No. 14-1146

IN THE

Supreme Court of the United States

TYSON FOODS, INC.,

Petitioner,

v.

PEG BOUAPHAKEO, Individually and On Behalf of All Others Similarly Situated, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

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April 2015

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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The Equal Employment Advisory Council respectfully submits this brief *amicus curiae* in support of the petition for a writ of certiorari.[1]

[1] Counsel of record for all parties received notice at least 10 days prior to the due date of the *amicus curiae's* intention to file this brief. All parties have consented to the filing of this brief. Counsel for *amicus curiae* authored this brief in its entirety. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than

INTEREST OF THE *AMICUS CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its membership includes over 250 major U.S. corporations, collectively providing employment to millions of workers. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity and Human Resources compliance. Their combined experience gives EEAC a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

All of EEAC's members are employers subject to the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. §§ 201 *et seq.*, as amended, Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, as amended, and other federal workplace protection and nondiscrimination laws. In addition, virtually all of EEAC's members conduct business in multiple state jurisdictions and thus are also subject to many different state nondiscrimination and wage and hour laws. As large employers, they represent likely targets of broad-based employment class action litigation in both state and federal courts. Thus, the nationwide constituency that EEAC represents has a direct and ongoing interest in the issues presented in this case regarding the proper interpretation and

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amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

uniform application of federal class certification procedural requirements.

EEAC seeks to assist the Court by highlighting the impact the decision below may have beyond the immediate concerns of the parties to the case. Accordingly, this brief brings to the Court's attention relevant matters that the parties have not raised. Because of its experience in these matters, EEAC is well situated to brief the Court on the concerns of the business community and the significance of this case to employers.

STATEMENT OF THE CASE

The plaintiffs are current and former hourly employees at Tyson Foods' Storm Lake, Iowa pork processing plant. Pet. App. 1a. In addition to their regular hourly wages, the plaintiffs – who worked either on the "slaughter" or the "processing" floor – received additional pay for donning and doffing activities ("K-Code time"). Pet. App. 26a.

The plaintiffs brought an action in federal court for violations of the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 *et seq.*, and Iowa Wage Payment Collection Law (IWPCL), Iowa Code §§ 91A.1 *et seq.*, accusing Tyson of failing to properly compensate its employees for overtime work. Pet. App. 5a, 26a-27a. Among other things, they claimed that the K-Code times were too low and did not cover the entire period of time needed to don and doff protective gear and to perform related activities. Pet. App. 5a, 27a. They moved to certify a Rule 23(b)(3) class and an FLSA collective action. *Id.*

Tyson opposed the motion, arguing that the claims of individual class members were not capable of

resolution on a classwide basis, pointing out among other things that the types of jobs performed and the protective equipment required varied significantly from person to person. Pet. App. 31a-32a. Rejecting Tyson's arguments, the trial court found Tyson's overall compensation system to be the "tie that binds" the class members' claims, warranting Rule 23(b)(3) certification, as well as conditional certification of an opt-in FLSA collective action. Pet. App. 32a.

After this Court decided *Wal-Mart Stores, Inc. v. Dukes*, ___ U.S. ___, 131 S. Ct. 2541 (2011), Tyson moved to decertify the Rule 23 class, renewing its argument that because the plaintiffs' claims were not capable of classwide resolution "in one stroke," *id.* at 2551, they could not establish commonality. Pet. App. 32a. In response, the plaintiffs produced expert testimony purporting to establish classwide liability and damages based on an estimation of the average time a small sample of employees spent on donning and doffing activities. *Id.* at 22a.

Tyson objected to what it characterized as a "trial by formula" approach to establishing common questions of liability and damages, an approach it argued was squarely foreclosed by *Dukes*. Pet. App. 10a, 11a. The trial court refused to decertify the class, concluding that whether "donning and doffing and/or sanitizing" protective gear "constitutes 'work'" was a question common to the class and susceptible to proof on a classwide basis. Pet. App. 37a.

At trial, plaintiffs' damages expert estimated that classwide damages were $6.6 million for the Rule 23 class and $1.6 million for the FLSA collective class, based on her assumption that every single member worked the purported "average" donning and doffing times. Pet. App. 124a-125a. She conceded, however,

that over 200 class members never worked more than 40 hours in a given work week, and therefore were not entitled to any relief. Pet. App. 22a. Tyson's pretrial motions for decertification and judgment as a matter of law were denied, Pet. App. 30a, and the jury eventually rendered a verdict for the plaintiffs. Pet. App. 27a.

Tyson appealed to the Eighth Circuit, which in a 2-1 ruling affirmed. Pet. App. 1a, 14a, 24a. After its petition for rehearing *en banc* was denied by a 6-5 vote, Tyson filed a petition for a writ of certiorari with this Court on March 19, 2015.

SUMMARY OF REASONS FOR GRANTING THE PETITION

The decision below represents one in a growing number in which class certification was permitted despite serious problems of class member commonality. It is unfaithful to this Court's admonition in *Wal-Mart Stores, Inc. v. Dukes*, ___ U.S. ___, 131 S. Ct. 2541 (2011), that in order to satisfy the requirements of Rule 23(a)(2) of the Federal Rules of Civil Procedure, plaintiffs must demonstrate that there exists at least one question common to the class *that is capable of classwide resolution*, meaning "that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." 131 S. Ct. at 2551. It also contravenes important class certification principles clarified by the Court in *Comcast Corp. v. Behrend*, ___ U.S. ___, 133 S. Ct. 1426 (2013), creating substantial uncertainty for employers – especially in the wage and hour context, in which there continues to be a proliferation of litigation. Accordingly, the petition should be granted and the decision below reversed.

The actions of the lower courts in this case are of particular concern because neither the trial court nor the appeals court majority was troubled by the undisputed fact that hundreds of class members suffered no injury at all, giving rise to serious problems under the Rules Enabling Act, 28 U.S.C. §§ 2071 *et seq*. Equally troubling, the decision below affirmed Rule 23 class certification on shaky proof of common damages, which rested on a questionable and unscientific sampling model. The manner in which purported classwide damages were calculated deprives Tyson of its right to present individual defenses, and thus also raises constitutional due process concerns.

This Court repeatedly has said that the class action procedure "is an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Comcast*, 133 S. Ct. at 1432 (citing *Califano v. Yamasaki*, 442 U.S. 682, 700–701 (1979)) (quotations omitted); *see also Dukes*, 131 S. Ct. at 2550. To invoke the exception, "a party seeking to maintain a class action 'must affirmatively demonstrate his compliance' with Rule 23." *Comcast* at 1432.

Despite those straightforward principles, lower courts cannot agree on whether sprawling wage and hour actions involving many disparate claims for relief are suitable for class treatment. *Compare Jimenez v. Allstate Ins. Co.*, 765 F.3d 1161 (9th Cir. 2014) (affirming class certification), *petition for cert. filed*, No. 14-910 (U.S. Jan. 27, 2015), *with Espenscheid v. DirectSat USA, LLC*, 705 F.3d 770 (7th Cir. 2013) (reversing class certification). The growing confusion regarding the propriety of Rule 23 class certification in such cases creates substantial uncertainty in an area

of law that is of great importance to the business community. This inconsistency undermines prompt and speedy resolution of individual claims by encouraging aggregation as a means of pressuring corporate defendants to forgo their statutory right to put forth a defense to each claim, being forced instead to settle for strategic reasons.

REASONS FOR GRANTING THE PETITION

I. REVIEW OF THE DECISION BELOW IS NECESSARY TO SETTLE PERSISTENT QUESTIONS OF CLASS ACTION PROCEDURE THAT ARE OF SUBSTANTIAL IMPORTANCE TO THE EMPLOYER COMMUNITY

The Eighth Circuit affirmed certification of a class pursuant to Rule 23 of the Federal Rules of Civil Procedure and a collective action pursuant to Section 16b of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 216b, despite substantial variations in the liability and damages claims of the individual plaintiffs. Because the decision below disregards the fundamental principles of class action law reinforced by this Court in *Wal-Mart Stores, Inc. v. Dukes*, ___ U.S. ___, 131 S. Ct. 2541 (2011) and *Comcast Corp. v. Behrend*, ___ U.S. ___, 133 S. Ct. 1426 (2013), review and reversal is warranted.

Review also is necessary to quell the growing conflict in the lower courts regarding the scope and breadth of *Dukes* and *Comcast*, and how they should govern a trial court's decision to certify a Rule 23 class. Accordingly, this case presents the Court with a timely opportunity to restore balance and consistency to the evaluation of Rule 23 class certification questions generally. In particular, review of the decision below

will allow the Court to resolve ongoing confusion regarding the circumstances under which claims involving highly individualized liability and damages issues – such as the payment of wages – ever are suitable for class treatment under Rule 23(b)(3).

A. *Dukes* And *Comcast* Brought Renewed Rigor To Rule 23 Class Certification Determinations

Federal court litigants seeking class certification generally must satisfy all four prerequisites of Federal Rule of Civil Procedure 23(a), as well as the requirements of at least one subsection of Rule 23(b). Fed. R. Civ. P. 23. Rule 23(a) permits class certification only when

> (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

Pet. App. 135a.

The class action procedure is an exception to the "usual rule that litigation is conducted by and on behalf of the individual named parties only." *Comcast*, 133 S. Ct. at 1432 (internal quotation and citation omitted); *see also Dukes*, 131 S. Ct. at 2550. As this Court observed in *Dukes*:

> Rule 23 does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to provide that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc. We

> recognized in *Falcon* that "sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question," and that certification is proper only "if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied."

131 S. Ct. at 2551 (citations omitted). Therefore, parties seeking class certification carry the considerable burden of proving every element of Rule 23(a), and trial courts, which must undertake a "rigorous analysis" of the proffered evidence, often will be required to look beyond the pleadings in determining whether the class certification requirements have been satisfied.

In *Dukes*, this Court clarified that Rule 23(a) commonality requires that all class members must have suffered the same injury – not simply a violation of the same statute. For example, "the mere claim by employees of the same company that they have suffered a Title VII injury, or even a disparate-impact Title VII injury, gives no cause to believe that all their claims can productively be litigated at once." *Id*. Rather, in order for Rule 23(a)'s commonality requirement to be met, the individual class members' claims must rely on a common assertion, such as that they all were subjected to discrimination by the same biased supervisor. "That common contention, moreover, must be of such a nature that it is capable of classwide resolution." *Id*. The Court reasoned:

> What matters to class certification … is not the raising of common 'questions'—even in droves—but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation. Dissimilarities within

> the proposed class are what have the potential to impede the generation of common answers.

Id. (citation omitted). *Dukes* thus confirmed that to justify certifying a class, the trial court must be satisfied that the answers to common questions will produce a result that applies to the class as a whole. As one commentator observed:

> In proposing the course correction in *Dukes*, the Court tightened the evidentiary rules for commonality under Rule 23. In moving away from the long held practice of evaluating common questions to address commonality, the Court fashioned procedural rules indexed upon evaluating common answers. This contraction is neither an abrogation of rights nor an attempt to impose hurdles on the path toward justice. Rather, the Supreme Court acted as referee to correct asymmetric influences in class actions. The elegance of statistical modeling may have generated a false sense of precision, while in the process losing the substantive concept of due process. For too long, class certifications mushroomed under the simplified methodology, failing to realize that interpreting statistics to generate a desired outcome is neither legally permissible nor ethically desired.

Saby Ghoshray, *Hijacked by Statistics, Rescued by Wal-Mart v. Dukes: Probing Commonality and Due Process Concerns in Modern Class Action Litigation*, 44 Loy. U. Chi. L.J. 467, 509 (2012).

This Court reinforced those principles in *Comcast Corp. v. Behrend*, a 23(b)(3) case, warning against certifying classes in which "[q]uestions of individual

damage calculations will inevitably overwhelm questions common to the class.'" 133 S. Ct. at 1433. *Comcast* involved allegations of anti-competitive business practices that resulted in customers having to pay more for cable service. Over Comcast's objections, the trial court certified a class as to a single theory of anticompetitive conduct, and a divided Third Circuit panel affirmed.

This Court reversed. It observed that because the class members were entitled to recover damages stemming only from the specific theory of anticompetitive conduct on which the trial court granted class certification, "a model purporting to serve as evidence of damages must measure only those damages attributable to that theory." *Id*. If the model fails to do so, it cannot then be used to establish "that damages are susceptible of measurement across the entire class" as required by Rule 23(b)(3). *Id*. The Court pointed out that under the methodology endorsed by the Third Circuit, "at the class-certification stage *any* method of measurement is acceptable so long as it can be applied classwide, no matter how arbitrary the measurements may be." *Id*. Such an approach, however, impermissibly "would reduce Rule 23(b)(3)'s predominance requirement to a nullity." *Id.*

Comcast, like *Dukes*, accordingly brought a measure of much-needed discipline to Rule 23 class certification determinations, which for some time had been, "by all accounts, a terrible mess." Mark Moller, *Common Problems for the Common Answers Test: Class Certification in Amgen and Comcast*, 2013 Cato S. Ct. Rev. 301 (Cato Inst. 2013); *see also In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 254 (D.C. Cir. 2013) ("Before *Behrend*, the case law was far more accommodating to class certification under Rule

23(b)(3). Though *Behrend* was grounded in what the Court deemed 'an unremarkable premise,' courts had not treated the principle as intuitive in the past").

B. In Affirming Certification Of A Rule 23 Class Overrun With Individual Questions Of Liability And Damages, The Eighth Circuit Disregarded This Court's Pronouncements In *Dukes* And *Comcast*

In declining to decertify the plaintiffs' Rule 23 class for lack of commonality, the trial court below "studied the *Dukes* decision and [found] its holdings and analysis largely inapplicable to and/or distinguishable from the instant case." It posited:

> The instant matter is not like *Dukes* where each alleged Title VII violation involved an inquiry into the individual decisionmaker's subjective thought process. Moreover, the court does not see the same evidentiary defects in the instant case as those addressed in *Dukes*, as the instant case is supportable by class-wide proof.

Pet. App. 37a.

Affirming, a fractured Eighth Circuit paid lip service to, but ultimately disregarded, both *Dukes* and the Court's subsequent decision in *Comcast*, electing instead to follow earlier decided, intra- and extra-circuit court rulings that construed Rule 23(a) commonality far more liberally than now is permitted. Pet. App. 9a (quoting *DeBoer v. Mellon Mort. Co.*, 64 F.3d 1171 (8th Cir. 1995); *Mejdrech v. Met-Coil Sys. Corp.*, 319 F.3d 910 (7th Cir. 2003)).

Among other things, it found that class certification under Rule 23(b)(3) was proper, because "[w]hile individual plaintiffs varied in their donning and doffing routines, their complaint is not dominated by individual issues such that the varied circumstances ... prevent 'one stroke' determination." Pet. App. 8a (quotations omitted). Furthermore, "applying Tyson's K-Code policy and expert testimony to 'generate … answers' for individual overtime claims did require inference, but this inference is allowable under *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946)." *Id.* As Judge Beam in his dissent to denial of panel rehearing pointed out, however, *Mt. Clemens* established a burden-shifting rule for assessing damages for underpayment of wages where the employer failed to maintain any proper records, which is not the case here. Pet. App. 121a (Beam, J., dissenting).

Judge Beam also objected to the fact that while the class members all were subject to the same compensation system, their wage claims were not subject to the same *answer* across the class. In particular, he noted that plant employees "are required to wear a different combination of sanitary and protective gear" depending on their particular job. Pet. App. 21a (Beam, J. dissenting). For instance:

> Those employees wearing knives to use in conjunction with their particular duties on a particular day are required to wear a combination of a plastic belly guard, mesh apron, mesh glove, Polar glove, membrane skinner gloves, Polar sleeves, "steel" for maintaining the knives and knife scabbards ("knife-related gear"). Other workers are required to wear a hard hat, hairnet, beard net, earplugs, ear muffs, rubber or cotton

> gloves, and rubber or plastic aprons ("sanitary gear").

Id. Even though the majority acknowledged that some employees would require more, and others less, time to don and doff the necessary equipment – which would directly impact whether and to what extent they were owed additional compensation above the K-Code time payment – it nevertheless found the plaintiffs' imprecise, "sample employee" damages model sufficient to justify class certification, contrary to this Court's holdings in *Dukes* and *Comcast*.

As Judge Beam observed:

> Here we have undifferentiated presentations of evidence, including significant numbers of the putative classes suffering no injury and members of the entire classes suffering wide variations in damages, ultimately resulting in a single-sum class-wide verdict from which each purported class member, damaged or not, will receive a pro-rata portion of the jury's one-figure verdict. Assuming that the district court could now re-open the proceedings …, the exercise would be laborious, virtually unguided, and well outside of the limiting parameters the Supreme Court has, as a matter of law, placed upon use of the Rule 23 class action machinery.

Pet. App. 24a (Beam, J. dissenting). Indeed, this Court in *Dukes* and *Comcast* firmly rejected such "Trial by Formula" approaches to establishing classwide damages, 131 S. Ct. at 2551, and for good reason as one commentator suggests:

> The use of statistics in class actions has been characterized as trial by formula, identifying gross statistical disparities, and bellwether trials;

> yet, each of these variants contains similar weaknesses. First, within the context of sampling, extrapolation allows a non-plaintiff to enjoy the fruits of adjudication by relying on a representative plaintiff's testimony and construction of causation. It does not, however, allow the defendant a reciprocal opportunity to defend against each absent class member. … Second, finding causation to a claimed injury becomes a function of statistical variability that results from various factors like quality, quantity, and class members' characteristics.

Ghoshray, 44 Loy. U. Chi. L.J. at 498-99 (footnotes omitted).

C. The Decision Below Magnifies The Disagreement In The Lower Courts Regarding The Scope Of *Dukes* And *Comcast* And Their Broad Applicability To Rule 23 Class Certification Determinations

Since *Dukes*, questions have emerged in the courts regarding whether and to what extent it should be applied to class certification determinations generally. For example, some courts downplay the fact that *Dukes* rejects the notion that plaintiffs may establish proof of classwide damages through statistical sampling, the very methodology utilized by the plaintiffs in the instant case and sanctioned by the court below. This Court observed:

> The Court of Appeals believed that it was possible to replace such proceedings with Trial by Formula. A sample set of the class members would be selected, as to whom liability for sex discrimination and the backpay owing as a result

> would be determined in depositions supervised by a master. The percentage of claims determined to be valid would then be applied to the entire remaining class, and the number of (presumptively) valid claims thus derived would be multiplied by the average backpay award in the sample set to arrive at the entire class recovery—without further individualized proceedings. We disapprove that novel project. Because the Rules Enabling Act forbids interpreting Rule 23 to "abridge, enlarge or modify any substantive right," a class cannot be certified on the premise that Wal–Mart will not be entitled to litigate its statutory defenses to individual claims.

Dukes, 131 S. Ct. at 2561. Some lower courts have adhered to that principle, *see, e.g., Authors Guild, Inc. v. Google Inc.*, 721 F.3d 132 (2d Cir. 2013), while others have not. *See Jimenez v. Allstate Ins. Co.*, 765 F.3d 1161 (9th Cir. 2014), *petition for cert. filed*, No. 14-910 (U.S. Jan. 28, 2015); *In re Johnson*, 760 F.3d 66 (D.C. Cir. 2014).

In *Johnson*, for instance, the D.C. Circuit acknowledged that under *Dukes*, "a class cannot be certified on the premise that [the defendant] will not be entitled to litigate its statutory defenses to individual claims." 760 F.3d at 75 (citation and internal quotation omitted). It nevertheless permitted the trial court's order granting class certification to stand, reasoning that the trial court:

> [I]n *effect* complied in advance with that aspect of the *Wal–Mart* decision. Unlike the lower courts in *Wal–Mart*, the district court here did not certify the class on the ground that it could resolve individualized issues on a classwide basis. The practical effect of the district court's decision

> is that it certified a "class action with respect to particular issues," which it is expressly authorized to do by Rule 23(c)(4).

Id. (emphasis added).[2]

Since *Dukes*, and "[i]n the wake of *Comcast* … district and circuit courts alike have grappled with the scope, effect, and application of *Comcast*'s holding, and in particular, its interaction with non-antitrust class actions." *Jacob v. Duane Reade, Inc.*, 293 F.R.D. 578, 581 (S.D.N.Y. 2013), *aff'd*, __ Fed. Appx. __, 2015 WL 525697 (2d Cir. Feb. 10, 2015). In general:

> [T]he class-certification decisions applying *Comcast* can be divided into three, distinct groups: (1) courts distinguishing *Comcast*, and finding a common formula at the class certification stage, and thus, predominance, satisfied; (2) courts applying *Comcast* and rejecting class certification on the ground that no common formula exists for the determination of damages; and (3) courts embracing a middle approach whereby they employ Rule 23(c)(4) and maintain class certification as to liability only, leaving damages for a separate, individualized determination.[3]

Id. at 581-82 (citations omitted).

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[2] The D.C. Circuit did so, despite conceding that "there is a controversy over the proper use of issue classes, especially when the result is to isolate a particular issue that would otherwise derogate from the predominance of common issues in a 23(b)(3) class action." *In re Johnson*, 760 F.3d at 75. *See infra* note 3.

[3] Federal appeals courts strongly disagree on the propriety of utilizing Rule 23(c)(4) to certify issue classes where other required elements of Rule 23 have not been satisfied. The Fifth Circuit holds that using Rule 23(c)(4) as a means of narrowing down a proposed class until the plaintiffs are able to establish

Some courts have read *Comcast* narrowly. *See Roach v. T.L. Cannon Corp.*, 778 F.3d 401, 402-03 (2d Cir. 2015); *In re Nexium Antitrust Litig.*, 777 F.3d 9, 18-19, 23 (1st Cir. 2015); *In re Deepwater Horizon*, 739 F.3d 790, 815 (5th Cir.), *cert. denied sub nom. BP Exploration & Prod. Inc. v. Lake Eugenie Land & Dev., Inc.*, 135 S. Ct. 754 (2014); *see also Perez v. Allstate Ins. Co.*, 2014 WL 4635745, at *21 (E.D.N.Y. Sept. 16, 2014) ("neither *Comcast* nor any other binding authority holds that the need to calculate damages on an individualized basis necessarily defeats the predominance element of Rule 23(b)(3)"). In *Roach v. T.L. Cannon Corp.*, for instance, the Second Circuit reversed a trial court's order denying certification of a 23(b)(3) nationwide class, concluding that "*Comcast* does not mandate that certification pursuant to Rule 23(b)(3) requires a finding that damages are capable of measurement on a classwide basis." 778 F.3d at 402.

There, the plaintiffs sued the owner-operator of several Applebee's Neighborhood Grill and Bar Restaurants, alleging among other things that the company "had a policy of not paying hourly employees an extra hour of pay when working a ten-hour work day as was then required" under New York state law (the "10-hour spread" claim). *Id.* at 403. In denying their motion to certify a 23(b)(3) nationwide class, the

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common issues of fact or law is improper. *Castano v. Am. Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996). In contrast, the Second Circuit takes the position that Rule 23(c)(4) may be utilized "to certify a class on a designated issue regardless of whether the claim as a whole satisfies the predominance test." *In re Nassau County Strip Search Cases*, 461 F.3d 219, 230 (2d Cir. 2006). The Seventh Circuit is in accord. *See McReynolds v. Merrill Lynch, Inc.*, 672 F.3d 482 (7th Cir. 2012).

trial court, relying on *Comcast*, found that because the plaintiffs have offered no "'model of damages susceptible of measurement' across the [entire] putative [10-hour spread claim] class, … '[q]uestions of individual damage calculations will inevitably overwhelm questions common to the class.'" *Id*. at 404 (citations omitted).

The Second Circuit reversed, observing, "Prior to the Supreme Court's decision in *Comcast*, it was 'well-established' in this Circuit that 'the fact that damages may have to be ascertained on an individual basis is not sufficient to defeat class certification' under Rule 23(b)(3). … We do not read *Comcast* as overruling these decisions." *Id*. at 405. Other courts similarly have read *Comcast* narrowly to permit certification of otherwise uncertifiable classes. *See In re Nexium Antitrust Litig.*, 777 F.3d 9, 23 (1st Cir. 2015) ("*Comcast* did not require that plaintiffs show that all members of the putative class had suffered injury at the class certification stage—simply that at class certification, the damages calculation must reflect the liability theory") (citation omitted); *In re Deepwater Horizon*, 739 F.3d 790, 815 (5th Cir.) (*Comcast* "has no impact on cases such as the present one, in which predominance was based not on common issues of damages but on the numerous common issues of liability"), *cert. denied sub nom. BP Exploration & Prod. Inc. v. Lake Eugenie Land & Dev., Inc.*, 135 S. Ct. 754 (2014).

Other courts construe *Comcast* differently, finding that where there exists no readily ascertainable means by which to measure and determine damages as to the class as a whole, Rule 23(b)(3) class certification is improper. *See, e.g., Halvorson v. Auto-Owners Ins. Co.*, 718 F.3d 773, 778 (8th Cir. 2013) ("The

predominance inquiry requires an analysis of whether a prima facie showing of liability can be proved by common evidence or whether this showing varies from member to member. In order for a class to be certified, each member must have standing and show an injury in fact that is traceable to the defendant and likely to be redressed in a favorable decision") (citations omitted); *Wallace B. Roderick Revocable Living Trust v. XTO Energy, Inc.*, 725 F.3d 1213, 1220 (10th Cir. 2013) ("Although individualized monetary claims belong in Rule 23(b)(3), predominance may be destroyed if individualized issues will overwhelm those questions common to the class") (citations omitted); *see also Stiller v. Costco Wholesale Corp.*, 298 F.R.D. 611, 627 (S.D. Cal. 2014) ("*Comcast* makes clear that individualized damages determinations can defeat Rule 23(b)(3)'s predominance requirement"), *appeal docketed*, No. 15-55361 (9th Cir. Mar. 6, 2015).

D. In The Absence Of Clear Direction From This Court, Lower Courts Will Continue To Apply Very Different Standards In Deciding Whether To Certify Claims Involving Inherently Individualized Issues, Such As In The Wage And Hour Context

The sometimes widely divergent standards applied by federal courts in evaluating 23(b)(3) motions to certify wage and hour classes can result in vastly different treatment of similarly situated workers, depending largely on the jurisdiction in which their claim is brought. Thus, while *"Dukes* is widely understood as reinvigorating the notion that class actions are the exception, rather than the rule," [courts are divided] "as to whether claims alleging widespread underpayment of wages fits within the

exception." *Enriquez v. Cherry Hill Mkt. Corp.*, 993 F. Supp. 2d 229, 236-37 (E.D.N.Y. 2013). As the district court in *Enriquez* explained:

> In part, the divide is simply a reflection of the reality that not all wage-and-hour cases are the same. In some, the claim is that an employer has classified a category of employees as exempt …. In other cases—including this one—the claim is that an employer has systematically failed to pay employees the legally mandated wage for all hours worked. At least one district court has certified such a case as a class action, finding that the employer's "overtime policy 'is the "glue" that the Supreme Court found lacking in *Dukes*.'" In the Court's view, however, that holding runs afoul of *Dukes*'s clear pronouncement that "[c]ommonality requires the plaintiff to demonstrate that the class members have suffered the same injury …." In other words, alleging that systematic underpayment of wages amounts to a "policy" of noncompliance with the wage-and-hour laws does not establish commonality if demonstrating such noncompliance requires, as it would in this case, an inquiry into the total pay and total hours worked for each employee.

Id. at 237 (citations omitted).

As in this case, individuals seeking to establish an employer's liability for alleged wage and hour violations must prove that they actually worked a specific number of hours and were not properly compensated for that time. *See, e.g., Davis v. Abingdon Mem'l Hosp.*, 765 F.3d 236, 242-43 (3d Cir. 2014). Accordingly, the basic requirements of a wage and hour claim, whether in state or federal court, often

involve highly individualized factual allegations that can vary significantly from plaintiff to plaintiff.

For those courts that faithfully adhere to this Court's reasoning in *Dukes* and *Comcast*, those individualized determinations would in most cases be found to predominate over common questions, such as whether employees felt pressure to underreport their hours worked. For others seeking to limit the scope of *Dukes* and *Comcast*, such highly individualized liability and damages issues "alone *cannot* preclude certification under Rule 23(b)(3)." *Roach*, 778 F.3d at 409 (emphasis added).

II. IMPROPER CERTIFICATION OF EMPLOYMENT CLAIMS ENCOURAGES OPPORTUNISTIC, "BET-THE-FARM" LITIGATION, WHICH ALL TOO OFTEN PLACES EMPLOYERS UNDER INORDINATE PRESSURE TO SETTLE, REGARDLESS OF MERIT

Continued inconsistency in the courts regarding the propriety of Rule 23(b)(3) class certification will have a profound effect on the business community in general, but especially on large companies that operate and employ staff across the United States. Such inconsistency threatens to expose those employers to significant risk of litigation under myriad worker protection laws, but especially in the wage and hour context. In particular, the decision below magnifies the conflict in the courts regarding whether, in light of *Dukes* and *Comcast*, 23(b)(3) class certification is permissible where – as routinely is the case in wage and hour class litigation – significant questions of disparate, individualized damages are presented.

This Court has said repeatedly that the class action procedure is "'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" *Comcast*, 133 S. Ct. at 1432 (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979)); *see also Dukes*, 131 S. Ct. at 2550 (quoting *Yamasaki*). The decision below does not adhere to that rule, and if allowed to stand, will make it easier to certify large class actions, increasing exponentially the pressure on employers to settle even meritless claims. Given the proliferation of class-based wage and hour litigation at the state and federal levels, employers already are at great financial risk, both in terms of the substantial fees associated with merely defending such claims, as well as the frequently exorbitant cost to resolve them.

Indeed:

> With vanishingly rare exception, class certification sets the litigation on a path toward resolution by way of settlement, not full-fledged testing of the plaintiffs' case by trial. In terms of their real-world impact, class settlements can be quite significant, potentially involving dollar sums in the hundreds of millions or requiring substantial restructuring of the defendant's operations.

Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 99 (2009) (footnote omitted). By limiting the reach of *Dukes* and *Comcast* and allowing highly individualized claims to form the basis for class certification – even where, for instance, the class contains entirely uninjured class members, *Nexium Antitrust Litig.*, 777 F.3d at 31 (certifying a class in which most of the class members were "probably injured") – some courts, including the court below, have all but ignored the reality that class

certification almost invariably leads to a settlement. As the Seventh Circuit observed, "Certification as a class action can 'coerce the defendant into settling on highly disadvantageous terms, regardless of the merits of the suit,' and in this case is 'highly likely to because of the magnitude of the potential damages.'" *Creative Montessori Learning Ctrs. v. Ashford Gear LLC*, 662 F.3d 913, 915 (7th Cir. 2011) (citations omitted).

Allowing plaintiffs to aggregate hundreds or thousands of claims without having to satisfy all the required elements of Rule 23 invariably will lead to the class action device being used not in the limited manner in which it was intended, but rather as a strategic and opportunistic means of extracting settlements from employers wishing to avoid the financial and commercial risk associated with class-wide litigation.

CONCLUSION

Accordingly, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 2015