Maximus's an opportunity to file a motion to certify this case for interlocutory appeal. *Id.* at 20.

Maximus moved to certify the district court's order for interlocutory appeal. D.E. 67. The district court certified its order granting conditional certification and notice for interlocutory appeal. D.E. 89 at 2. The court also equitably tolled the statute of limitations during the pendency of the appeal. D.E. 91 at 2.

Maximus petitioned the Fourth Circuit for permission to appeal. The Fourth Circuit denied that petition. App. at 69. After an unsuccessful

petition for rehearing en banc, Maximus moved to stay the circuit court's mandate. The Fourth Circuit denied that motion, too. App. at 71.

In an email exchange, the district judge's law clerk wrote that the district court "d[id] not intend to stay this case further at this point." App. at 74. Maximus has not moved to extend the district court's stay—either in the district court or in the Fourth Circuit.

ARGUMENT

This Court should deny Maximus's application for a stay.

I. A STAY IS AN EXTRAORDINARY REMEDY.

A stay pending appeal constitutes "extraordinary relief," and the party seeking that relief bears a "heavy burden." *Winston-Salem/Forsyth Cnty. Bd. of Educ. v. Scott*, 404 U.S. 1221, 1231 (1971) (Burger, C.J., in chambers); *see also Williams v. Zbaraz*, 442 U.S. 1309, 1311 (1979) (Stevens, J., in chambers). "A stay is not a matter of right, even if irreparable injury might otherwise result." *Ind. State Police Pension Trust v. Chrysler LLC*, 556 U.S. 960, 961 (2009).

"Except in the most extraordinary circumstances, an application for a stay will not be entertained unless the relief requested was first sought in the appropriate court or courts below or from a judge or judges thereof." Sup. Ct. R. 11.

In determining whether to grant a stay pending appeal, the Court considers four factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the

applicant will be irreparably injured absent a stay; (3) whether issuance of a stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 433–34 (2009) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)). Here, each of these factors cuts against granting a stay.

II. MAXIMUS HAS NOT ADEQUATELY SOUGHT A STAY FROM THE LOWER COURTS.

This Court should deny review because Maximus has not sought a stay in the lower courts.

The district court stayed this action while the Fourth Circuit considered Maximus's petition for an interlocutory appeal. But once that appeal was denied, Maximus never moved the district court to extend that stay. Receiving an email from the district court's law clerk stating that the district court was disinclined to extend the stay is not the equivalent of "requesting" "relief" "in the appropriate court or courts below." Sup. Ct. R. 11. Maximus has not done that.

Maximus did ask the Fourth Circuit to stay its mandate. But that motion was not an appropriate request for a stay either. The mere filing of a petition for permission to appeal under 28 U.S.C. § 1292(b) does not confer jurisdiction on the court of appeals. *See id.* ("The Court of Appeals which *would have* jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken.") (emphasis added). And circuit courts do not issue mandates when there is no appellate

jurisdiction. *See Sgaraglino v. State Farm Fire & Cas. Co.*, 896 F.2d 420, 421 (9th Cir. 1990) (defining the "issuance of the mandate" as "return[ing] [the case] to the district court's jurisdiction"). "Here, the district court never lost jurisdiction over [the] case. As a consequence, there [wa]s no 'mandate,' i.e., return of jurisdiction, for [the Fourth Circuit] to stay." *Ellis v. U.S. Dist. Court for Western Dist. of Washington (Tacoma)*, 360 F.3d 1022, 1023 (9th Cir. 2004); *Key Enterprises of Delaware, Inc. v. Venice Hosp.*, 9 F.3d 893, 898 (11th Cir. 1993) ("In any appeal dismissed by the court because it lacks jurisdiction, no mandate shall issue.") Indeed, despite the passage of the mandatory deadline for the Fourth Circuit to issue a mandate, Fed. R. App. P. 41(b), no mandate has issued in this case—and none ever will. Maximus's request to stay the mandate, then, was a misbegotten request to stay something that was never to occur in the first instance.

The upshot is this: if Maximus wanted to extend the district court's stay, it could have moved the district court to do so. It then could have sought relief from any adverse decision in the Fourth Circuit. It didn't do either of these things. Instead, Maximus seeks relief in the first place from this Court. That's reason enough to deny Maximus's request. Sup. Ct. R. 11.

III. MAXIMUS IS UNLIKELY TO SUCCEED ON THE MERITS.

Maximus is also exceedingly unlikely to obtain certiorari, before judgment, and prevail on the merits before this Court.

A. There Is Significant Doubt Over Whether This Court Has Jurisdiction to Grant Certiorari.

Maximus seeks to appeal a district court's interlocutory and discretionary case-management order directly to the Supreme Court. There is at least some question about whether this Court would have jurisdiction to grant a writ of certiorari in this unique posture.

Generally, "the failure to satisfy a threshold prerequisite for court of appeals jurisdiction, such as the issuance of a certificate of appealability, [does not] prevent[] a case from being in the court of appeals for purposes of § 1254(1)." *Hohn v. United States*, 524 U.S. 236, 248 (1998). But this Court has never extended this proposition to cover failed petitions for interlocutory review under § 1292(b), which are committed almost entirely to the discretion of the court of appeals. *McFarlin v. Conseco Servs., LLC*, 381 F.3d 1251, 1259 (11th Cir. 2004).

In cases like this one, where an appeal was denied under § 1292(b), it is unclear whether the case is "in" the court of appeals within the meaning of § 1254(1). "The chief requisite to the exercise of th[e] power [to grant certiorari before judgment] is that there be a case pending in the court of appeals, which means that a notice of appeal has been filed and that the case is docketed in the court of appeals. E. Gressman, K. Geller, S. Shapiro, T. Bishop, & E. Hartnett, Supreme Court Practice 2.4 (9th ed. 2007) (citing *Gay v. Ruff*, 292 U.S. 25, 30 (1934)). Neither of those things occurs where, as here, the court of appeals refuses to take up the case under § 1292(b).

Further muddying the jurisdictional waters, it is also possible that this Court lacks jurisdiction *unless* it concludes that the Fourth Circuit abused its discretion in denying review under § 1292(b). *See, e.g.*, *Nixon v. Fitzgerald*, 457 U.S. 731, 743 (1982) (conditioning this Court's exercise of certiorari jurisdiction under § 1254 on a finding that the court of appeals erred in not finding appellate jurisdiction under the collateral-order doctrine). If that's the case, then the path to jurisdiction requires this Court hold that the Fourth Circuit abused its discretion in declining to take up this appeal under § 1292(b).

That is not likely to occur. An "appellate court's discretion under section 1292(b)" is comparable "to the Supreme Court's discretion to grant or deny certiorari." *Kennedy v. Bowser*, 843 F.3d 529, 536 (D.C. Cir. 2016). Given the nearly boundless scope of that discretion, any jurisdictional path for Maximus would be all but blocked here.

B. Maximus Cannot Meet the Extraordinarily Steep Standard for Certiorari Before Judgment.

Maximus cannot meet the extraordinarily steep standard for certiorari before judgment.

Certiorari before judgment is "an extremely rare occurrence," *Coleman*, 424 U.S. at 1304 n.* (Rehnquist, J., in chambers). It will be granted "only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." Sup. Ct. R. 11.

Thus, certiorari has been granted before judgment below in cases of great constitutional significance and of extraordinary national importance for other reasons. *See Mistretta v. United States*, 488 U.S. 361, 371 (1989) ("imperative public importance" and "disarray among the Federal District Courts" over constitutionality of sentencing guidelines statute); *Dames & Moore v. Regan*, 453 U.S. 654, 668 (1981) (issues arising out of presidential actions to secure release of hostages held by Iran "are of great significance and demand prompt resolution"); *United States v. Nixon*, 418 U.S. 683, 686–87 (1974) ("public importance of the [presidential confidentiality] issues presented and the need for their prompt resolution"); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 584 (1952) ("[d]eeming it best that the issues raised be promptly decided by this Court," certiorari granted before judgment in case challenging constitutionality of presidential order seizing steel mills).

This case, a labor dispute involving a group of employees' right to be paid for all hours worked and the correct amount of overtime compensation, does not meet that standard.

B. Maximus Cannot Meet the Ordinary Standard for Certiorari.

Nor can Maximus meet the normal criteria for certiorari.

(1) There is no circuit split.

First, there is no split in the circuits. The timing of notice in an FLSA case is a fact-based question of "case management" fitting squarely

within a district court's broad discretion to manage collective actions. *See Hoffman-La Roche*, 493 U.S. at 171, 174.

Here, there is no doubt that the district court properly exercised its discretion based on the evidence presented. There is no disagreement—and Maximus does not contend otherwise—about the meaning of the FLSA's phrase "similarly situated," or that courts have authority and discretion under *Hoffman-La Roche* to send notice. There is, at most, some variation among courts about how best to exercise their discretion given the particular features of the cases before them. That does not amount to a circuit split. *Pack v. Investools, Inc.*, No. 2:09–cv–1042–TS, 2011 WL 2161098, at *2 (D. Utah June 1, 2011) ("[D]ifferent results …from the application of different facts to the same or similar rule of law …do not demonstrate a substantial difference of opinion…under § 1292(b).").

Maximus's contrary argument is premised on the Fifth Circuit's opinion in *Swales v. KLLM Trans. Servs., LLC*, 985 F.3d 430 (5th Cir. 2021), which criticized some elements of the majority two-step framework articulated in *Lusardi*. But these criticisms do not evidence a "substantial difference of opinion."

Swales held that "a district court should identify, at the outset of the case, what facts and legal considerations will be material to determining whether a group of 'employees' is similarly situated," and observed that "[t]he amount of discovery necessary to make that

determination will vary case by case." *Swales*, 985 F.3d at 441. *Swales* urged courts to proceed cautiously and in view of the evidence when managing the notice process. *Id.*

But these principles guide district courts' considerable discretion in every circuit. Earlier this year, the First Circuit placed *Swales* squarely in line with prevailing practice rather than recognizing it as a departure. *See Waters v. Day & Zimmerman NPS*, 23 F.4th 84, 89 (1st Cir. 2022) ("[C]onditional certification…entails a 'lenient' review of the pleadings, declarations, or other limited evidence…to assess whether the 'proposed members of a collective are similar enough to receive notice of the pending action.'" (quoting *Swales*, 985 F.3d at 436)).

And even if *Swales did* represent a broadly applicable rejection of "conditional certification," it would be an "outlier" in doing so. *Piazza*, 2021 WL 3645526, at *4. A majority of circuit courts have recognized or endorsed *Lusardi*'s two-step approach. *See, e.g.*, *Thiessen*, 267 F.3d at 1105 ("the [two-step] approach is the best of the…approaches"); *Morgan*, 551 F.3d at 1260; *Camesi v. Univ. of Pittsburgh Med. Ctr.*, 729 F.3d 239, 243 (3d Cir. 2013); *White v. Baptist Mem'l Health Care Corp.*, 699 F.3d 869, 877 (6th Cir. 2012); *Hipp v. Liberty Nat'l Life Ins. Co.*, 252 F.3d 1208, 1218 (11th Cir. 2001); *Myers*, 624 F.3d at 555. Courts are "not bound to find reasonable cause for disagreement whenever authorities lack unanimity." *Wyeth*, 703 F. Supp. 2d. 527 (internal quotation omitted). That is certainly true here.

(2) There is no question of exceptional importance warranting this Court's review.

Nor does Maximus seek to present an issue of exceptional importance. Sup. Ct. R. 20(1).

Maximus's pitch on this count is premised on a contrived narrative about out-of-control and frivolous FLSA litigation overwhelming our federal court system. This tale has no basis in reality.

Start with the numbers. In the last year in which statistics are available, FLSA actions made up just over two percent of all civil filings in federal court. *See* U.S. Courts, Statistics & Reports, available at https://www.uscourts.gov/statistics/table/c-4/statistical-tables-federal-judiciary/2022/06/30. Of those cases, only a fraction were collective actions.

Then look at the results. FLSA actions are common because FLSA violations are, unfortunately, common. Scholars who study wage theft estimate that employers shortchange their employers to the tune of billions of dollars each year.[3] To put this number in perspective, it is roughly equivalent to the total loss from all robberies, burglaries, larceny, and motor vehicle theft in the United States each year.[4]

This Court's cases addressing FLSA violations bear out the same point. In cases, like this one, alleging that employers are shortchanging

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[3] See, e.g., https://www.epi.org/publication/employers-steal-billions-from-workers-paychecks-each-year/; https://smlr.rutgers.edu/sites/default/files/Documents/Centers/CWW/Publications/wage_theft_in_the_united_states_a_critical_review_june_2020.pdf; https://www.epi.org/publication/wage-theft-2021/.

[4] https://www.epi.org/publication/employers-steal-billions-from-workers-paychecks-each-year/.

workers for pre- and post-shift time, this Court has almost always sided with employees. *See Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 690–91 (1946); *Steiner v. Mitchell*, 350 U.S. 247, 252–53 (1956); *Mitchell v. King Packing Co.*, 350 U.S. 260, 262 (1956); *IBP, Inc. v. Alvarez*, 546 U.S. 21, 25 (2005); *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1049 (2016).

And in cases like this one, where employees who work in call centers claim they are forced to work off the clock at the beginning and end of their shifts, lower courts have been ruling in favor of employees, too. *See, e.g.*, *Peterson v. Nelnet Diversified Solutions, LLC*, 15 F.4th 1033, 1035 (10th Cir. 2021).

The FLSA's collective-action mechanism, then, serves as an important tool to manage group litigation for these sorts of broadscale violations. *Hoffmann-La Roche*, 493 U.S. at 170. And contrary to Maximus's assertions, district courts do not blindly authorize notice. They require employees to make a "factual showing" that the affected employees "were victims of a common policy or plan that violated the law." *Enkhbayar*, 475 F. Supp. 2d at 564.

That is what the district court did here; and there is no reason for this Court to second guess the district court's decision.

C. Maximus Is Unlikely to Prevail on the Merits.

Even if Maximus were successful in obtaining a writ of certiorari, it would not prevail on the merits in this Court.

Maximus asks this Court to overrule *Hoffman-La Roche*. Petition at 16. But this Court rarely overrules its own precedent. And there is no reason to do so here. *Hoffman-La Roche* was correctly decided. District courts enjoy wide discretion to manage litigation. *Hoffman-La Roche*, 493 U.S. at 168, 172. It is therefore entirely reasonable for district courts to send notice to similarly situated employees early in the litigation based on an evidentiary record showing that other employees were harmed by the same unlawful policy. *Id.*

IV. MAXIMUS FACES NO IRREPARABLE HARM, BUT GRANTING A STAY WOULD HARM EMPLOYEES AND THE PUBLIC INTEREST.

Maximus cannot show any irreparable harm, further undercutting the need for an emergency stay from this Court.

The "sole consequence" of the district court's decision is "the sending of court-approved notice to employees," *Genesis*, 569 U.S. at 75, "so that they can make informed decisions about whether to participate," *Hoffmann-La Roche*, 493 U.S. at 170.

Sending notice will not affect Maximus's legal rights or force it to take some course of action that cannot be undone. Maximus's "aggregate liability … does not depend on whether the suit proceeds as a class action." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 408 (2010).

Sending notice merely requires Maximus to passively tolerate the court's dissemination of information about this case. That hardly

amounts to irreparable harm. "[T]he ordinary incidents of litigating … a case are not 'irreparable injury.'" *PaineWebber Inc. v. Farnam*, 843 F.2d 1050, 1051 (7th Cir. 1988) (citing *Petroleum Expl., Inc. v. Pub. Serv. Comm'n*, 304 U.S. 209, 222 (1938)).

Maximus's current and former employees, however, would face irreparable harm if a stay were issued. There is no guarantee that the district court will continue to equitably toll the statute of limitations for employees who wish to join this case. And more to the point, notice delayed is often notice denied. People move, change their names, and pass away. They become harder to locate based on stale employment records. With each passing day, the effectiveness of any notice to affected employees is diminished.

Last, the public interest favors denying a stay. The FLSA reflects Congress' stated public policy of requiring uniform wage-and-hour standards. *See Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 708 (1945). Further delaying notice to similarly situated employees would frustrate Congress' remedial designs.

CONCLUSION

For these reasons, Maximus's petition should be denied.

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Respectfully submitted,

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