No. 14-6063

In the

UNITED STATES COURT OF APPEALS

for the

SIXTH CIRCUIT

EDWARD MONROE,
FABIAN MOORE, and TIMOTHY WILLIAMS,
Plaintiffs-Appellees,

vs.

FTS USA, LLC and UNITEK USA, LLC,
Defendants-Appellants.

On Appeal from the United States District Court
for the Western District of Tennessee
Case No. 08-cv-02100

BRIEF OF *AMICUS CURIAE* NATIONAL EMPLOYMENT LAWYERS ASSOCIATION In Support of Appellees

Laura L. Ho
William C. Jhaveri-Weeks,
Counsel of Record
GOLDSTEIN, BORGEN, DARDARIAN & HO
300 Lakeside Drive, Suite 1000
Oakland, California 94612
Tel: (510) 763-9800

Roberta L. Steele
NATIONAL EMPLOYMENT LAWYERS ASSOCIATION
2201 Broadway, Suite 402
Oakland, CA 94612
Tel: (415) 296-7629

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to Sixth Circuit Rule 26.1, the National Employment Lawyers Association ("NELA") makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly-owned corporation? If YES, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest.

No.

/s/ William C. Jhaveri-Weeks Date: July 2, 2015
William C. Jhaveri-Weeks

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Federal Statutes and Rules

STATEMENT OF INTEREST

The National Employment Lawyers Association ("NELA") is the largest professional membership organization in the country comprised of lawyers who represent workers in labor, employment, and civil rights disputes. Founded in 1985, NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA and its 69 circuit, state, and local affiliates have a membership of over 4,000 attorneys who are committed to working on behalf of those who have been treated illegally in the workplace. To ensure that the rights of working people are protected, NELA has filed numerous *amicus curiae* briefs before the U.S. Supreme Court and other federal appellate courts regarding the proper interpretation of worker protection laws, in addition to undertaking other advocacy actions on behalf of workers throughout the United States.

NELA has an abiding interest in ensuring that the collective action mechanism for enforcing the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq*., is not improperly circumscribed, but remains viable and available to groups of employees whose rights have been violated by illegal employment practices. The ability to try collective action cases using practical and efficient methods of proof, with discretion preserved for the trial court in formulating feasible trial plans, is essential to the enforcement of the FLSA. NELA's interest in this case is to cast

light on the legal issues presented and to assist the Court in determining the broader impact the decision in this case may have on access to the courts for employees who have been unlawfully treated.[1]

[1] All parties have consented to NELA's filing of this *amicus* brief. No party's counsel authored any part of this brief. No party and no party's counsel contributed any money intended to fund the preparation or filing of this brief. No person other than NELA members and its counsel contributed money intended to fund the preparation or filing of this brief.

SUMMARY OF ARGUMENT

When an employer subjects a group of employees to an unlawful employment practice, such as systematically failing to pay them for overtime work, the Fair Labor Standards Act ("FLSA") provides a crucial mechanism to challenge the practice collectively, rather than through individual lawsuits (lawsuits that would not be brought, given the costs of bringing suit and the limited amount at stake for each individual). FTS suggests (Br. at 1) that "drawing conclusions about a large number of people based on testimony from only a handful" is a suspect approach (and by "handful," FTS means "seventeen" class members, plus others); yet this is exactly what happens in virtually every collective action, and this is the reason that collective actions exist in the first place. Without the ability to draw conclusions about large groups based on common evidence, the FLSA could not be enforced.

Here, a group of cable technicians proved to a jury that, under the instructions of their employer, they worked an average of over 13 hours of unrecorded time each week without being paid for it—blatant violation of the law. They proved this the way plaintiffs in class or collective actions almost always prove their claims: through common evidence. Here, the evidence consisted of (i) trial testimony from seventeen cable technicians, who described the company's practice of depriving them of overtime by having them mis-record their start and

end times in order to shave off time actually worked, and record lunch breaks when no breaks were taken; (ii) trial testimony from three managers, three administrators, and one executive, confirming the company-wide practice; and (iii) documentary evidence, including time-sheets, of the number of hours each of the 296 members of the collective action recorded throughout the relevant period. This evidence was easily sufficient for a jury to find, as it did, that FTS was liable under the FLSA for its company-wide practice of under-paying its technicians for overtime.

With respect to damages, the fact that FTS kept no records of the off-the-clock overtime meant that Plaintiffs were required to make only a reduced *prima facie* estimate of their unpaid hours worked under *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946), after which the burden would shift to FTS to disprove Plaintiffs' approximation. Plaintiffs satisfied their *prima facie* burden by offering testimony from which the jury found the amount of off-the-clock work that the seventeen testifying employees worked each week, and by using those findings, along with every single employee's time-sheets, to perform an estimated calculation of the amount of overtime that was unpaid to the class.

The burden thus shifted to FTS to prove that Plaintiffs' estimate was incorrect, either class-wide or with respect to individual employees, but FTS made no effort to do so. Although FTS listed fifty cable technicians as potential trial

witnesses in its pre-trial submission (the fifty "representative witnesses" jointly selected by the parties for discovery purposes), FTS chose not to call a single employee witness. It made a strategic decision not to allow the jury to hear what those employees would say, and instead called only the company's CEO and three other members of upper management. Despite having failed to defend the case at trial, FTS claims that the district court's "errors" and "shortcuts" should serve as a "cautionary tale" to other judges. (Br. at 3). In fact, this case is a cautionary tale for defendants who elect not to put on evidence at trial.

Boiling down FTS's assertions on appeal—that the trial plan was "improper" and the testifying plaintiffs were not "representative"—one is left with one primary legal theory in support of reversal: a challenge to the sufficiency of the evidence. To prevail on such a challenge requires overcoming great deference owed to the fact-finder. FTS cannot do so here, because even if the facts were not construed in favor of the jury's verdict, as they must be, the jury acted well within reason in finding that FTS had a company-wide practice of failing to pay its cable technicians for overtime hours worked. Other Circuits have rejected similar post-trial challenges to the sufficiency of representative evidence in FLSA collective actions.

As a separate theory, FTS challenges the evidentiary aspects of the trial plan, claiming that the trial court refused to allow FTS to present evidence, but

evidentiary decisions are also reviewed with great deference. FTS's brief is silent as to how, exactly, the court "precluded" FTS from introducing evidence. This silence arises from the fact that FTS, not the Court, made the decision to keep out such evidence. This decision by FTS forecloses any due process argument.

With respect to FTS's challenge to the district court's decision to allow the case to proceed as a collective action, FTS has shown no abuse of discretion. Employees are "similarly situated," and thus entitled to proceed collectively under the FLSA, when they "articulate[] … common means by which they were allegedly cheated," such as "forcing employees to work off the clock." *See O'Brien v. Ed Donnelly Enterprises, Inc.*, 575 F.3d 567, 585 (6th Cir. 2009). Here, the Plaintiffs demonstrated that there was a company-wide practice of forcing technicians to work off the clock. The FLSA collective action standard is less stringent than the class certification standard under Rule 23. *Id.* Declining to try 300 claims independently when all of those claims challenged the same company-wide practice was well within the district court's discretion.

These FLSA collective action plaintiffs have proceeded through trial, and a jury has sided with them. For the remedial purposes underlying the FLSA to be effectuated, appeals courts must be willing to affirm verdicts based upon representative proof—such proof is the only practical way of trying an FLSA collective action.

ARGUMENT

FTS's appellate challenges to the "trial plan" and the use of representative proof are not framed within any particular legal theory that could justify reversal of a jury verdict. Upon examination, these challenges primarily amount to an argument that the evidence introduced at trial was insufficient to support the verdict. From this primary argument, one can separate out a secondary argument that the trial plan amounted to an improper evidentiary decision concerning the proof to be allowed at trial, as well as a third argument based on a purported "due process" violation (notwithstanding the fact that FTS itself is responsible for the decision not to call any employee witnesses):

- FTS claims that the "inferences" drawn by the jury cannot be supported by the evidence presented, because FTS thinks that the evidence was "unreliable." (Br. at 1.) This is a challenge to the sufficiency of the evidence.

- FTS claims that the district court "allowed [plaintiffs] to litigate nearly 300 claims *en masse* based on the testimony of only" seventeen. (Br. at 2.) This appears to be a challenge to the sufficiency of the evidence.

- FTS claims that the trial plan "hamstrung FTS in litigating … defenses to individual employees' claims" (even though Defendant chose not to call additional witnesses to attempt to disprove their claims). (Br. at 3.) This appears to be a challenge to the trial court's evidentiary decisions.

- FTS claims that Plaintiffs were "relieved … of their burden of proof" (Br. at 3)—but rather than a challenge, for example, to a jury instruction, this is essentially a claim that Plaintiffs' evidence was not sufficient to meet their burden of proving that FTS violated the FLSA.

- FTS phrases its "issue presented" as: "whether the trial plan adopted by the district court was improper and violated FTS's due process rights, by inviting the jury to find liability on the claims of nearly 300 employees based on the testimony of only a 'handful' of them that Plaintiffs never proved were representative of the remainder, and by precluding FTS from litigating its individual defenses to each employee's claim." (Br. at 5). Whether the testimony supported a liability finding for the collective group is a question of the sufficiency of the evidence; whether FTS was precluded from litigating its defenses is an evidentiary question.

The deferential standards of review that apply to these appellate arguments are absent from FTS's brief. Applying the proper standards, Plaintiffs produced evidence that easily supports a finding of class-wide liability and award of damages. Affirmance of this finding is consistent with the remedial purposes of the FLSA.

FTS's second major argument on appeal—that the district court abused its discretion in refusing to decertify the class—fails under Sixth Circuit precedent: these employees alleged that they suffered from a company-wide practice of failing to pay cable technicians for overtime work, and this commonality supports the district court's exercise of discretion to allow the case to proceed collectively.

I. THE VERDICT SHOULD BE AFFIRMED BECAUSE THE EVIDENCE WAS SUFFICIENT, AND FTS CHOSE NOT TO PRESENT A DEFENSE.

A. The Remedial Purpose of the FLSA Supports Affirming the Sufficiency of the Evidence Here.

The FLSA contemplates representative actions, permitting employees to bring actions on "behalf of . . . other employees similarly situated." 29 U.S.C.

§ 216(b). "Congress passed the FLSA with broad remedial intent." *Keller v. Miri Microsystems LLC*, 781 F.3d 799, 806 (6th Cir. 2015). Courts consider Congress's purpose when interpreting the FLSA, *id.* at 806, and do not apply the statute "'in a narrow, grudging manner.'" *Herman v. Fabri-Centers of Am., Inc.*, 308 F.3d 580, 585 (quoting *Tenn. Coal, Iron & R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 597 (1944)).

Because unlawful wage practices typically affect groups of employees, rather than individuals, and because the harmful effects may be relatively small on an individual basis, employees must be afforded practical and workable methods of challenging FLSA violations on a collective basis. The Supreme Court made this clear in *Mount Clemens*, rejecting the requirement of precise, individualized proof because imposing such a burden "has the practical effect of impairing many of the benefits of the [FLSA]," and the "remedial nature of this statute and the great public policy which it embodies … militate against making that burden an impossible hurdle for the employee." 328 U.S. at 687-88. If the intent of Congress in passing the FLSA is to be effectuated, courts must ensure that collective actions, relying as they must on common proof, continue to provide a workable method for employees to enforce the wage laws. Here, the evidence was sufficient to allow the jury to conclude that a violation occurred, and to support the requisite *prima facie* showing of damages.

B. The Standard of Review on a Denial of Motion for Judgment as a Matter of Law.

The trial court denied FTS's motion for judgment as a matter of law, in which FTS argued that the representative proof offered at trial did not support a finding of liability. This Court reviews that decision "de novo," "applying the same standard used by the district court." *See Waldo v. Consumers Energy Co.*, 726 F.3d 802, 818 (6th Cir. 2013). The standard used by the district court, and hence this Court, is highly deferential to the jury: "In evaluating a motion for judgment as a matter of law and deciding whether there was sufficient evidence to support the jury's verdict, the evidence should not be weighed, and the credibility of the witnesses should not be questioned. The judgment of this court should not be substituted for that of the jury; instead, the evidence should be viewed in the light most favorable to the party against whom the motion is made, and that party given the benefit of all reasonable inferences." *Id.* (quoting *Tisdale v. Fed. Express Corp.*, 415 F.3d 516, 531 (6th Cir. 2005)). A motion for judgment as a matter of law should be granted only if "there is no genuine issue of material fact for the jury, and reasonable minds could come to but one conclusion in favor of the moving party." *Barnes v. City of Cincinnati*, 401 F.3d 729, 736 (6th Cir. 2005).

C. Plaintiffs' Evidence Was Sufficient to Allow a Reasonable Jury to Find that FTS Underpaid Overtime Wages to the Collective Class.

Employers regularly challenge the sufficiency of representative evidence to support a verdict in FLSA off-the-clock cases, and such efforts almost always fail because of deference owed to the jury. *See, e.g., Garcia v. Tyson Foods, Inc.*, 770 F.3d 1300, 1306 (10th Cir. 2014) ("[T]he overarching question for the jury was whether the [employer's policy] had resulted in underpayment. The jury answered this question 'yes.' Our task is to determine whether this answer was reasonable based on the evidence. It was."); *Morgan v. Family Dollar Stores, Inc.*, 551 F.3d 1233, 1280 (11th Cir. 2008) ("[T]he only issue we must squarely decide is whether there was legally sufficient evidence—representative, direct, circumstantial, in-person, by deposition, or otherwise—to produce a reliable and just verdict. There was.").

Here, testimony from seventeen geographically dispersed employees, along with testimony from three managers and three administrators, indicated that cable technicians were instructed to work off-the-clock to reduce their overtime pay—a company-wide policy implemented by shaving time at the beginning and end of the day or by recording false lunch breaks. Defendants ask this Court to rule that even though the jury found that all seventeen employee witnesses, without exception, worked substantial unrecorded overtime, the jury could rationally have "come to but one conclusion": that there was *not* a company-wide policy of

requiring cable technicians to perform off-the-clock work. Simply articulating FTS's position on appeal shows that it is wrong as a matter of common sense. It is also wrong under Supreme Court precedent, this Court's precedent, and other circuit courts' precedent. In FLSA collective actions that proceed through trial, representative evidence is provided to the fact-finder to demonstrate the employer's practices to the members of the collective action, and the fact-finder decides whether such evidence gives rise to liability. That is what happened here.

1. Binding Precedent Evaluating the Use of Representative Proof at Trial in FLSA Actions Supports the Sufficiency of the Evidence Here.

The Supreme Court's decision in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946), provides the framework for analyzing this appeal. At issue in that case was whether the employees were undercompensated for time spent walking to their respective work-spaces in the employer's eight-acre facility and then preparing their clothing and work-stations to begin "productive work"—*i.e.*, making pieces of pottery, for which they were paid on a piece-rate basis. The evidence adduced by the plaintiffs at trial "consisted largely of testimony of eight union employees or former employees of the company," on behalf of approximately 300 opt-in plaintiffs. *Mt. Clemens Pottery Co. v. Anderson*, 149 F. 2d 461, 462 (6th Cir. 1945). The Court of Appeals reversed a judgment for the employees, concluding that the employees had failed to meet their burden to "show

by evidence, not resting upon conjecture, the extent of overtime worked," stating that "[i]t does not suffice for the employee to base his right to recovery on a mere estimated average of overtime worked." *Id.* at 465. The Supreme Court reversed, holding that the Court of Appeals had "imposed upon the employees an improper standard of proof, a standard that has the practical effect of impairing many of the benefits of the Fair Labor Standards Act." *Mt. Clemens*, 328 U.S. at 686. Given that the employer, not the employee, bears the burden of maintaining proper records of wages and hours, the Court set forth the following "proper and fair standard … for the employee to meet in carrying out his burden of proof":

> [W]here the employer's records are inaccurate or inadequate and the employee cannot offer convincing substitutes … an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate.

Id. at 687-88.

In the case at bar, Plaintiffs were required to satisfy the initial *Mt. Clemens* burden by proving that the collective action members "performed work for which [they were] not properly compensated," and "show[ing] the amount and extent of that work as a matter of just and reasonable inference." *Id.* at 687. The employees

did so. They offered proof that FTS implemented a company-wide scheme under which cable technicians under-recorded their overtime hours in order to keep wage costs down. This proof—testimony from seventeen employees and six managers and supervisors—was even more substantial than in *Mt. Clemens*, where only eight employees testified on behalf of approximately the same number of opt-ins (300) as here. Plaintiffs here also offered proof giving rise to a "just and reasonable inference" about the amount of overtime pay each collective class member was owed: the jury found that the seventeen testifying employees had worked an average of thirteen off-the-clock hours each week. Using the actual payroll records of each collective action member, the Plaintiffs added this average of thirteen off-the-clock hours to the hours actually recorded every week within the applicable time period to calculate the individualized amount of estimated unpaid overtime due to each class member.

After Plaintiffs made this *prima facie* showing, the burden shifted to FTS to attempt to demonstrate that the hours worked were lower. FTS limited its efforts to cross-examining the seventeen witnesses and calling four high-level company executives—the jury considered that evidence in reaching its conclusion about the amount of unpaid overtime the seventeen testifying employees worked. FTS made no other effort to meet its burden, failing to call any employee witnesses to attempt to establish that they worked less than the typical off-the-clock time worked by the

seventeen testifying witnesses. FTS had engaged in discovery with respect to these witnesses, and its decision not to call them at trial was presumably motivated by a desire to prevent the jury from hearing what they would say.

The Sixth Circuit has previously applied the *Mt. Clemens* standard. In *U.S. Department of Labor v. Cole Enterprises, Inc.*, 62 F.3d 775 (6th Cir. 1995), an off-the-clock FLSA collective action involving restaurant workers, the trial evidence related to only seven class members. After a bench trial, the district court "found that the waiters and waitresses … worked an average of one half-hour per day outside their scheduled shift hours, and that Defendants had failed to compensate the employees for this extra work." *Id.* at 779. There, as here, the defendant challenged the sufficiency of the evidence. Citing *Mt. Clemens*, the Sixth Circuit stated: "The information [pertaining to testifying witnesses] was also used to make estimates and calculations for similarly situated employees who did not testify. The testimony of fairly representative employees may be the basis for an award of back wages to nontestifying employees." *Id.* at 781. The Court saw no need for every employee to offer individual proof that he or she did, in fact, work off the clock; rather, the employees demonstrated to the fact-finder that the employer had a practice of failing to pay workers for off-the-clock work, and the representative proof allowed the fact-finder to estimate the average amount of such work class-wide. *See also O'Brien*, 575 F.3d at 585 (6th Cir. 2009) (observing, in discussing

"similarly situated" FLSA employees: "[I]t is possible that representative testimony from a subset of plaintiffs could be used to facilitate the presentation of proof of FLSA violations, when such proof would ordinarily be individualized.").

2. Similar FLSA Decisions from Other Circuit Courts Support the Sufficiency of the Evidence Here.

Courts of Appeals routinely hold that representative evidence, along with other common evidence, is a proper basis for jury verdicts in favor of FLSA collective classes.

In *Garcia v. Tyson Foods, Inc.*, 770 F.3d 1300 (10th Cir. 2014), the court affirmed a trial verdict awarding FLSA plaintiffs a recovery for unpaid off-the-clock work. There, the plaintiffs put forward testimony from only 3 plaintiffs concerning the time they typically spent putting on protective gear, along with an internal company study suggesting that employees typically spent longer donning their gear than the time for which they were credited, and evidence based on interviews of a number of employees. *Id.* at 1306; *see also Garcia v. Tyson Foods, Inc.*, 890 F. Supp. 2d 1273, 1283-84 (D. Kan. 2012) (district court's order denying motion for judgment as a matter of law, stating that 5 employees testified, not 3, out of "thousands of plaintiffs"). The Tenth Circuit held that such proof was "a reasonable basis for the jury's finding of systematic undercompensation." The court first observed that "the jury could reasonably rely on representative … proof of undercompensation once the district court ordered certification as a class action

and collective action"—indeed, the collective action "mechanism would be impotent" if it were not permissible to draw class-wide conclusions based on representative evidence. *Garcia*, 770 F.3d at 1307.

In *Morgan v. Family Dollar*, 551 F.3d 1233 (11th Cir. 2008) (cited with approval by this Court in *O'Brien*), only seven employees testified, out of 1,424 opt-in plaintiffs, claiming that they had been misclassified as exempt from overtime pay as "executive" employees, when in fact their duties were non-executive in nature. In addition to testimony from the seven employees, the plaintiffs also introduced manager testimony and all of their pay records, as in the instant case. Because the employees' duties were at issue, they also introduced job manuals and handbooks to show that the non-exempt nature of their work entitled them to overtime pay (as opposed to the simpler showing here, which was just that the cable technicians *worked* overtime). There, as here, the Court stated: "Family Dollar cannot validly complain about the number of testifying plaintiffs when… Family Dollar itself had the opportunity to present a great deal more testimony from Plaintiff store managers." *Id.* at 1278.

In *Reich v. Southern New England Telecommunications Corp.*, 121 F.3d 58, 67 (2d Cir. 1997), a group of employees prevailed in claiming that they should have been paid for lunch breaks during which they were not relieved of duty. The Second Circuit stated: "In meeting the burden under *Mt. Clemens*, the Secretary

need not present testimony from each underpaid employee; rather, it is well-established that the Secretary may present the testimony of a representative sample of employees as part of his proof of the prima facie case under the FLSA." *Id.* There, only 2.5% of the opt-in class testified (39 witnesses, suggesting that the total class was over 1500). *See Reich v. S. New Eng. Tel. Corp.*, 892 F. Supp. 389, 402 (D. Conn. 1995). In assessing whether the evidence was sufficient, the Court observed: "[T]here is no bright line formulation that mandates reversal when the sample is below a percentage threshold. It is axiomatic that the weight to be accorded evidence is a function not of quantity but of quality." *S. New Eng. Tel. Corp.*, 121 F.3d at 67. Based on 39 employees' testimony that they had been required to work on their lunchbreaks, both the district and appeals court concluded that a class-wide showing of liability had been made.

In *Brock v. Seto*, 790 F.2d 1446 (9th Cir. 1986), which the Sixth Circuit cited in *Cole Enterprises*, 62 F.3d at 781, four employees testified that they worked uncompensated overtime, and this was sufficient to establish an FLSA violation as to all sixteen employees who opted into the action. The trial court had refused to award damages, concluding that the evidence of uncompensated overtime was too speculative. The Ninth Circuit reversed, explaining that once it was established that employees worked uncompensated overtime, "'it is the duty of the trier of facts to draw whatever reasonable inferences can be drawn from the employees'

evidence.'" *Brock*, 790 F.2d at 1448-49 (quoting *Mt. Clemens Pottery*, 328 U.S. at 693).

In *Donovan v. Burger King Corp.*, 672 F.2d 221, 224-25 (1st Cir. 1982), following a bench trial with testimony from only six employees, Burger King was found to have misclassified 246 assistant managers. The First Circuit held that even though only a small number of employees testified, the evidence was sufficient to conclude that all of the collective action members "devoted more than 40 percent of their time to non-managerial duties," giving rise to class-wide liability. *Id.* at 224. There, the trial court had concluded, in its discretion, that hearing witnesses from only six employees was "enough to give me a feeling for what is going on." *Id.* at 225. Similar to the present case, counsel for Burger King acquiesced in the trial court's approach, rather than seeking to call additional witnesses itself, causing the First Circuit to conclude: "we do not accept Burger King's present complaint that the restaurants are so different that it should have been allowed to present testimony concerning more of them." *Id.*

Similarly, in *Donovan v. Bel-Loc Diner, Inc.*, 780 F.2d 1113, 1116 (4th Cir. 1985), based upon testimony from twenty-two witnesses, the Court of Appeals upheld a finding that ninety-eight opt-in plaintiffs had not received uninterrupted lunch breaks, and were entitled to back-pay. The court rejected the employer's argument that every employee should have been required to testify:

> [T]he contention that no evidence was introduced regarding the break habits of nontestifying employees lacks merit. There is no requirement that to establish a Mt. Clemens pattern or practice, testimony must refer to all nontestifying employees. Such a requirement would thwart the purposes of the sort of representational testimony clearly contemplated by Mt. Clemens. … Courts have frequently granted back wages under the FLSA to non-testifying employees based on the representative testimony of a small percentage of the employees.

Id.

In *Donovan v. New Floridian Hotel, Inc.*, 676 F.2d 468, 472 (11th Cir. 1982), the Court upheld an award of back-pay to 207 FLSA plaintiffs following a trial in which twenty-three employees testified, along with managers. There, the Court stated: "it is clear that each employee need not testify in order to make out a prima facie case of the number of hours worked as a matter of 'just and reasonable inference.'" *Id.* The case involved several categories of employees—for waitresses, whose hours were not recorded by the employer, the Court estimated the number of hours they worked on average by considering the testimony and looking at payroll records. *Id.* at 472 & n.7. In the instant case, the jury and district court did exactly the same thing. *See also Donovan v. Hamm's Drive Inn*, 661 F.2d 316, 318 (5th Cir. 1981) ("The court found, based on the testimony of employees, that certain groups of employees averaged certain numbers of hours per week and awarded back pay based on those admittedly approximate calculations. After the employees testified, [the employer] produced no evidence

of the precise hours worked, nor did it negative the reasonableness of the inference to be drawn from the employee's evidence.") (internal quotation omitted).

In *Brennan v. General Motors Acceptance Corp.*, 482 F.2d 825, 829 (5th Cir. 1973), sixteen employees testified that they worked unreported overtime—evidence from which "the trial court might well have concluded that plaintiff had established a prima facie case that all thirty-seven employees had worked unreported hours." The burden then shifted to the employer to show that some employees had "resisted the 'pervasive effect' of the supervisors' instructions" to work unreported overtime, and the employer there succeeded in showing that some employees had done so. Here, FTS could have called witnesses in an attempt to do the same, but it chose not to.

By way of contrast, the few cases in which representative testimony has not supported a verdict have been dramatically different. In *Secretary of Labor v. DeSisto*, 929 F.2d 789 (1st Cir. 1991), only a single employee testified on behalf of 244. In holding that such evidence was insufficient, the court observed: "In a typical FLSA case, the Secretary presents testimony from some of the affected employees as part of the proof of a prima facie case. It is well established that not all employees need testify in order to prove the violations or to recoup back wages. Rather, the Secretary can rely on testimony and evidence from representative employees to meet the initial burden of proof requirement." *Id.* at 792. The Court

noted that although the initial burden is "minimal," it is not "nonexistent," and although "there is no ratio or formula for determining the number of employee witnesses required," the testimony of a single employee was not enough. *Id.* at 793. Similarly, in *Reich v. Southern Maryland Hospital, Inc.*, 43 F.3d 949 (4th Cir. 1995), a back-pay award for 3,368 employees at a for-profit hospital could not be supported by testimony by a representative sample of 54 because unlike the cable technicians in this case, who all performed the same job, the plaintiffs in *Southern Maryland Hospital* included employees with a wide array of different job types, including many from which no employee testified. *Id.* at 952. In light of "the magnitude and complexity of th[e] case," and "the different positions, departments, shifts, pay periods, and time periods" at issue, the evidence did not support a hospital-wide finding. *Id.*

D. FTS's Strategic Decision Not to Call Witnesses Was Not an Evidentiary Abuse of Discretion by the District Court.

FTS listed fifty employees as potential trial witnesses—the fifty employees it had jointly selected with Plaintiffs as representative discovery plaintiffs. FTS's appeal brief repeatedly argues that the district court precluded FTS from calling witnesses. Absent from FTS's brief is an explanation of *how* the district court supposedly did so. That is because the district court did not prevent FTS from calling witnesses—FTS was the author of its own trial strategy. *See, e.g., In re Powerhouse Licensing, LLC*, 441 F.3d 467, 473 (6th Cir. 2006) (when counsel

pursues a "litigation strategy fraught with obvious risks," counsel is hard-pressed to claim "clear error" by district court). A district court's decision to admit or exclude evidence is reviewed for abuse of discretion. *See Tisdale*, 415 F.3d at 535 ("Decisions regarding the admission and exclusion of evidence are within the peculiar province of the district court and are not to be disturbed on appeal absent an abuse of discretion.") (quotation marks omitted). Here, FTS can identify no abuse of discretion. FTS's failed trial strategy is not a proper basis for this Court to weigh in on evidentiary considerations that might have precedential effects, but that the district court was never called upon to decide.

E. There Was No Due Process Violation, Nor Is There Reason for this Court to Consider the Issue in Light of FTS's Strategic Decision Not to Call Witnesses.

FTS repeats many times that there was a "constitutional violation" arising from its inability to "cross-examine" more witnesses, but FTS deliberately chose not to call such witnesses. Thus, FTS is in no position to contend on appeal that the *district court* was at fault for FTS's inability "to pick the class apart, plaintiff by plaintiff." (Br. at 45.) Moreover, once Plaintiffs made a *prima facie* showing under *Mt. Clemens*, the burden shifted to FTS to come forward with evidence, and nothing but its own inaction prevented it from doing so.

In any event, FTS does not cite a single case, from any court, holding that an employer has a due process right to call every single employee as a witness in an

FLSA collective action (and, in fact, cites a only a single FLSA case mentioning due process: a district court case from Louisiana in which the court decertified an executive exemption class because some employees were exempt but others were not, noting that in light of that fact, the court had "concerns" about due process, *see* Br. at 44-47). Such a rule would not only be inconsistent with the long line of appellate precedent described above, as well as the Supreme Court's *Mt. Clemens* decision, but would obviously thwart the enforcement of the FLSA by destroying the ability of plaintiffs to vindicate their rights by pooling resources and lowering the costs of challenging widespread violations. *See, e.g., Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, 170 (1989).

In asking this Court to unnecessarily reach a Constitutional question and give an unprecedented answer to that question, FTS relies on cases that are completely inapposite. *See, e.g.*, Br. at 44, *citing U.S. v. Armour & Co.*, 402 U.S. 673, 682 (1971) (noting in passing that a party who enters into a consent decree in the antitrust context has waived the right to defend itself—a right that originates in the due process clause) *and Lindsey v. Normet*, 405 U.S. 56, 66 (1972) (due process rights of tenants not violated by state eviction law that required trial within six days and restricted issues to whether tenant had paid rent). There is no reason to reach FTS's due process argument, given that FTS itself inflicted the injury of

which it complains, but even if there were, the argument is entirely contrary to the case law.

II. PLAINTIFFS ARE SIMILARLY SITUATED

A company-wide practice of failing to pay cable technicians for off-the-clock overtime, carried out through common, company-wide tactics, should be subject to a classwide challenge. A trial judge, who is familiar with the factual allegations in the case, should be invested with discretion about whether to allow the employees to try the existence of the scheme as a group, or whether to require them to challenge it through 300 individual actions.

The Sixth Circuit reviews decisions to decertify a collective action under a "deferential" "abuse of discretion" standard. *See O'Brien v. Ed Donnelly Enterprises, Inc.*, 575 F.3d 576, 584 (6th Cir. 2009); *see also Morgan*, 551 F.3d at 1261 (with respect to FLSA certification, the "ultimate decision rests largely within the district court's discretion"). The "similarly situated" standard is less stringent than the Rule 23 standard for class certification. *O'Brien*, 575 F.3d at 587-85 ("The district court implicitly and improperly applied a Rule 23-type analysis when it reasoned that the plaintiffs were not similarly situated because individualized questions predominated. [ ] This is a more stringent standard than is statutorily required" under the FLSA). There was no abuse of discretion here.

A. The District Court Did Not Abuse Its Discretion in Certifying a Collective Class.

Employees may proceed collectively if they are "similarly situated." *See* 29 U.S.C. § 216(b). The Sixth Circuit, while "not purport[ing] to create comprehensive criteria for informing the similarly-situated analysis," has held that employees are similarly situated when "their claims [a]re unified by common theories of defendants' statutory violations, even if the proofs of these theories are inevitably individualized and distinct." *O'Brien*, 575 F.3d at 585. In *O'Brien*, the plaintiffs' claims "were unified so, because plaintiffs articulated two common means by which they were allegedly cheated: forcing employees to work off the clock and improperly editing time-sheets." *Id.* The Court explained that this was true even though "proof of a violation as to one particular plaintiff d[id] not prove that the defendant violated any other plaintiff's rights under the FLSA." *Id.* Here, Plaintiffs alleged a common violation: they were all forced to work overtime hours off the clock, through one of three common means. Thus, *O'Brien* is dispositive of the certification question.

In addition, the trial court made its decision to deny certification with the benefit of a trial record. The court saw the witnesses testify in person, saw Defendant cross-examine those witnesses, and determined that the witnesses presented a common picture. Here, Plaintiffs proved, to the satisfaction of the jury, that every single testifying employee worked significant weekly unpaid hours.

Every opt-in plaintiff was in the same job position as these testifying employees. Testifying witnesses covered the various regions of the employer, and yet still experienced the same things. In addition, testimony from three managers and three administrators confirmed that the class was similarly situated with respect to FTS's off-the-clock overtime scheme. After sitting through this evidence, the district court was best positioned to exercise its discretion and determine that these employees were, in fact, similarly situated.

B. The Seventh Circuit's *Espenscheid* Decision Is Inapplicable.

Espenscheid v. DirectSat USA, LLC, 705 F.3d 770 (7th Cir. 2013), is easily distinguishable. First, the Court there merely affirmed a decertification decision, finding no abuse of discretion. Here, FTS is asking this Court to reverse and find that the trial court abused its discretion—a much greater showing is necessary.

Second, no trial occurred in *Espenscheid*, and the Seventh Circuit rested its decision on the district court's conclusion that trial would not be workable. Here, a trial was held, and the presentation of evidence was manageable. Plaintiff proved that all seventeen testifying witnesses worked substantial unpaid overtime hours—a showing that FTS failed to rebut. FTS's failure eliminates one of the factors upon which Judge Posner relied in *Espenscheid*—the defendant's "offer to prove" that workers underreported their time because they "wanted to impress the company with [their] efficiency." Here, rather than consider the hypotheticals with

which Judge Posner was engaged, we have the benefit of a trial, and no such showing was made by FTS.

Unlike the present case, which involved a single class of employees performing the same job, *Espenscheid* involved employees in many different subclasses and job types, and their claims were dependent upon specific tasks that only certain categories of employees performed, making it more difficult to try class-wide FLSA violations. There, the plaintiffs proposed a complex set of representative plaintiffs—forty-two out of 2341 (1.8%)—in an effort to satisfy their burden under *Mt. Clemens*, but in this case, with only one type of employee, almost 6% of the class testified.

Moreover, the plaintiffs in *Espenscheid* were "unable to specify" any additional proof, other than the testimony of the representative employees, that they proposed to present at trial, *id.* at 776, whereas here, Plaintiffs put forward testimony from three managers, three administrators, and an executive, as well as documentary evidence of the pay records of every single member of the class. This difference is material to the certification analysis.

Because the Plaintiffs here introduced the pay records of every employee, they avoided other issues that Judge Posner discussed in *Espenscheid.* For example, in that case, the plaintiffs did not indicate how they would account for differing overtime rates among the class. *Espenscheid*, 705 F.3d at 774. Here, the

rate was individualized based on each employee's time-sheets, and Plaintiffs did not argue that all worked the same amount of overtime. Rather, they argued that all worked approximately the same amount of unrecorded hours, and they added those unrecorded hours to each employee's *recorded* hours in each time period, which allowed them to estimate the number of unrecorded overtime hours each employee worked in each pay period.

In addition, although the *Espensheid* decision cited *Mt. Clemens*, it risks disobeying the holding of that case by applying too high a standard to the level of proof that employees must introduce at trial. For example, *Espenscheid* cites the risk that an employee might receive a windfall by receiving damages that are greater than what he is actually owed; but that imprecision in damages is precisely what *Mt. Clemens* held should *not* bar recovery in FLSA cases. Such a risk is inherent when the employer has not kept adequate records. In addition, when a group of employees demonstrates that an employer is systematically requiring them to work unpaid overtime, it would be contrary to *Mt. Clemens* to require that each employee individually prove that he worked unpaid overtime in accordance with the company-wide practice—but that is what *Espenscheid* comes close to suggesting. Here, the employees were similarly situated, and this Court should not stray from the rule of *Mt. Clemens*; it should affirm the district court's exercise of discretion in allowing the case to proceed on a collective basis.

CONCLUSION

For the foregoing reasons, the Court should affirm the trial verdict and the rulings of the court below.

Dated: July 2, 2015

Respectfully submitted,

/s/ William C. Jhaveri-Weeks

Laura L. Ho
William C. Jhaveri-Weeks
GOLDSTEIN, BORGEN, DARDARIAN & HO

Roberta L. Steele
NATIONAL EMPLOYMENT LAWYERS ASSOCIATION

Attorneys for *Amicus Curiae*
National Employment Lawyers Association

CERTIFICATE OF COMPLIANCE

(Fed. R. App. P. 32(a) & 6th Cir. Rule 32)

This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(B) and because this brief contains 6,995 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5), and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6), because this brief has been prepared in a proportionally spaced typeface using the Microsoft Word 2010 word processing program, a 14-point font size, and the Times New Roman type style.

Dated: July 2, 2015

GOLDSTEIN, BORGEN, DARDARIAN & HO

/s/ William C. Jhaveri-Weeks
William C. Jhaveri-Weeks

Attorneys for *Amicus Curiae*
National Employment Lawyers Association

CERTIFICATE OF SERVICE

I hereby certify that, on this 2nd day of July, 2015, I caused the foregoing brief to be filed electronically with the Court, where it is available for viewing and downloading from the Court's ECF system, and that such electronic filing automatically generates a Notice of Electronic Filing constituting service of the filed document upon all counsel of record.

Dated: July 2, 2015

GOLDSTEIN, BORGEN, DARDARIAN & HO

/s/ William C. Jhaveri-Weeks
William C. Jhaveri-Weeks

Attorneys for *Amicus Curiae*
National Employment Lawyers Association