No. 14-910

IN THE

Supreme Court of the United States

ALLSTATE INSURANCE COMPANY,

Petitioner,

v.

JACK JIMENEZ, individually and on behalf of all others similarly situated,

Respondent.

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

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

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To the Honorable the Chief Justice and the Associate Justices of the United States Supreme Court:

Pursuant to Rule 37.1 and .2 of the Rules of this Court, the Equal Employment Advisory Council (EEAC) hereby respectfully moves this Court for leave to file the accompanying brief as *amicus curiae* in support of the position of the Petitioner in this case. The written consent of the attorney for the Petitioner

has been filed with the Clerk of the Court. The consent of the attorney for the Respondent was requested but refused.

In support of its motion, EEAC submits the following:

1. 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. 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.

2. 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

uniform application of federal class certification procedural requirements.

3. 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.

WHEREFORE, for the reasons stated, the Equal Employment Advisory Council respectfully requests the Court grant it leave to file the accompanying brief *amicus curiae.*

Respectfully submitted,

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

The Equal Employment Advisory Council respectfully submits this brief *amicus curiae* in support of the petition for a writ of certiorari, contingent upon the granting of its accompanying motion for leave to file.[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. 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

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. 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 uniform application of federal class certification procedural requirements.

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intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

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

In 2005, Allstate reclassified all of its California claims adjusters from salaried, exempt, to hourly, non-exempt, employees. Pet. App. 3a-4a. Respondent Jack Jimenez was hired in 2006 as an hourly casualty claims adjuster in Petitioner Allstate Insurance Company's Diamond Bar, California Market Claims Office (MCO). Pet App. 24a.

Jimenez's employment was terminated in September 2010. *Id*. Shortly thereafter, he filed a lawsuit on behalf of himself and other similarly situated adjusters claiming violations of California's minimum wage and overtime laws. Pet. App. 4a. Among other things, Jimenez alleged that Allstate regularly expects its claims adjustors to work more than 40 hours per week, but refuses to provide them with overtime compensation or meal and rest periods. *Id*. After the case was removed to federal court, Jimenez moved to certify the following class, comprised of approximately 1,300 individuals:

> All current and former California-based 'Claims Adjusters,' or persons with similar titles and/or similar job duties, who work(ed) for Allstate

> within the State of California at any time from September 29, 2006 to final judgment.

Pet. App. 18a-19a.

According to Jimenez, common questions exist regarding whether Allstate (1) maintained an "unwritten" policy discouraging the reporting of overtime, and that class members regularly worked in excess of 40 hours per week without receiving overtime compensation; (2) knew or should have known about it; and (3) "stood idly by without compensating class members for such overtime." Pet. App. 5a. As evidence, Jimenez offered the declarations of seven class members who claimed that they worked in excess of 40 hours per week but, under pressure from the company, did not report the overtime so as to be compensated for it. Pet. App. 36a-37a.

Allstate opposed class certification on a number of grounds. First, it contended that company policy is to compensate employees for all time actually worked, and that any departures from the policy are not common to the class. Pet. App. 37a-39a. The company also asserted that there is no evidence that any class members other than the seven declarants voluntarily failed to report overtime or that their experiences are representative of the class as a whole, noting that the class members worked in 13 different offices throughout California, under different supervisors, and on different types of claims. *Id*. In addition, Allstate claimed that common questions do not predominate because overtime claims are subject to many individual questions and defenses, and thus are generally not suitable for class treatment. Pet. App. 43a-44a.

The trial court certified the class, finding that whether Allstate maintained and enforced an unwritten policy discouraging the reporting of overtime

worked was a question common to the class as a whole, which predominated over "any individualized issues regarding the specific amount of damages a particular class member may be able to prove." Pet App. 6a. The Ninth Circuit affirmed. Pet App. 3a.

In doing so, the Ninth Circuit pointed out that the plaintiffs must satisfy the following three elements in order to maintain their state wage and hour claims: (1) that they performed work for which they were not compensated; (2) the employer knew or should have known that they did so; but (3) the employer did nothing to correct the problem. Pet. App. 9a. To the extent that the plaintiffs identified three common questions that closely track the legal requirements, the Ninth Circuit concluded that certification was permissible. Pet. App. 11a.

The Ninth Circuit also affirmed the district court's holding that "the common question of whether Allstate had an 'unofficial policy' of denying overtime payments while requiring overtime work predominated over any individualized issues regarding the specific amount of damages a particular class member may be able to prove." Pet. App. 5a-6a. In particular, it endorsed the trial court's "statistical sampling" model as a viable means of resolving liability, Pet. App. 6a., while "leaving the potentially difficult issue of individualized damage assessments for a later day." *Id*. It rejected Allstate's contention that the trial court's ruling conflicts with this Court's pronouncements 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), and violates the company's due process rights to mount a defense to individual claims. Pet. App. 11a-12a. Allstate subsequently filed a petition for writ of certiorari with this Court on January 25, 2015.

SUMMARY OF REASONS FOR GRANTING THE WRIT

The decision below magnifies a growing conflict among the lower courts regarding the scope and breadth of this Court's decisions in *Comcast Corp. v. Behrend*, ___ U.S. ___, 133 S. Ct. 1426 (2013), and *Wal-Mart Stores, Inc. v. Dukes*, ___ U.S. ___, 131 S. Ct. 2541 (2011), and how those rulings should govern a trial court's decision to certify a class under Rule 23 of the Federal Rules of Civil Procedure, particularly in contexts other than employment discrimination and antitrust litigation. *Compare In re Nexium Antitrust Litig.*, ___ F.3d ___, 2015 WL 265548, at *10 (1st Cir. Jan. 21, 2015), *and Roach v. T.L. Cannon Corp.*, ___ F.3d ___, 2015 WL 528125 (2d Cir. Feb. 10, 2015), *with Halvorson v. Auto-Owners Ins. Co.*, 718 F.3d 773, 778 (8th Cir. 2013), *and Wallace B. Roderick Revocable Living Trust v. XTO Energy, Inc.*, 725 F.3d 1213, 1220 (10th Cir. 2013). Accordingly, it 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 is warranted so as to resolve the ongoing confusion among federal district and circuit courts regarding the circumstances under which claims involving highly individualized liability and damages issues – such as those involving the payment of wages – are suitable for class treatment under Rule 23(b)(3).

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, 700–01 (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." *Id*. Thus, plaintiffs seeking certification of wage and hour claims must satisfy all of the requirements of Rule 23(a), and at least one of the requirements of 23(b) – typically (b)(3).

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. *See, e.g., Enriquez v. Cherry Hill Mkt. Corp*., 993 F. Supp. 2d 229, 236-37 (E.D.N.Y. 2013). 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 WRIT

I. REVIEW OF THE DECISION BELOW IS NECESSARY TO BRING MUCH NEEDED CLARITY TO CLASS CERTIFICATION ISSUES OF SUBSTANTIAL IMPORTANCE TO THE EMPLOYER COMMUNITY

The Ninth Circuit below held that certification of a class of workers asserting state wage and hour claims under Rule 23(b)(3) of the Federal Rules of Civil Procedure was proper, even though (among other things) resolution of questions purportedly common to the class would not establish the disputed elements of the underlying claim. Because the ruling is at odds

with this Court's pronouncements 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), and deepens the conflict in the federal courts regarding the applicability of those decisions to class certification determinations generally, and wage and hour claims in particular, review and reversal by this Court is warranted.

To maintain multiple claims as a class action, plaintiffs generally must meet certain procedural requirements. Federal court litigants seeking class certification, for instance, must satisfy all four prerequisites of Federal Rules of Civil Procedure Rule 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." Fed. R. Civ. P. 23(a).

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 Corp.* 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, 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.

After years of veritable chaos in the law of class actions, "[t]he solution *Wal-Mart* offered was a new guiding principle that could discipline the class-certification inquiry across its various domains." Mark Moller, *Common Problems For The Common Answers Test: Class Certification In Amgen And Comcast*, 2013 Cato S. Ct. Rev. 301 (Cato Inst. 2013). As one commentator observed:

> By limiting questions that qualify as common, [*Dukes*] has—depending on whom you ask—refined or poisoned the Rule 23(b)(3) predominance inquiry, which weighs common questions against individual ones to decide whether class action treatment is justified. Quite simply, after *Dukes*, class plaintiffs have fewer common questions to take to the (b)(3) bank.

Andrey Spektor, *The Death Knell Of Issue Certification And Why That Matters After Wal-Mart v. Dukes*, 26 St. Thomas L. Rev. 165, 167 (2014) (footnote omitted).

Indeed, this Court confirmed in *Comcast Corp. v. Behrend*, a 23(b)(3) case, that "[i]f anything, Rule 23(b)(3)'s predominance criterion is even more demanding than Rule 23(a)," 133 S. Ct. at 1432 (citation omitted), warning against certifying classes in which "[q]uestions of individual damage calculations will inevitably overwhelm questions common to the class.'"

Id. at 1433. *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." *Moller*, 2013 Cato S. Ct. Rev. at 301; *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").

Comcast involved allegations of anti-competitive business practices that resulted in customers having to pay more for cable service. Seeking to represent a class of present and former Comcast cable subscribers in the Philadelphia area, the plaintiffs moved for Rule 23(b)(3) class certification. In support, they offered four different theories of class-wide damages, and presented expert analysis comparing the actual cable prices in the relevant market to hypothetical prices that ostensibly would have applied but for the alleged anticompetitive activities. The plaintiffs' expert made an overall class-wide damages estimate, but did not base the calculation on any one particular theory of liability over another.

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 [has to be limited to] damages attributable to

that theory." 133 S. Ct. at 1433. 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.*

A. There Is Considerable Disagreement In The Lower Courts Regarding The Applicability Of *Dukes* And *Comcast* To Class Certification Determinations Generally

Since *Dukes*, questions have emerged in the courts regarding the extent to which its reasoning applies beyond the Title VII context. Likewise, "[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.[2]

Duane Reade, 293 F.R.D. at 581-82 (citations omitted), *aff'd*, __ Fed. Appx. __, 2015 WL 525697 (2d Cir. Feb. 10, 2015).

On the one hand, "[s]ome federal courts have tried to walk away from some of the holdings of *Comcast*. [The Third Circuit], the Ninth Circuit and the Sixth Circuit all have issued decisions in which they attempt to distinguish *Comcast*. These courts also have discussed more generally how to interpret *Comcast* and have tried to limit its impact." Penelope A. Preovolos & Dominique-Chantale Alepin, *Judges Speak Out: The Make-Or-Break Moment Of Certifying A Class*, St. Bar of Cal., J. of the Antitrust & Unfair Competition L. Sec. 50, 51 (2014).

In *Roach v. T.L. Cannon Corp.*, for instance, the Second Circuit reversed the trial court's order denying certification of a 23(b)(3) nationwide class, concluding

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[2] 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 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).

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." ___ F.3d ___, 2015 WL 528125, at *1 (2d Cir. Feb. 10, 2015). There, the plaintiffs sued the owner-operator of several Applebee's Neighborhood Grill and Bar Restaurants where they had worked, 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*.

In denying their motion to certify a 23(b)(3) nationwide class, the 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 *2 (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 *3-*4. Other courts similarly have read *Comcast* narrowly so as to allow certification of otherwise uncertifiable classes. *See In re Nexium Antitrust Litig.*, ___ F.3d ___, 2015 WL 265548, at *10 (1st Cir. Jan. 21, 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). There are some courts, on the other hand, that construe *Comcast* more broadly, concluding 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); *see also 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).

B. Without Definitive Guidance From This Court, Lower Courts Will Continue To Apply Very Different Standards In Evaluating The Propriety Of Certifying Highly Individualized Wage And Hour Claims For Rule 23 Class Treatment

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 is routinely the case in wage and hour class litigation – significant questions of disparate, individualized damages are presented.

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, for instance, "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," and that "[t]his does not mean merely that they

> have all suffered a violation of the same provision of law." 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 overtime hours and were not compensated for that time. In *Davis v. Abington Memorial Hospital*, 765 F.3d 236, 242-43 (3d Cir. 2014), for instance, the Third Circuit affirmed dismissal of a putative FLSA collective action complaint pursuant to Rule 8 of the Federal Rules of Civil Procedure, concluding that the plaintiffs' factual assertions – that they "typically" worked more than 40 hours per week for which they were not properly compensated – were too threadbare and conclusory to satisfy the pleading standards established by this Court in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). In doing so, it observed that a plaintiff seeking to recover under such a theory must, at a minimum, "sufficiently allege [forty] hours of work in a given workweek *as well* as some uncompensated time in excess of the [forty] hours." *Davis*, 765 F.3d at 242-43 (citation omitted).

As *Davis* iillustrates, 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*, the nature of those individualized determinations surely would be deemed in most instances 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*, 2015 WL 528125, at *7 (emphasis added).

II. IMPROPER CERTIFICATION OF EMPLOYMENT CLASS ACTIONS PROFOUNDLY DISADVANTAGES EMPLOYERS, WHO OFTEN ACQUIESCE TO THE PRESSURE TO SETTLE SUCH CLAIMS, REGARDLESS OF THEIR MERIT

> [This] Court has become increasingly attuned to the reality of modern civil litigation that sees litigants spending a fortune to "try" cases that almost never go to trial. … At every milestone in the life of a case – from complaint to judgment (or more realistically, from investigation to appeal) – costs escalate exponentially, putting pressure on defendants to settle.

Spektor, 26 St. Thomas L. Rev. at 165 (footnote omitted). Indeed, "[f]ew litigation milestones are as significant as a class action certification." *Id*. at 166. Allowing plaintiffs to aggregate the claims of 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.

"[T]he trend toward more wage and hour class actions will continue to increase if plaintiffs' attorneys continue to seek ways to bring state wage and hour claims rather than claims under the federal FLSA." Manesh K. Rath, *Managing Risk Associated With Wage And Hour Class Actions*, 2010 WL 284482, at *10 (Aspatore Pub. 2010). As one commentator observed:

> This trend will be especially pronounced in states in which damages provisions are greater or in states where there is a history of favorable juries, runaway jury awards, and increased union activity and pro-union sentiment.
>
> Indeed, the plaintiffs' bar in wage and hour litigation seems to view state claims as a critical boundary to try to expand. One critical trend is for plaintiffs' attorneys to bring state wage and hour claims alongside claims under the FLSA.

Id. 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. One company alone "recently settled sixty-three wage-and-hour class action suits for an estimated $342 to $640 million and still has another twelve suits pending." Daniel V. Dorris, *Fair Labor Standards Act Preemption Of State Wage-And-Hour Law Claims*, 76 U. Chi. L. Rev. 1251 (2009) (footnote omitted). 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, *see In re Nexium Antitrust Litig.*, ___ F.3d ___, 2015 WL 265548, at *16 (certifying a class in which most, but not all, of the class members were "probably injured") – some courts, including the Ninth Circuit, have all but entirely ignored the reality that class certification almost invariably leads to a settlement.

As noted, this Court has said repeatedly that class action litigation is an exception to the general rule. *See Comcast*, ___ U.S. ___, 133 S. Ct. at 1432; *see also Dukes*, ___ U.S. ___, 131 S. Ct. at 2550. 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.

CONCLUSION

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

Respectfully submitted,

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