No. 17-4125

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WALID JAMMAL, ET AL.,
Plaintiffs-Appellees,

v.

AMERICAN FAMILY INSURANCE COMPANY, ET AL.,
Defendants-Appellants

On Appeal from the United States District Court for the Northern District of Ohio, No. 1:13-cv-00437-DCN

AMICUS CURIAE BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF APPELLANTS

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In accordance with Sixth Circuit Rule 26.1, *amicus curiae* Chamber of Commerce of the United States of America makes the following disclosures:

I. Is said *amicus curiae* a subsidiary or affiliate of a publicy-owed corporation?

No.

II. Is there a publicly-owned corporation, not a party to the appeal, which has a financial interest in the outcome?

No.

Dated: January 24, 2018

/s/ Shay Dvoretzky
Counsel for Amicus Curiae Chamber of Commerce of the United States of America

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STATEMENT OF PARTY CONSENT

All parties have consented to the filing of this brief on behalf of the *amicus curiae*.

STATEMENT OF THE *AMICUS CURIAE*

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation.[1] The Chamber represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. One important function of the Chamber is to represent the interests of its members in matters before Congress, the executive branch, and the courts. To that end, the Chamber routinely files *amicus curiae* briefs in cases that raise issues of concern to the Nation's business community, including cases that involve labor and employment matters.

The Chamber has a significant interest in this Court's interpretation of laws that implicate the distinction between employees and independent contractors. A number of the Chamber's members hire independent contractors. Those members—and, by extension, the Chamber—have an interest in clarifying their legal obligations,

[1] No party's counsel authored this brief in whole or in part. Nor did any party, party's counsel, or other person (other than *Amicus*, its members, or its counsel) contribute money intended to fund the preparation or submission of this brief.

as well as in developing a workforce in a manner conducive to growth and prosperity for businesses and workers alike.

INTRODUCTION

In a decades-long line of authority, this Court and others have applied agency law to conclude that insurance agents are independent contractors rather than employees. This case should be no different. As Appellants have demonstrated, the decision below contravenes settled law. Permitting that decision to stand would cause chaos in the insurance industry, and beyond.

In a diverse range of industries—from trucking to sales to technology—the independent contractor model is widespread and becoming more so. Independent contracting can offer significant benefits to businesses and workers alike. But contracting parties cannot realize these benefits if they cannot predict with confidence that courts will respect the relationship into which they have voluntarily entered. Without such certainty, companies mindful of the high costs of worker reclassification will shy away from the independent contractor model. The Supreme Court has accordingly acknowledged the need for clear rules in this area. *See Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 327 (1992). The district court's treatment of the *Darden* factors flies in the face of that directive, and, if affirmed, will undermine the predictability essential to any company—in any industry—that wishes to use independent contractors.

Moreover, in determining that American Family agents were employees rather than independent contractors, the district court further erred by drawing conclusions about approximately 7,200 class members based on inconsistent testimony from just a handful of witnesses. The law does not permit the use of "representative" testimony so lacking in indicia of actual representativeness. Appellants have explained the significant factual differences between this case and *Monroe v. FTS USA, LLC*, 860 F.3d 389 (6th Cir. 2017), *petition for cert. pending* (No. 17-637), a collective action brought under the Fair Labor Standards Act (FLSA) in which this Court permitted the use of representative evidence. In addition to the distinctions that Appellants identify, *Monroe* is also distinguishable because its rule is limited to FLSA cases in which an employer failed to keep adequate records of time worked. This case, by contrast, is a Rule 23 class action brought under the Employee Retirement Income Security Act of 1974 (ERISA), and involves no allegations of unrecorded time.

The district court misapplied *Darden* and relied on unrepresentative evidence to reach a result that contravenes settled precedent and that will cause serious harm across a number of industries. This Court should reverse the decision below.

ARGUMENT

I. The District Court's Decision Will Have Significant Ramifications Across a Range of Industries.

A. Independent Contracting Is Widespread and Offers Substantial Benefits to Businesses and Workers Alike.

For businesses and workers in a range of industries, independent contracting can offer distinct advantages over employment. When parties voluntarily structure their working relationship in this fashion because those advantages are mutually appealing, courts should hesitate to set aside their choice—and should be mindful of the benefits that will be lost if independent contracting arrangements cannot claim judicial respect.

Parties may favor independent contracting over employment for a host of reasons. A company may choose independent contracting because it needs the flexibility "to adjust [its] workforce based on demand, seasonal fluctuations [or] other factors"; because it wishes to "benefit from greater efficiency, as contractors are typically experts in the product, market, or service"; or because it operates "in [an] industr[y] where the output is easily measured," so "[p]aying for performance" makes more sense than paying salaries. Steven Cohen and William B. Eimicke, *Independent Contracting Policy and Management Analysis*, Columbia School of International Affairs 15 (Aug. 2013) (hereinafter *Independent Contracting*), *available at* http://www.columbia.edu/~sc32/documents/IC_Study_Published.pdf (last visited Jan. 21, 2018).

Many workers are drawn to independent contracting primarily because it offers flexibility and autonomy. An independent contractor, unlike an employee, enjoys "the ability to choose his or her own hours, clients and manner in which the work is completed." *Id.* at 16. For some workers—"for example, those with family or school obligations"—that freedom provides "an opportunity to work that they might not otherwise have." Anne E. Polivka, *Into Contingent and Alternative Employment: By Choice?*, Monthly Labor Review 55, 74 (Oct. 1996), *available at* https://www.bls.gov/mlr/1996/10/art6full.pdf (last visited Jan. 21, 2018). For others, it affords the opportunity to take "control over their economic destiny." *Independent Contracting*, at 16. Because independent contractors can decide when, how, and with whom to do business, "the quantity and quality of work is better correlated with the amount of money they make." *Id.* Workers with time and energy to devote to their craft thus stand to benefit greatly from independent contracting.[2] *See id.* ("[O]ften highly motivated contractors are more likely to earn more money than regular employees."). These and other advantages generate greater worker happiness overall: "Self-employed adults are significantly more satisfied with their jobs than other workers." Pew Research Ctr., Take this Job and Love It (Sept. 17, 2009), *available at*

[2] A point illustrated by the experiences of American Family agents: The average agent brings in more than $240,000 in commissions annually, and many exceed $500,000. *See* Brief for Appellants 8.

http://www.pewsocialtrends.org/2009/09/17/take-this-job-and-love-it/#fnref-743-6 (last visited Jan. 23, 2018).

It therefore makes sense that, for most workers, independent contracting is a choice rather than a necessity. *See Independent Contracting*, at 11 (studies "debunk the popular misconception that workers are forced into independence due to job loss or lack of alternatives"). Indeed, "[f]ewer than 1 in 10 independent contractors sa[y] they would prefer a traditional work arrangement." Bureau of Labor Statistics, *Contingent and Alternative Employment Arrangements*, at 4 (Feb. 2005), *available at* http://www.bls.gov/news.release/pdf/conemp.pdf (last visited Jan. 21, 2018). This holds true in sectors from the traditional to the cutting-edge. In trucking, for example—a field in which the Supreme Court noted the prevalence of owner-operators sixty-five years ago, *see Am. Trucking Ass'ns v. United States*, 344 U.S. 298, 303 (1953)—hundreds of thousands of drivers choose to operate independently, even though many employee-driver positions are available. *See* U.S. Census Bureau, 2002 Economic Census: Vehicle Inventory and Use Survey 15 (Dec. 2004), *available at* https://www.census.gov/prod/ec02/ec02tv-us.pdf (last visited Jan. 23, 2018) (counting more than half a million trucks run primarily by owner-operators); Steven L. Johnson, *Relative Advantages and Disadvantages of Independent Contractor Status: A Survey of Owner-Operators' Opinions and Rationale* 16 (Jan. 2012), *available at* https://rosap.ntl.bts.gov/view/dot/26063 (last visited Jan. 12, 2018) (eighty percent of surveyed independent drivers reported it would be "very easy" or "easy" to find

company employment). At the other end of the spectrum, "[t]he millennial generation, armed with a MacBook, iPad and iPhone, working out of shared office-spaces, [is] increasingly attracted" to "gig" work instead of conventional employment relationships. *Independent Contracting*, at 10–11.

From independent truck drivers to MacBook-toting millennials, workers in every corner of the American economy are drawn to the advantages of independent contracting. "Independent contractors are found in nearly every industry and across all sectors." *Id.* at 7. Americans working as independent contractors collected $473 billion in personal income in 2010, *see id.* at 8, and their ranks are steadily growing: Their share of the national workforce increased by a third between 1995 and 2015. Pew Research Ctr., The State of American Jobs 38 (2016), *available at* http://www.pewsocialtrends.org/2016/10/06/the-state-of-american-jobs/ (last visited Jan. 23, 2018) (independent contractors represented 6.3% of the American workforce in 1995, 8.4% in 2015).

Of course, independent contracting may not make sense for every business or every worker. Some companies may want a level of control over production greater than what independent contracting provides; some workers may want the stability afforded by workplace benefits that are generally available only to employees. But, in some circumstances, independent contracting offers advantages not available in employment relationships, and millions of Americans in many industries have ordered their working lives accordingly.

B. The District Court's Decision Undermines the Predictability Essential to Companies and Workers that Choose Independent Contracting.

If businesses and workers are to secure the benefits of independent contracting when it suits their needs, they must be able to predict with confidence that a court will respect their choice later on. Employees may be entitled to certain legal benefits unavailable to independent contractors (and they generally receive different tax treatment as well). As a result, when a court reclassifies independent contractors as employees long after the start of the working relationship, the costs to businesses can be enormous. *See, e.g.*, Key Issue 5K: Evaluating the Consequences of Improper Worker Classification, Payroll Tax Deskbook (24th ed. 2017) (consequences of reclassification can include responsibility to make up for past retirement benefits, retroactive payment of overtime and minimum wages, and imposition of back taxes, penalties, and interest). For small businesses in particular, reclassification "can mean the difference between solvency and bankruptcy."[3] *Independent Contracting*, at 59.

[3] Of course, reclassification affects large companies as well. This case illustrates the point. Plaintiffs seek on the order of a *billion dollars* in benefits. *See* Petition for Permission to Appeal 10, ECF No. 3 (Oct. 26, 2017). The precise amount of any award could be determined only through an "unusually complicated" damages proceeding, R.320, Opinion, PageID20986, dedicated to determining the benefits due some 7,200 agents employed over the course of a decade whose baseline rates of pay presumably would have differed markedly had they been characterized as employees all along. *See* Petition for Permission to Appeal 10, ECF No. 3. Even the most profitable businesses can ill afford exposure to such protracted litigation and massive liability.

The substantial costs of reclassification necessitate clear rules up front. If a business cannot reasonably rely on settled law supporting its initial decision to treat certain workers as independent contractors, it may be forced to classify them as employees in the first place—at the price of the flexibility and autonomy valued by so many American workers. Indeed, the nature of an employment relationship virtually requires employers to exercise a high degree of control over workers classified as employees. As to workers entitled to overtime wages, for example, businesses generally must impose definite work schedules in order to control costs.

The Supreme Court has recognized as much. In *Darden*, the Court adopted the common-law agency test for "employee" status—and rejected a different approach adopted by the Fourth Circuit—in part because the common-law standard would afford greater certainty to contracting parties. The Fourth Circuit's test, the Supreme Court said, "would severely compromise the capacity of companies . . . to figure out who their 'employees' are and what, by extension, their pension-fund obligations will be." *Darden*, 503 U.S. at 327. Similarly, in *Community for Creative Nonviolence v. Reid*, 490 U.S. 730, 750 (1989), the Court concluded that the common-law test would comport with the policy of "ensuring predictability through advance planning."

The district court failed to appreciate this principle. It broke ranks with decades of precedent "repeatedly h[olding] that insurance agents are independent contractors, rather than employees." *Weary v. Cochran*, 377 F.3d 522, 524 (6th Cir. 2004). Moreover, its novel and unfounded application of particular *Darden* factors will

harm businesses and workers in all sectors if it is followed in future cases. In this regard, three aspects of the district court's opinion stand out: its disregard of the parties' contract; its focus on high-level control over agents' results, rather than control over the details of their work; and its fresh examination of whether insurance agents qualify as skilled workers.

1. The District Court Failed To Respect the Parties' Contract.

First, the district court paid mere lip service to the parties' contract. That contract explicitly designated the agents as independent contractors and formally structured their rights and duties in accordance with that designation. *See* R.320, Opinion, PageID20952 (contractual language allocating to agents "full control of [their] activities and the right to exercise independent judgment as to time, place, and manner of soliciting insurance, servicing policyholders and otherwise carrying out the provisions of this agreement").

If businesses are to "figure out who their 'employees' are" in advance, they must have the ability to set the metes and bounds of the working relationship in a contract. *Darden*, 503 U.S. at 327. Recognizing this principle, courts have long accorded significant weight to contractual agreements designating workers as independent contractors. *See, e.g.*, *FedEx Home Delivery v. NLRB*, 563 F.3d 492, 504 (D.C. Cir. 2009) (reasoning that "the parties' intent expressed in the contract," among other factors, "augur[ed] strongly in favor of independent contractor status"); *Weary*, 377 F.3d at 525 (relying on contract characterizing agent as independent contractor,

and collecting cases to the same effect). That makes sense: When a judge wants to determine whether one party has a "right to control" the details of the other's work, *Darden*, 503 U.S. at 323, the document setting out the parties' rights is the best place to start.

Businesses, for their part, have relied on this sensible line of precedent to take advantage of a valuable tool for achieving certitude in their working relationships. When hiring an independent contractor, a company will often prepare a contract (1) expressly designating the person as such, and (2) structuring the relationship in a fashion consistent with that designation. Such contracts are common across various sectors of the American economy—from black-car services, *Saleem v. Corporate Transp. Grp., Ltd.*, 854 F.3d 131, 136 (2d Cir. 2017) ("Franchisee is not an employee . . . of Franchisor . . . . . Franchisee shall at all times be free from the control or direction of Franchisor in the operation of Franchisee's business . . . ."), to home delivery, *FedEx*, 563 F.3d at 498 ("[C]ontractors sign a Standard Contractor Operating Agreement that specifies the contractor is not an employee of FedEx 'for any purpose' and confirms the 'manner and means of reaching mutual business objectives' is within the contractor's discretion . . . ."), to computer programming, *Daughtrey v. Honeywell, Inc.*, 3 F.3d 1488, 1490 (11th Cir. 1993) ("The CONSULTANT is an independent contractor and shall be free to exercise discretion and independent judgment as to the method and means of performance . . . ."), to sales, *Eyerman v. Mary Kay Cosmetics, Inc.*, 967 F.2d 213, 215 (6th Cir. 1992) ("The agreement further provided that Eyerman would

be considered an independent contractor, and not an employee, ... and MKC would not have the right to control how Eyerman conducted her activities.").

Refusing to give effect to contracts like American Family's—those that both nominally and substantively treat workers as independent contractors—will compromise the ability of businesses across all industries to confidently order their working relationships. *See* Brief for Appellants 19–21 (American Family contracts "not only declare that the agent is an independent contractor," but formally allocate control over the details of the business to the agent). This Court's precedent does not tolerate that result. *See Weary*, 377 F.3d at 525.

2. The District Court Focused on High-Level Control over Agents' Results, Rather than Control over the Details of Their Work.

Second, the district court erred by focusing on Appellants' high-level control over company standards and agents' results, rather than asking whether Appellants controlled the details of agents' day-to-day activities. *See* R.320, Opinion, PageID20972–73 (finding that managers were involved in goal setting and the creation of agents' business plans, and that they "enforce[ed] compliance with these goals and plans"). An employer's day-to-day control over the manner of work is what makes someone an employee; by contrast, control over results and imposition of standards are "fully consistent with an independent contractor relationship." *FedEx*, 563 F.3d at 502 (quoting *C.C. Eastern, Inc. v. NLRB*, 60 F.3d 855, 860 (D.C. Cir. 1995)); *see Weary*, 377 F.3d at 526 (business may require compliance with

administrative guidelines, in the interest of maintaining companywide standards, without transforming relationship into one of employment).

Were the law otherwise, independent contracting could not exist. A business that hires a person to do a job must be able to control that person at *some* level: The hiring party is unlikely to benefit from the relationship unless it can specify the results it desires and impose basic standards to govern performance. *See Mazzei v. Rock-N-Around Trucking, Inc.*, 246 F.3d 956, 964 (7th Cir. 2001) (some "level of supervision" will generally be "required to ensure that the [independent contractor] arrangement . . . is of some value" to a business). In line with this principle, companies of all stripes routinely impose results-oriented controls on their independent contractors (and, indeed, have been doing so for decades). *See, e.g.*, *FedEx*, 563 F.3d at 500–501 (delivery drivers); *Brown v. Sears, Roebuck & Co.*, 125 F. App'x 44, 45 (7th Cir. 2004) (home installation); *SIDA of Hawaii, Inc. v. NLRB*, 512 F.2d 354, 359 (9th Cir. 1975) (cab drivers).

If the district court's approach becomes the law, businesses will not be able to predict with confidence that control over results and standards will be deemed permissible. And because releasing control over such matters is not feasible in practice, businesses will hesitate to hire independent contractors in the first place.

3. The District Court Examined Afresh Whether Insurance Agents Qualify as Skilled Workers.

Finally, this Court has held that "the skill required" to perform the work of an insurance agent weighs in favor of independent contractor status, because "the sale of insurance is a highly specialized field, requiring considerable training, education, and skill." *Weary*, 377 F.3d at 526–27 (internal quotation marks omitted). Yet the district court held to the contrary. The court reasoned that—although selling insurance requires a high level of skill as a general matter—the agents in this case typically acquired their skill through American Family training. R.320, Opinion, PageID20973–74.

In a framework that aims to facilitate "categorical judgments about the 'employee' status of claimants with similar job descriptions," *Darden*, 503 U.S. at 327, the level of skill required to do a particular job cannot be subject to reexamination *de novo* in every case. Businesses must be able to rely on binding precedent establishing that a given job is a skilled one. Thus, courts ask categorical questions about the level of skill needed to do the job—not individualized questions about when, where, and how a particular employee developed his or her abilities. *See, e.g.*, *Weary*, 377 F.3d at 526–27 (looking only to the training, education, and skill needed to sell insurance, and not—as the dissent urged—to the source of an agent's training); *Aymes v. Bonelli*, 980 F.2d 857, 862 (2d Cir. 1992) (district court erred by relying on plaintiff's "relative

youth and inexperience" when the relevant question was "the skill necessary to perform the work").[4]

The district court's treatment of this factor thus constitutes another pronounced departure from settled law that will hinder the ability of businesses in all industries to "figure out who their 'employees' are" in advance. *Darden*, 503 U.S. at 327. This Court should correct the lower court's error.

II. The District Court's Use of Representative Testimony Was Not Authorized by this Court's Case Law.

In a class action, plaintiffs are obligated to establish that relief is appropriate as to all members of the class. To do so, plaintiffs may rely on testimony that is representative of the claims of the class members—but only insofar as the evidence "is reliable in proving or disproving the elements of the[ir] . . . cause of action." *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1046 (2016). Representative evidence is "reliable" in that sense if "each class member could have relied" on the evidence "if he or she had brought an individual action." *Id.* If evidence is not representative, a constellation of authorities—rules, statutes, and constitutional guarantees—precludes reliance on such evidence to prove class claims. *See, e.g.*, *id.* (Federal Rules of Evidence 401, 403 and 702 govern use of representative evidence); *Wal-Mart Stores,*

[4] The district court relied on *Janette v. American Fidelity Group, Ltd.*, 298 F. App'x 467, 474 (6th Cir. 2008), an unpublished disposition describing the inquiry slightly differently: not merely the level of skill required for the job, but whether the skill "could be" learned outside the business. Of course, the skill of selling insurance could be (and usually is) acquired outside of American Family training programs.

Inc. v. Dukes, 564 U.S. 338, 367 (2011) (permitting plaintiffs to rely on a representative sample in their class action would violate the Rules Enabling Act by interpreting Rule 23 in a way that "abridge[d]" the defendant's "substantive right" to litigate individual defenses (quoting 28 U.S.C. § 2072(b)); *In re Chevron U.S.A., Inc.*, 109 F.3d 1016, 1020 (5th Cir. 1997) (introduction of representative evidence raised "due process concerns" because of the lack of "safeguards designed to ensure that the claims" would be determined in a manner "reasonably calculated to reflect the results that would be obtained if those claims were actually tried").

This Court permitted the use of representative testimony in *Monroe*, concluding that testimony from a representative sample of fifty cable technicians was properly admitted to prove the claims of a class of nontestifying technicians. Appellants have demonstrated the critical factual differences between the use of representative testimony in *Monroe* and its use in this case. *See, e.g.*, Brief for Appellants 53 (the district court, unlike the *Monroe* court, identified no "objective criteria demonstrating that the testimony offered at trial was fairly representative of non-testifying class members").

But the distinctions between *Monroe* and this case do not end there. *Monroe* was a collective action brought under the FLSA, and the *Monroe* court relied on FLSA-specific rules in holding that representative testimony was proper. In particular, *Monroe* rests on two doctrinal considerations that do not apply in this ERISA action: the unique standard for certification in FLSA cases, and the rule of *Anderson v. Mt.*

Clemens Pottery Co., 328 U.S. 680 (1946), *superseded by statute on other grounds*, Portal-to-Portal Act of 1947, Pub. L. No. 80–49, 61 Stat. 84.

A. Unlike Plaintiffs in *Monroe*, Plaintiffs Here Cannot Rely on the Unique Standard for Certification in FLSA Cases.

The difference between *Monroe* and this dispute starts with the difference between FLSA certification and Rule 23 certification. The *Monroe* court reasoned that certification and the propriety of representative testimony were two sides of the same coin: If certification was proper, representative testimony was too. *See Monroe*, 860 F.3d at 409 (stating that "the collective-action framework presumes" that if employees are "similarly situated" for purposes of certification, they "are representative of each other and have the ability to proceed to trial collectively"); *id.* ("[W]e do not define 'representativeness' so specifically—just as we do not take such a narrow view of 'similarly situated.'").

As the *Monroe* court emphasized, the standard in this Circuit for certifying a FLSA collective action (even at step two of the two-step certification process) is less exacting than the standard for certifying a Rule 23 class action.[5] *Id.* at 397. On this basis, the court distinguished *Espenscheid v. DirectSat USA, LLC*, 705 F.3d 770, 774–75 (7th Cir. 2013), in which the Seventh Circuit held, on facts similar to *Monroe*, that

[5] District courts "typically bifurcate certification of FLSA collective action cases." *Monroe*, 860 F.3d at 397. At step one, the court conditionally certifies a class, triggering notice to class members and discovery; at step two, following discovery, the court "looks more closely at whether the members of the class are similarly situated." *Id.* *Monroe* involved step two. *Id.* at 395–97.

neither certification nor representative testimony was proper. The *Monroe* court observed that the Seventh Circuit—unlike this Circuit—applies the demanding Rule 23 certification standard in FLSA cases. And that, the court wrote, was "the controlling distinction for the issues" before it. *Monroe*, 860 F.3d at 406.

Put another way: Had *Monroe* been a Rule 23 case instead of a FLSA case, both certification and representative testimony would have been improper. Accordingly, even if the testimony in this Rule 23 action is precisely as "representative" as the testimony in *Monroe*—though, as Appellants have shown, it is not—that testimony cannot support classwide relief.

B. *Mt. Clemens* and Its Progeny Do Not Apply Here.

In approving the use of representative testimony, *Monroe* also looked to a line of cases applying the Supreme Court's decision in *Mt. Clemens*. *See Monroe*, 860 F.3d at 410. The rule of *Mt. Clemens*, however, applies only to a narrow subset of FLSA cases involving inadequate recordkeeping by an employer. It is inapplicable here.

In *Mt. Clemens*, employees filed suit under the FLSA alleging that they had not been properly compensated "for time spent walking to and from their workstations." *Tyson Foods*, 136 S. Ct. at 1047. The employees were unable to prove the amount of uncompensated time on an individual basis because the employer had failed to keep records of their hours worked, as required by the FLSA. *Mt. Clemens*, 328 U.S. at 686–87. The Court concluded that the FLSA plaintiffs should not suffer for their employer's failure to maintain required records. *Id.* at 687. The Court therefore held

that when an FLSA plaintiff demonstrates that he or she has been undercompensated, but cannot prove the extent of the injury because of the employer's failure to keep records, the plaintiff may introduce statistical or other representative evidence if it permits a "just and reasonable inference" of the true amount of damages. *Id.* The burden then shifts to the employer to negate the inference. *Id.* at 687–88.

Tyson Foods likewise allowed employees to rely on representative evidence to recover on state-law claims that were derivative of FLSA claims because an "evidentiary gap" was "created by the employer's failure to keep adequate records." 136 S. Ct. at 1047.[6] And *Monroe*, in turn, involved the same narrow context: FLSA claims as to which "accurate employer records" were "absen[t]." *See Monroe*, 860 F.3d at 404, 410–11 (relying on *Mt. Clemens*). But neither the Supreme Court nor this Court has expanded *Mt. Clemens* beyond those limited circumstances. The rule of these cases applies only in certain FLSA cases involving failures of proof caused by inadequate employer recordkeeping.

[6] Although the plaintiffs' claims were brought under state law derivative of the FLSA, *Tyson Foods* makes clear that *Mt. Clemens* applies only in FLSA cases involving recordkeeping failures. *Id.* at 1049 ("In FLSA actions, inferring the hours an employee has worked from a study such as [plaintiffs' expert's] has been permitted by the Court so long as the study is otherwise admissible."); *id.* at 1047 ("In this suit, as in *Mt. Clemens*, respondents sought to introduce a representative sample to fill an evidentiary gap created by the employer's failure to keep adequate records.").

This is not such a case. Plaintiffs' claims arise under ERISA, not the FLSA. And Plaintiffs do not complain of any evidentiary hurdles resulting from any deficient recordkeeping by Appellants. *Mt. Clemens* and *Tyson Foods*—and, by extension, *Monroe*—do not apply here.

CONCLUSION

This Court should hold that the district court erred in its application of *Darden* and its reliance on representative testimony, and reverse the decision below.

Dated: January 24, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In accordance with Federal Rule of Appellate Procedure 32(a)(7)(C) and Sixth Circuit Rule 32, the undersigned attorney for *amicus curiae* certifies that the foregoing brief

(i) complies with the type-volume limitation in Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B) because it contains 5,112 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f); and

(ii) 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 Microsoft Office Word 2016 in 14-point Garamond.

Dated: January 24, 2018

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Counsel for Amicus Curiae Chamber of Commerce of the United States of America

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of January, 2018, I electronically filed the foregoing with the Clerk of the Court of the United States Court of Appeals for the Sixth Circuit by using the CM/ECF system. Counsel for Defendants-Appellants and Plaintiffs-Appellees will be served by that system.

/s/ Shay Dvoretzky
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