

No. 11-3639

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

GEORGE McREYNOLDS, et al.,

Plaintiffs-Appellants,

v.

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.,

Defendant-Appellee.

Interlocutory Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division, No. 05 C 6583
The Honorable Robert W. Gettleman, Judge Presiding

**MOTION OF CHAMBER OF COMMERCE OF THE UNITED STATES OF
AMERICA FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN
SUPPORT OF DEFENDANT-APPELLEE AND AFFIRMANCE**

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**FED. R. APP. P. AND CIRCUIT RULE 26.1
DISCLOSURE STATEMENT**

The undersigned, counsel of record for *amicus* Chamber of Commerce of the United States of America,¹ hereby furnishes the following information in accordance with Rule 26.1 of the Federal Rules of Appellate Procedure and Rule 26.1 of the Circuit Rules of the United States Court of Appeals for the Seventh Circuit:

(1) The full name of every party or *amicus* the attorney represents:

Chamber of Commerce of the United States of America.

(2) If such party or *amicus* is a corporation:

(i) Its parent corporation, if any:

None. Chamber of Commerce of the United States of America has no parent corporations.

(ii) A list of stockholders that are publicly held companies owning 10% or more of stock in the party:

None. No publicly held company has any ownership interest in Chamber of Commerce of the United States of America.

(3) The names of all law firms whose partners or associates have appeared for the party or *amicus* in the case or are expected to appear for the party in this Court:

Gibson, Dunn & Crutcher LLP

National Chamber Litigation Center, Inc.

¹ Disclosures for each counsel for *Amicus Curiae* are included in the proposed brief.

MOTION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE*

Pursuant to Federal Rule of Appellate Procedure 29(b), the Chamber of Commerce of the United States of America (the “Chamber”) respectfully requests leave to file the accompanying Brief as *Amicus Curiae* in Support of Defendant-Appellee Merrill Lynch, Pierce, Fenner & Smith (“Defendant-Appellee”). The Chamber urges affirmance of the order of the U.S. District Court for the Northern District of Illinois denying class certification in this action pursuant to Fed. R. Civ. P. 23.

As explained below, the proposed brief focuses on the broad impact of *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), in elucidating defendants’ inviolable rights to present defenses from the unique perspective of an organization representing millions of businesses of every size and across all industries. While the parties have necessarily focused principally on facts unique to their dispute, including the particulars of the challenged policies at Defendant-Appellee, the Chamber believes it is important for the Court to have the benefit of briefing that goes beyond their appropriately fact-bound discussion to address the broader implications that certification here would have on proposed class actions against the business community more generally. Indeed, the proposed brief raises several important issues clarified in *Wal-Mart*, including constitutional due process considerations fundamental to class certification proceedings such as a defendant’s

entitlement to individual defenses, as well as limitations imposed by the Rules Enabling Act. Additionally, the proposed brief focuses on the textual, structural, and historical limitations on bifurcated proceedings under Rule 23(c)(4), which also are not addressed in detail by the parties' briefs. In addressing these important class certification issues, this Court should have the benefit of a full discussion of the serious constitutional and statutory concerns that Plaintiffs' reading of Rule 23 and controlling Supreme Court precedent creates. The proposed brief therefore would be of assistance to this Court. Defendant-Appellee has consented to the filing of this brief. Plaintiffs have not.

1. Interest Of *Amicus Curiae*

The Chamber is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents an underlying membership of three million professional organizations of every size, in every industry sector, and from every region of the country. A central 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 regularly files amicus briefs in cases that raise issues of vital concern to the nation's business community. The Chamber has filed amicus briefs in thousands of cases, including *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), a case at the heart of this

matter. The Chamber's briefs have been described as "helpful" and "influential" by courts² and commentators.³

Many of the Chamber's members are subject to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2, which is a focus of the decision below. The Chamber's members devote extensive resources to developing employment practices and programs designed to ensure compliance with Title VII and other legal requirements. The Chamber's members therefore have a strong interest in this case to ensure that the broad principles set forth in *Wal-Mart* are not artificially constrained and that plaintiffs in Title VII class actions meet their burdens of proof under Federal Rule of Civil Procedure 23. The Chamber's members might otherwise risk being subjected to the sort of "Trial by Formula" which the Supreme Court squarely rejected in *Wal-Mart* as inconsistent with a defendant's basic rights to due process. 131 S. Ct. at 2561.

² See, e.g., *Kedy v. A.W. Chesterton Co.*, 946 A.2d 1171, 1179 n.8 (R.I. 2008); *Scott v. Cingular Wireless*, 161 P.3d 1000, 1004 (Wash. 2007).

³ David L. Franklin, *What Kind of Business-Friendly Court? Explaining the Chamber of Commerce's Success at the Roberts Court*, 49 Santa Clara L. Rev. 1019, 1026 (2009); see also *id.* (quoting Supreme Court practitioner Carter Phillips: "The briefs filed by the Chamber in that Court and in the lower courts are uniformly excellent. They explain precisely why the issue is important to business interests. Except for the Solicitor General representing the United States, no single entity has more influence on what cases the Supreme Court decides and how it decides them than the [Chamber]").

2. Unique Briefing By *Amicus Curiae* Chamber of Commerce of the United States of America Will Assist The Court In Resolving Important Statutory and Constitutional Issues.

Plaintiffs in this case seek certification of their Title VII claims challenging certain teaming and account distribution policies at Defendant-Appellee that purportedly caused disparate impacts along racial lines. Whatever the merits of these claims, due process considerations that drove the outcome and animated the Supreme Court's opinion in *Wal-Mart* militate with equal force against class certification in this case. The proposed *amicus* brief will help inform this Court's resolution of the following statutory and constitutional questions.

First, the proposed *amicus* brief provides a "unique perspective" that "can assist the court of appeals beyond what the parties are able to do," *Nat'l Org. for Women v. Scheidler*, 223 F.3d 615, 617 (7th Cir. 2000) (citing *Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1063 (7th Cir. 1997)), by examining the potentially far-reaching effects of this Court's decision in shaping the post-*Wal-Mart* development of class certification standards under Rule 23. The Court's consideration of the important due process interests and statutory rights at stake is appropriately informed by legal argument that supplements the parties' necessarily more fact-bound discussion of class certification in this case. Indeed, the parties' briefs do not contain a detailed discussion of the implications of the Due Process Clause or the Rules Enabling Act on class certification in this or similar cases.

Second, Plaintiffs propose a novel end-run around the stringent requirements for class certification in Rule 23(a) and (b) by certifying an “issue class” under Rule 23(c)(4) that fails in any event to meet Rule 23’s standards for commonality and predominance. This question has the potential to throw the Rule 23 doors open to every kind of class action that otherwise would fail to meet the traditional requirements for class certification and upend decades of relevant Rule 23 jurisprudence. Although Defendant-Appellee addresses the issue of discrete class certification under Rule 23(c)(4) in its brief, the proposed *amicus* brief provides a unique and substantially more detailed perspective on this question. Among other issues, the *amicus* brief provides unique analysis of subsection (c)(4)’s place in Rule 23’s structural and procedural framework; Rule 23’s drafting history; pronouncements from the Supreme Court in *Wal-Mart*, *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 832-33 (1999), and *Amchem Products v. Windsor*, 521 U.S. 591, 613-14 (1997), on the requirements for class certification set forth in subsections (a) and (b); and Article III standing problems that might be created by certifying discrete issues that otherwise fail to meet the standards for certification under Rule 23. Likewise, although Defendant-Appellee briefly addresses Seventh Amendment problems posed by issue certification under Rule 23(c)(4), the proposed *amicus* brief devotes four pages of unique briefing to this important constitutional issue.

In sum, the Chamber's proposed *amicus* brief focuses principally on due process and Rule 23 interpretative issues "that are not to be found in the parties' briefs." *Voices for Choices v. Ill. Bell Tel. Co.*, 339 F.3d 542, 545 (7th Cir. 2005) (Posner, J., in chambers). The Chamber also avoids duplication of arguments already raised by providing a unique perspective addressing the development of class certification law above the fact-bound fray of the immediate case and by fleshing out in greater detail legal principles "the parties for one reason or another have not [fully] brought to [this Court's] attention," *Ryan*, 125 F.3d at 1064, or "have not adequately developed," *Sierra Club, Inc. v. Env'tl. Prot. Agency*, 358 F.3d 516, 518 (7th Cir. 2004). The more extensive discussion of constitutional and statutory interpretation issues in the proposed brief, therefore, will assist the Court by providing it with "information . . . beyond what the parties [have provided]." *Nat'l Org. for Women*, 223 F.3d at 617.

CONCLUSION

For the foregoing reasons, the motion for leave to file a brief as *amicus curiae* should be granted. If such relief is granted, the Chamber requests that the accompanying brief be considered filed as of the date of this Motion's filing.

Respectfully submitted this 29th day of December, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that on December 29, 2011, I electronically filed the foregoing Motion with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system, which will accomplish service on all participants in the case that are registered CM/ECF users. The following counsel will be served via email on today's date:

Jared R. Friedman, WEIL, GOTSHALL & MANGES LLP

December 29, 2011

/s/ Alexander K. Mircheff
Alexander K. Mircheff