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

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

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August 2015

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

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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 Petitioner and of reversal.[1]

[1] 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 *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

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 and compliance with federal Equal Employment Opportunity (EEO) and worker protection laws. Its membership comprises 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 application of federal class certification procedural requirements to wage and hour claims.

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

Respondents 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, Respondents – who worked either on the "slaughter" or the "processing" floor – received additional pay for donning and doffing activities ("K-Code time"). Pet. App. 26a.

Respondents 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 the company'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 Respondents' claims were not capable of classwide resolution "in one stroke," *id.* at 2551, they could not establish commonality. Pet. App. 32a. In response, Respondents 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, Respondents' 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 Respondents. 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, which this Court granted on June 8, 2015.

SUMMARY OF ARGUMENT

This Court's holdings 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), confirm that class certification under Rule 23 of the Federal Rules of Civil Procedure is impermissible where individual questions preclude "one stroke" resolution of liability and damages as to the class as a whole. *Dukes*, 131 S. Ct. at 2551. Because the panel majority below affirmed certification of a wage and hour class involving substantial individual questions of liability and damages incapable of classwide resolution, it contravened the class action principles clarified in both *Dukes* and *Comcast*. Accordingly, the decision below should be reversed.

In *Dukes*, this Court reversed certification of a class action brought under Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, concluding that because the plaintiffs could not state a common injury that was capable of classwide resolution, they failed to satisfy the commonality requirements of Rule 23(a). 131 S. Ct. at 2553. It reiterated and clarified the general rule that plaintiffs must present "'significant proof'" that every Rule 23 element has been satisfied, and the district court

must resolve any challenge to that evidence, prior to certifying a class. *Id.* at 2553-54. Those requirements are intended to comport with federal constitutional principles of due process designed, in part, to "effectively limit the class claims to those fairly encompassed by the named plaintiff's claims." *Id.* at 2550 (citation and internal quotations omitted). The Court built on that concept in *Comcast*, confirming there that plaintiffs may not maintain a Rule 23(b)(3) class where they cannot point to a reliable means by which to measure and determine damages across the class.

Collectively, *Dukes* and *Comcast* reinforce that claims involving individualized questions of liability and damages – such as those arising frequently in the wage and hour context – are unsuitable for Rule 23 class certification. Wage and hour litigation often involves allegations that an employer failed to properly compensate an employee, or group of employees, for overtime worked. In order to maintain such claims as a class, however, the employees must demonstrate that common questions are susceptible to classwide *answers*. Given their inherently individualized nature, unpaid wages claims typically will involve far more complex and difficult questions of both liability and damages than Rule 23 will allow.

Improper certification of highly individualized wage and hour claims equips opportunistic plaintiffs and their attorneys with a powerful means of forcing settlement of even questionable claims. Indeed, the increasingly exorbitant costs associated with defending wage and hour class actions create enormous pressure on corporate defendants to settle. The larger a class, the greater the potential liability and defense costs, as well as the substantial risk of reputational damage among a company's employees, customers,

and federal government regulators like the Labor Department. Indeed, in light of current efforts to establish means by which to "blacklist" those with less-than-stellar labor law compliance records from doing business with the government, many employers are more wary than ever of "bet the farm" class litigation that could reflect poorly on their compliance efforts.

The panel majority below failed to adhere to this Court's admonitions both in *Dukes* and *Comcast* 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*). It follows that unless multiple claims can be resolved without resort to hundreds or thousands of individual trials on liability or damages, certification under Rule 23 is improper. The decision below disregards 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.

ARGUMENT

I. IN AFFIRMING CERTIFICATION OF A RULE 23 CLASS RIFE WITH INDIVIDUAL LIABILITY AND DAMAGES ISSUES, THE EIGHTH CIRCUIT DISREGARDED THE PRINCIPLES ELUCIDATED BY THIS COURT IN *DUKES* AND *COMCAST*

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 16(e) 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), reversal is warranted.

Federal court litigants seeking class certification generally 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; *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997). Rule 23(b) criteria consider whether conducting the case as a class action would be fair and efficient. For instance, Rule 23(b)(3) permits class certification only when "the questions of law or fact common to class members predominate over any questions affecting only individual members, and . . . a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).[2]

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." *Dukes*, 131 S. Ct. at 2550 (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979)); *see also Comcast*, 133 S. Ct.

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[2] The Advisory Committee's Note interpreting Rule 23 conclusively states that where the "likelihood that significant questions, not only of *damages* but of *liability* and *defenses to liability*, would be present, affecting the individuals in different ways," class action certification under Rule 23(b)(3) is "not appropriate." Advisory Comm. Note, *reprinted in* 39 F.R.D. 69, 103 (1966) (emphasis added).

at 1432 (quoting *Yamasaki*). 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.

A. *Dukes* Confirms That Rule 23(a) Commonality Requires That All Class Members Must Have Suffered A Common Injury Capable Of Classwide Resolution

In *Dukes*, a Title VII case, this Court held that in order to satisfy the requirements of Rule 23(a)(2), 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. 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.

Here, Respondents were hourly workers assigned to Petitioner's Storm Lake, Iowa pork processing plant in its "Kill," "Cut," or "Retrim" department. Pet. App. 45a. It is undisputed that their job duties differed from department to department, and so too did the safety gear, or "Personal Protective Equipment (PPE)," they were required to wear. Pet. App. 46a. Naturally, differences in the actual equipment worn by individual employees resulted in many variances in the time required to don and doff that equipment

and perform related tasks, and hence in the compensation owed for doing so.

Brushing aside those individual considerations, the district court declined to decertify the class, reasoning that:

> [U]nlike *Dukes*, the instant case involves a company wide compensation policy that is applied uniformly throughout defendant's entire Storm Lake facility. If it is determined that the donning and doffing and/or sanitizing of the PPE at issue constitutes "work" for which plaintiffs are entitled to compensation, then such a determination is applicable to all such situated plaintiffs.

Pet. App. 37a.

Significantly, however, the district court failed to consider the critical *next* question, that is, whether proof of a nationwide compensation policy, coupled with a finding that the donning and doffing activities amounted to "work," would have been sufficient to establish *classwide* injury. The highly individualized proof required to determine each class member's entitlement to unpaid wages plainly precluded the generation of "common answers apt to drive the resolution of the litigation," *Dukes*, 131 S. Ct. at 2551 (citation omitted), making certification improper.

B. *Comcast* Confirms That A Rule 23(b)(3) Class May Not Be Certified Where No Reliable Means Exists For Measuring And Determining Classwide Damages

In *Comcast Corp. v. Behrend*, a 23(b)(3) case, this Court cautioned against certifying classes in which "[q]uestions of individual damage calculations will inevitably overwhelm questions common to the class.'"

133 S. Ct. 1426, 1433 (2013). *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.

In reversing, this Court 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 in this class action 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*.

This Court in *Comcast*, as well as in *Dukes*, thus firmly rejected the use of statistical sampling as a legitimate means of establishing either Rule 23(a) commonality or predominance under Rule 23(b)(3). As the Court explained in *Dukes*:

> 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 (citations omitted).

In fact, "trial by statistics died on June 20, 2011." Jay Tidmarsh, *Resurrecting Trial By Statistics*, 99 Minn. L. Rev. 1459 (2015). And for good reason. "Whatever its abstract merits, trial by statistics was ultimately doomed to die because it suffered from a fatal disease: it failed to allow the parties to submit individualized proof not only on the amount of injury but also – and this was the especially damning part – on the fact of injury." *Id.* at 1464.

Respondents offered expert testimony at trial purporting to establish the "average" time it took class members to perform donning and doffing activities. That average led to a final judgment against Petitioner in the amount of $5,785,757.40. Pet. App. 6a. Even though that judgment rested on questionable and unscientific sampling data, and it is undisputed that hundreds of class members suffered no injury at all, the panel majority nevertheless refused to decertify the class. It fully embraced Respondents' imprecise, "sample employee" approach, and in doing so disregarded this Court's admonitions in both *Dukes* and *Comcast.*

As Judge Beam pointed out in his dissent:

> 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). This Court thus should hold that because no precise and accurate means existed to measure and determine damages as to the class as a whole, 23(b)(3) certification was improper here, and typically is improper in similar wage and hour cases.

> If a legal system must correct wrongs to individuals, as adherents to theories of corrective justice hold, then correctly determining a defendant's liability *en masse* is insufficient. Rather, the linkage between a plaintiff's harm and a defendant's causal contribution to that harm is the only justification for redistribution from a defendant to a plaintiff. Except for the sampled cases, trial by statistics eliminates the proof on both sides of this connection: the defendant's causal act and the plaintiff's consequent injury.

99 Minn. L. Rev. at 1470-71 (footnote omitted); *see also* Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 Yale L.J. 949, 979 (1988) ("[T]here is no legal obligation to confer a gratuitous benefit").

II. READ TOGETHER, *DUKES* AND *COMCAST* COMPEL THE CONCLUSION THAT CLAIMS FOR UNPAID WAGES INVOLVING HIGHLY INDIVIDUALIZED LIABILITY AND DAMAGES QUESTIONS ARE UNSUITABLE FOR CLASS TREATMENT

"Considering whether 'questions of law or fact common to class members predominate' begins, of course, with the elements of the underlying cause of action." *Erica P. John Fund, Inc., v. Halliburton Co.*, 131 S. Ct. 2179, 2184 (2011). As the Eighth Circuit itself has observed, determining whether common questions predominate over individual ones:

> [R]equires 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.

Halvorson v. Auto-Owners Ins. Co., 718 F.3d 773, 778 (8th Cir. 2013) (citations omitted).

"An employee who brings suit under [the FLSA] for unpaid minimum wages or unpaid overtime compensation, together with liquidated damages, has the burden of proving that he performed work for which he was not properly compensated." *Anderson v. Mt. Clemens Pottery Co*., 328 U.S. 680, 686-87 (1946), *superseded by statute on other grounds*, Portal-to-Portal Act of 1947, 61 Stat. 84 (1947). It follows that individuals seeking Rule 23(b)(3) certification must be able to establish the elements of a threshold wage and

hour claim as to each class member, *i.e.*, whether each class member actually worked the requisite amount of overtime and was not properly compensated for doing so. Certification questions arise frequently in federal wage and hour litigation, which routinely involves highly individualized factual allegations that can vary significantly from plaintiff to plaintiff, so unsurprisingly "there is no reliable way to determine if an employee was paid for fewer hours than actually worked without examining each employee's individual time records and considering the employee's individual testimony." *Pryor v. Aerotek Scientific, LLC*, 278 F.R.D. 516, 536 (C.D. Cal. 2011).

Countless jobs exist for which time worked and compensation owed varies considerably from employee to employee:

- *Pizza delivery drivers*, *see Luiken v. Domino's Pizza, LLC*, 705 F.3d 370, 378 (8th Cir. 2013) ("The varied context of the transactions made it unreasonable for some customers to construe the delivery charge as a payment for personal services, thereby preventing one-stroke determination of a classwide question");
- *Home satellite technicians*, *see Espenscheid v. DirectSat USA, LLC*, 705 F.3d 770, 773-74 (7th Cir. 2013) ("[S]ome, maybe many, of the technicians may not work more than 40 hours a week and may even work fewer hours; others may work more than 40 hours a week. Variance would also result from different technicians' doing different tasks, since it's contended that the employer told them not to report time spent on some of those tasks, though – further complicating the problem

of proof – some of them reported that time anyway");

- *Nurses*, *see Hinterberger v. Catholic Health Sys.*, 299 F.R.D. 22, 50 (W.D.N.Y. 2014) ("District courts applying *Dukes* also have declined to certify Rule 23 class actions brought by nurses against health care facilities");
- *Insurance underwriters*, *see McKeen-Chaplin v. Provident Sav. Bank, FSB*, 21 Wage & Hour Cas. 2d (BNA) 1070, 2013 WL 5883794, at *3 (E.D. Cal. Oct. 30, 2013) ("[D]etermining whether all Underwriters actually worked overtime will require an individualized inquiry into the work schedules of each class member");
- *Service technicians*, *see Elder v. Comcast Corp.*, No. 12 C 1157, 2015 WL 3475968, at *9 (N.D. Ill. June 1, 2015) ("Ultimately, Plaintiffs have failed to establish by a preponderance of the evidence that there is a pattern to the frequency, manner or duration of home dispatch and home garage technicians' pre-shift and post-shift activities. In the absence of such a pattern, the court cannot fashion a common answer to the question of whether Plaintiffs actually worked pre-shift and post-shift work, which is a question central to Plaintiffs' claims"); and
- *Loss prevention managers*, *see Bradford v. CVS Pharmacy, Inc.*, No. 1:12-cv-1159-TWT, 2015 WL 4717312, at *3 (N.D. Ga. Aug. 7, 2015) ("The differences in the duties performed by the various Plaintiffs, as well as the varying

> degrees of discretion and independent judgment they each exercised, will make individualized inquiries inevitable when determining whether a particular FLSA defense applies").

In *Stiller v. Costco Wholesale Corp.*, 298 F.R.D. 611 (2014), *appeal docketed*, No. 15-55361 (9th Cir. Mar. 6, 2015), for instance, a group of Costco store employees alleged that they were not compensated for post-shift time spent in lockdown while loss prevention and security protocols were implemented – a task they claimed could take from five to 60 minutes to complete. They asserted that Costco maintained an unwritten companywide policy of detaining employees during such procedures without compensation, in violation of the FLSA and California wage and hour laws.

As to the latter claims, the district court certified a statewide Rule 23(b)(3) class that included "[a]ll persons who worked for Costco Wholesale Corporation in California as hourly, non-exempt employees who were subject to Costco's closing lockdown procedures between May 15, 2005 and October 1, 2009." *Id.* at 614. At the close of evidence, Costco moved to decertify, arguing that the plaintiffs failed to present evidence sufficient to satisfy either 23(a) commonality or 23(b)(3) predominance.

Specifically, Costco contended that because lockdown procedures – and the extent to which employees were required to remain in store post-shift without being compensated – varied from store to store, liability could not be determined on a classwide basis. Agreeing, the district court decertified the class, concluding that "liability cannot be proved on a classwide basis without thwarting Costco's ability to demonstrate that some class members, due to a variety of circumstances, did not actually experience

unpaid OTC time despite being subjected to the Alleged Policy." *Id.* at 628.

Likewise, in *Espenscheid v. DirectSat USA, LLC*, the Seventh Circuit decertified a class comprised of 2,341 technicians responsible for installing and repairing home satellite dishes on the ground that each technician's individual situation was different, and "to determine damages would, it turns out, require 2341 separate evidentiary hearings …." 705 F.3d 770, 773 (7th Cir. 2013). As the Seventh Circuit observed:

> [I]t's not as if each technician worked from 8 a.m. to 5 p.m. and was forbidden to take a lunch break and so worked a 45-hour week (unless he missed one or more days because of illness or some other reason) but was paid no overtime. Then each technician's damages could be computed effortlessly, mechanically, from the number of days he worked each week and his hourly wage. ... Nothing like that is possible here.

Id.

As in *Stiller* and *Espenscheid*, the certified class in this case comprises workers in various jobs, each with different safety equipment requirements. For example:

> 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 sleeve, plexiglass arm guard, 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").

Pet. App. 21a (Beam, J., dissenting). Depending on the requirements of the particular job in question, those donning and doffing activities invariably took some employees more, and others less, time to accomplish.

The panel majority acknowledged that those differences would directly impact whether and to what extent Respondents were owed additional compensation above the K-Code time payment. It nevertheless concluded inexplicably that the complaint "is not dominated by individual issues such that the varied circumstances ... prevent 'one stroke' determination." Pet. App. 8a (citations and internal 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.*

To the contrary, Respondents "put the damages cart before the liability horse. *Mt. Clemens* first requires that an employee 'prove[] that he has in fact performed work for which he was improperly compensated.'" *Stiller*, 298 F.R.D. at 629. Respondents did not, and in fact could not, offer proof that the entire class as a whole suffered the same injury, and thus certification was improper. Improper certification resulted in the denial of Petitioner's right to assert individual defenses to liability, and thus failed to prevent a jury from awarding substantial monetary damages to the entire class – including those who suffered no harm at all.

III. PERMITTING THE AGGREGATION OF DISPARATE WAGE AND HOUR CLAIMS WOULD ARM THE PLAINTIFFS' BAR WITH A POWERFUL TOOL FOR FORCING EMPLOYERS INTO SUBSTANTIAL SETTLEMENTS HAVING LITTLE, IF ANYTHING, TO DO WITH THE UNDERLYING MERITS

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.

A. Class-Based FLSA And State Wage-And-Hour Claims Have Increased Dramatically Over The Last Decade

Wage and hour litigation has morphed into a billion-dollar industry for the plaintiff's bar. Such claims not only have increased in number, but also in size and complexity. For instance:

> Despite the fact that the FLSA has been on the books for more than seventy years, in the last decade there has been an explosion of FLSA suits filed against employers. [In fact], the number of FLSA filings in federal court between the years 2000 and 2009 has more than tripled.
>
> * * *

> This dramatic rise in FLSA filings has not gone unnoticed by businesses. In October 2007, the proliferation of FLSA lawsuits even made the cover of Business Week, in an article aptly titled "Wage Wars." As the article notes:
>
> "No one tracks precise figures, but lawyers on both sides estimate that over the last few years companies have collectively paid out more than $1 billion annually to resolve these claims, which are usually brought on behalf of large groups of employees. What's more, companies can get hit again and again with suits on behalf of different groups of workers or for alleged violations of different provisions of a complex tapestry of laws."

William C. Martucci & Jennifer K. Oldvader, *Addressing the Wave of Dual-Filed Federal FLSA and State Law "Off-the-Clock" Litigation: Strategies for Opposing Certification and A Proposal for Reform*, 19-SPG Kan. J.L. & Pub. Pol'y 433, 433-34 (Spring 2010) (citation and footnote omitted).

The number of FLSA lawsuits filed in federal court has shot up more than 300% over the last decade, and more than 500% over the last two decades. U.S. Gov't Accountability Office, GAO-14-69, FAIR LABOR STANDARDS ACT: The Department of Labor Should Adopt a More Systematic Approach to Developing Its Guidance 6-7 (2013). Of those, fully forty percent assert class-based claims. *Id.* at 16. According to a recent U.S. Government Accountability Office (GAO) report, a driving force behind the rise is the increased interest by plaintiffs' attorneys in bringing wage and hour claims, which they find easier to handle and prove than other types of employment-related lawsuits. *Id.* at 10.

The likelihood of employers being caught unawares in this wage and hour litigation wave is not remote by any measure. As one commentator described it:

> [T]he federal dockets in Florida and several other states have been inundated with wage and hour collective action complaints. In fact, the continuous filing of wage and hour class/collective actions [has] resulted in the judges in the United States District Court for the Middle District of Florida implementing special FLSA Scheduling Orders just to be able to sort potentially viable or meritorious claims from the purely frivolous claims. The same court implemented a Standing Order preventing one particular wage and hour firm from even filing any more cases without leave of the court itself. And, furthermore, federal courts across the country have been forced to discipline numerous of these wage and hour firms for continued solicitation of putative collective action members—who in many cases remain members of the defendant corporation's active workforce.

Christopher M. Pardo, *The Cost of Doing Business: Mitigating Increasing Recession Wage and Hour Risks While Promoting Economic Recovery*, 10 J. Bus. & Sec. L. 1, *10–*11 (2009) (footnotes omitted).

Litigation is likely to further increase in light of efforts by the government to tie the award of federal contracting dollars directly to compliance with state and federal labor laws. Signed by President Obama on July 31, 2014, Executive Order No. 13,673 requires covered employers bidding on federal contracts valued at more than $500,000 to disclose various labor law violations over a three-year period – across twelve federal labor and employment statutes, including the FLSA – and, if a contract is awarded, to update this

information every six months during the performance of the contract. 79 Fed. Reg. 45,309 (Aug. 5, 2014). That obligation also extends to employers bidding on *subcontracts* valued at more than $500,000; they must disclose to the first-tier contractor any labor law violations from the past three years and, if a subcontract is awarded, update this information every six months during the performance of the subcontract.

It is entirely conceivable that plaintiffs could begin to file administrative complaints or proposed class actions for the purpose of leveraging a potential adverse finding by the Labor Department or ruling by a trial court – both of which would be considered reportable "violations" under Exec. Order No. 13,673 – in order to force a favorable settlement.

B. Class Certification Often Leads To Settlement, Even Of Entirely Defensible Claims

This proliferation (actual and anticipated) of class-based wage and hour litigation has placed employers 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. A trial court's certification of a class alone can "coerce the defendant into settling on highly disadvantageous terms, regardless of the merits of the suit…." *Creative Montessori Learning Ctrs. v. Ashford Gear LLC*, 662 F.3d 913, 915 (7th Cir. 2011) (citations omitted). This pressure to settle tends to increase in direct proportion to the "magnitude of the potential damages." *Id.*

Indeed, aggregating wage and hour claims for those purposes is a low-risk, high-reward proposition for plaintiffs' counsel. "While the plaintiffs' attorney has to incur the costs of filing the class action lawsuit and

has to invest a substantial amount of time that could potentially be wasted if the class is not certified, once the class *is* certified, in the majority of cases the defendant will settle ….” Steven Bolanos, *Navigating Through the Aftermath of* Wal-Mart v. Dukes*: The Impact of Class Certification, and Options for Plaintiffs and Defendants*, 40 W. St. U. L. Rev. 179, 183 (Spring 2013) (footnote omitted) (emphasis added). This Court has acknowledged that reality, observing:

> [W]hen damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable. Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims. Other courts have noted the risk of “in terrorem” settlements that class actions entail ….

AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1752 (2011). Improper certification of employment class actions generally, and wage and hour classes in particular, ignores the fact that certification frequently leads to a settlement, even in cases of questionable merit:

> Once the class is certified, because of the destructive capability of an unfavorable judgment, the pressure on defendants to settle is irresistible and defendants ‘always’ settle. Because of this ‘automatic’ or ‘guaranteed settlement’ after a class is certified, the certification process becomes the most important part of the case and the ‘only avenue for a court to rule in a way that is relevant to the ultimate outcome of the case.’ However, certification decisions are based on federal or state procedural rules and are almost completely

> unrelated to the merits of the case. It is this procedure-based method of certification that leads to inequity for defendants, who are likely to settle after certification even when they might have a strong case on the merits.

Bolanos, 40 W. St. U. L. Rev. at 183 (footnotes omitted); *see also* Thomas H. Barnard & Amanda T. Quan, *Trying to Kill One Bird with Two Stones: The Use and Abuse of Class Actions and Collective Actions in Employment Litigation*, 31 Hofstra Lab. & Emp. L.J. 387, 405-06 (2014) ("Class actions are extremely popular and [a] heavily-used means of pursuing employment litigation because Plaintiffs, and their class action attorneys, often see class actions as an easy way to maximize damages while minimizing effort: Certification as a class action can coerce the defendant into settling on highly disadvantageous terms, regardless of the merits of the suit").

By limiting the reach of *Dukes* and *Comcast* and allowing highly individualized claims to form the basis for class certification, the Eighth Circuit all but ignored the reality that class certification almost invariably leads to a settlement. Permitting plaintiffs to aggregate hundreds or thousands of claims without having to satisfy all the required elements of Rule 23 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 classwide litigation.

CONCLUSION

Accordingly, the *amicus curiae* Equal Employment Advisory Council respectfully submits that the decision below should be reversed.

Respectfully submitted,

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August 2015