No. 09-

IN THE
Supreme Court of the United States

MOHAWK INDUSTRIES, INC.,

Petitioner,

v.

SHIRLEY WILLIAMS, GALE PELFREY, BONNIE JONES, AND LORA SISSON, individually and on behalf of a class,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a district court abuses its discretion by going beyond the allegations in the complaint and examining the factual record to determine whether the named plaintiffs have satisfied the class certification requirements of Federal Rule of Civil Procedure 23.

RULE 29.6 DISCLOSURE STATEMENT

Petitioner Mohawk Industries, Inc. ("Mohawk") states that it is a publicly-traded corporation incorporated under the laws of Delaware. Mohawk has no parent corporation, and no publicly-traded company owns ten percent or more of its stock.

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Petitioner Mohawk Industries, Inc. ("Mohawk") respectfully petitions for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit in *Williams v. Mohawk Industries, Inc.*, No. 08-13446-GG.

OPINIONS BELOW

The decision of the Eleventh Circuit that gives rise to this petition is reported as *Williams v. Mohawk Industries, Inc.*, 568 F.3d 1350 (11th Cir. 2009), the text of which appears in this petition on pages 1a through 21a. The order of the United States District Court for the Northern District of Georgia at issue in the appeal to the Eleventh Circuit is filed as Docket No. 190 in *Williams v. Mohawk Industries, Inc.*, No. 4:04-CV-0003-HLM (N.D. Ga. Mar. 3, 2008). The text of the order appears in this petition on pages 22a through 94a.

STATEMENT OF JURISDICTION

The Eleventh Circuit rendered its judgment on this matter on May 28, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

PROVISIONS INVOLVED

Federal Rule of Civil Procedure 23(a) provides that:

> One or more members of a class may sue or be sued as representative parties on behalf of all members only if: (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.

Federal Rule of Civil Procedure 23(b) provides that:

> A class action may be maintained if Rule 23(a) is satisfied and if:
>
> (1) prosecuting separate actions by or against individual class members would create a risk of: (A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or (B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;
>
> (2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or
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> (3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include: (A) the class members' interests in individually controlling

> the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action.

Federal Rule of Civil Procedure 23(c)(1)(A) provides that:

> At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.

STATEMENT OF THE CASE

This petition arises out of a suit by a putative class of current and former hourly employees of Mohawk who allege that Mohawk hired illegal immigrants and thereby suppressed the wages that plaintiffs were offered and voluntarily accepted. Following the filing of the lawsuit, the parties engaged in extensive class discovery over an eight month period. Upon review of an extensive factual record, the district court denied class certification because the evidence indicated that plaintiffs could not meet the requirements set forth in Federal Rule of Civil Procedure 23. The Eleventh Circuit's decision below held in part that the district court erred by looking beyond the pleadings in evaluating class certification.

That ruling, however, conflicts with the decisions of other circuit courts of appeals, and creates a six to six circuit split on the issue of when a district court may look beyond the pleadings to determine whether to certify a class. This Court should grant certiorari to provide the lower courts with guidance as to a critical issue regarding the scope of a district court's discretion under Rule 23.

1. Plaintiffs are current or former hourly employees of Petitioner Mohawk. On January 6, 2004, they filed a putative class action in the United States District Court for the Northern District of Georgia on behalf of approximately 50,000 of Mohawk's current and former hourly employees.[1]

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[1] The four named plaintiffs were Shirley Williams, Gale Pelfrey, Bonnie Jones, and Lora Sisson. Ms. Williams and Ms. Sisson

Pet. App. 2a. Mohawk is a leading manufacturer of carpets, rugs, tile, and other floor coverings, and has extensive manufacturing operations in Georgia. Mohawk's operations provide good jobs with benefits to tens of thousands of workers in Georgia and elsewhere. In 2007, for example, Mohawk paid an average hourly wage of approximately $13.31 per hour with full benefits. Among other things, those benefits included health care, dental, life insurance, short- and long-term disability, a 401(k) matching program, an annual profit-sharing program, paid vacation, and maternity leave.

Plaintiffs asserted claims for substantive Racketeer Influenced and Corrupt Organizations Act ("RICO") violations under the federal RICO statute (18 U.S.C. § 1962(c)) and the Georgia RICO statute (Ga. Code Ann. § 16-14-4(a)), as well as a Georgia RICO conspiracy claim under Ga. Code Ann. § 16-14-4(c), and a claim for unjust enrichment. All of these claims stemmed from plaintiffs' allegation that Mohawk knowingly employed illegal aliens to depress the wages of all of its legal hourly workers throughout Georgia. See Pet. App. 2a–3a; Compl. ¶¶ 14–31.[2]

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are now deceased and no longer serve as putative class representatives.

[2] The Complaint set forth five alleged RICO predicate acts: (1) knowingly hiring more than ten illegal aliens during a 12-month period, in violation of 8 U.S.C. § 1324(a)(3)(A); (2) harboring illegal aliens, in violation of 8 U.S.C. § 1324(a)(1)(A)(iii); (3) encouraging illegal aliens to enter the United States, in violation of 8 U.S.C. § 1324(a)(1)(A)(iv); (4) accepting false identification documents, in violation of 18 U.S.C. § 1546(a); and (5) using false identification documents, in violation of 18 U.S.C. § 1546(b). See 18 U.S.C. § 1961(1)(B), (F)

2. On March 15, 2004, the district court adopted the parties' Joint Preliminary Report and Discovery Plan. Over an eight-month class discovery period, plaintiffs received everything they demanded from Mohawk. Specifically, in response to 79 document requests, Mohawk produced nearly one million pages and over 20 million electronic records. Plaintiffs also served third-party subpoenas and document requests upon five temporary employment agencies from which Mohawk obtained temporary employees. These agencies produced an additional 10,000 pages to plaintiffs. Plaintiffs also took five depositions of Mohawk's corporate representatives and conducted seven depositions of temporary employment agency representatives.

3. On December 18, 2007, plaintiffs moved under Rule 23(b)(3) and Rule 23(b)(2) to certify a class of legal, hourly employees who have worked or currently worked in Mohawk's facilities in North Georgia.[3] Pet. App. 62a–63a. This proposed class comprised nearly 50,000 workers at 71 locations in ten different counties in the State of Georgia. See *id.* at 27a. Two plaintiffs moved to be class

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(providing that violations of 8 U.S.C. § 1324 and 18 U.S.C. § 1546 constitute "racketeering activity" for RICO purposes).

[3] Plaintiffs defined their class as follows: "All persons legally authorized to be employed in the United States who are or have been employed in hourly positions by Mohawk Industries, Inc., its subsidiaries or affiliates in Georgia at any time from January 5, 1999 to the present, other than Excluded Employees." Plaintiffs' motion defined "Excluded Employees" as "employees whose employment at Mohawk has been limited to: Dal-Tile, Unilin, or any Mohawk facility or facilities in Milledgeville, Dublin, Tifton, Norcross, Kennessaw or Atlanta, Georgia." Pet. App. 4a.

representatives: Bonnie Jones, a current hourly employee of Mohawk; and Gail Pelfrey, a former Mohawk hourly employee. See 41a–44a; Compl. ¶¶ 5, 7.

On March 3, 2008, the district court denied plaintiffs' motion for class certification. See Pet. App. 93a. In reaching this conclusion, the district court's "rigorous analysis" consisted of its "examin[ation] [as to] whether sufficient evidence exists to reasonably conclude that plaintiffs may proceed in the manner proposed." *Id.* at 63a–65a (internal quotation marks omitted). In an order that spans 136 pages in slip form, the court closely reviewed the facts revealed by extensive class discovery and concluded that no evidence supported plaintiffs' core class allegation: "that [Mohawk] engaged in a *corporate-wide* RICO enterprise with temporary employment agencies to employ illegal workers and thereby depress the wages of workers who were eligible for employment in the United States." *Id.* at 75a n.4 (emphasis added. Instead, the Court found that that the evidence offered no support for the existence of "*one grand conspiracy* to employ illegal workers." *Id.* at 74a (emphasis added).

The district court explained:

> [T]he evidence in the record demonstrates that each of [Mohawk's] five divisions in this case conducted its own hiring, entered into its own relationships with various temporary employment agencies, and had discretion and autonomy to choose whether to enter into such relationships and to set the terms of the relationships. The record further demonstrates

> that each division set its own wages for its non-temporary hourly employees.

Id. "The evidence thus reveals that the relationships with the various temporary employment agencies occurred on a division-by-division or facility-by-facility basis, rather than a corporate-level basis." *Id.* Without a "corporate-wide enterprise" or "one grand conspiracy," the district court held that the plaintiffs failed to establish commonality, typicality, predominance, and superiority under Rule 23. *Id.* at 74a–75a, 77a–78a, 90a–93a. Accordingly, it denied class certification.

4. On March 17, 2008, plaintiffs petitioned the Eleventh Circuit for leave to appeal the district court's order under Rule 23(f). The Eleventh Circuit granted the petition on June 17, 2008.

On May 28, 2009, the United States Court of Appeals for the Eleventh Circuit vacated the district court's order denying class certification. As to Rule 23(a)'s commonality and typicality requirements, the Court held that the allegations in the complaint itself sufficed and that the district court abused its discretion by not relying solely upon those allegations to satisfy Rule 23(a). *Id.* at 12a ("We agree with the employees that *their complaint* raises questions that are common to all members of the class.") (emphasis added); *id.* at 13a ("This claim is typical of the claims of other members of the class because the claims are based on the *same legal theory* .... Although this *legal theory may ultimately not be sustained by the evidence*, it is typical of the class of which [named plaintiffs] are representative.") (emphasis added).

Specifically, the court of appeals concluded that plaintiffs satisfied the commonality requirement because the question of "[w]hether Mohawk conducted the affairs of an enterprise through a pattern of racketeering activity that depressed the wages of all employees is a question *common to each employee's complaint*." *Id.* at 12a (emphasis added). Likewise, the Eleventh Circuit held that plaintiffs satisfied the typicality requirement because the class's claims were based on the "same legal theory," namely: "that the hiring of illegal aliens by Mohawk depressed the wages of all legal hourly workers regardless of location." *Id.* at 13a.

In addition, the Eleventh Circuit required the district court on remand to accept those blanket allegations in conducting the predominance and superiority analyses of Rule 23(b). The court held that the district court erred in its predominance and superiority analyses because it relied upon "its erroneous determination about a lack of common issues." *Id.* at 17a. In so doing, the Eleventh Circuit relied upon its precedent in *Klay v. Humana, Inc.*, 382 F.3d 1241 (11th Cir. 2004). The court of appeals explained why, in its view, almost all RICO claims will result in class certification: "In *Klay*, we explained that 'the common issues of fact [in a RICO action], concerning the existence of a[n enterprise and] a pattern of racketeering activity ... are quite substantial. They would tend to predominate over all but the most complex individual issues.'" Pet. App. 14a–15a (quoting *Klay*, 382 F.3d at 1258–59) (alterations in original).

REASONS FOR GRANTING THE PETITION

This case presents a question upon which the circuits are deeply divided: the extent to which a district court may look beyond the pleadings to resolve factual disputes in the record in determining whether to certify a class under Rule 23. In vacating the district court's decision below, the Eleventh Circuit placed severe restrictions on a district court's ability to do so. In so doing, the Eleventh Circuit aligned itself with the Sixth, Eighth, Ninth, Tenth, and District of Columbia Circuits. These courts' decisions, however, directly conflict with the conclusions of the First, Second, Third, Fourth, Fifth, and Seventh Circuits.

Indeed, the First Circuit recently noted that "[t]he circuits are ... divided" on whether "the complaint's allegations are necessarily controlling" or whether "a court has the power to test disputed premises early on if and when the class action would be proper on one premise but not another." *Tardiff v. Knox County*, 365 F.3d 1, 4–5 & n.5 (1st Cir. 2004).

This division arises in the context of reviewing district court class certification decisions. Under Rule 23, a court may only certify a class if two sets of requirements are met. First, the district court must examine whether the "parties seeking class certification" have satisfied Rule 23(a)'s "four threshold requirements." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613–14 (1997). These threshold requirements are numerosity, commonality, typicality, and adequacy of representation. Fed. R. Civ. P. 23(a).

These four prerequisites "are necessary but not sufficient conditions for a class action." Fed. R. Civ. P. 23 advisory committee note of 1966. The district court also must conclude that the action falls within one of Rule 23(b)'s "three alternative criteria for maintainability." Manual for Complex Litigation (Fourth) § 21.131 (2009). In the case of an action for money damages under Rule 23(b)(3), a district court must find that the putative class "meet[s] two requirements beyond the Rule 23(a) prerequisites: Common questions must 'predominate over any questions affecting only individual members'; and class resolution must be 'superior to other available methods for the fair and efficient adjudication of the controversy.'" *Amchem*, 521 U.S. at 615.[4]

This Court's last guidance in this area is almost three decades old. In *General Telephone Co. of the Southwest v. Falcon*, this court held that a district court should conduct a "rigorous analysis" of class certification, noting that "sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question." 457 U.S. 147, 160–61 (1982). In the years since *Falcon*, the circuit courts have divided over the extent

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[4] Rule 23(b) also sets forth two other types of classes. "Rule 23(b)(1) covers cases in which separate actions by or against individual class members would risk establishing incompatible standards of conduct for the party opposing the class would as a practical matter be dispositive of the interests of nonparty class members or substantially impair or impede their ability to protect their interests." *Amchem*, 521 U.S. at 614 (citations and internal quotation marks omitted). "Rule 23(b)(2) permits class actions for declaratory or injunctive relief where 'the party opposing the class has acted or refused to act on grounds generally applicable to the class.'" *Id.*

to which courts must (or may) "probe behind the pleadings." *Id.* at 160. Some courts have read *Falcon* broadly, permitting district courts wide latitude to test allegations that form the basis for proceeding as a class action.

Other courts have construed *Falcon* narrowly and required district courts to defer to allegations in the pleadings. These courts have relied upon language from this Court's decision in *Eisen v. Carlisle & Jacquelin*, which explained that there is "nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action." 417 U.S. 156, 177 (1974). This Court should grant certiorari to resolve the important federal issue of the degree to which district courts can test allegations in determining whether suit can proceed as a class action.

I. This Court Should Resolve The Conflict Among The Courts Of Appeals Regarding Courts' Discretion To Resolve Factual Disputes At The Class Certification Stage.

All twelve regional courts of appeals have grappled with the tension between *Falcon* and *Eisen*, resulting in an acknowledged deep split amongst the circuits.[5] The Eleventh Circuit in the decision below,

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[5] In addition to the First Circuit, numerous courts and commentators have acknowledged the circuit split. See, e.g., *Meijer, Inc. v. Warner Chilcott Holdings Co. III, Ltd.*, 246 F.R.D. 293, 299 (D.D.C. 2007) (observing that "Eisen remains good law" in the D.C. Circuit, notwithstanding the contrary "standard for class certification motions operative in other circuits," including Second, Third, Fourth, and Seventh Circuits); David S. Evans,

along with the Sixth, Eighth, Ninth, Tenth, and District of Columbia Circuits, require district courts to accept allegations in the pleadings, and do not permit those courts to resolve factual disputes except as to the issue of whether plaintiffs can show common proof of injury. On "the more rigorous end of this spectrum," the "Second, [Third,][6] Fourth, Fifth, and Seventh Circuits ... forbi[d] district courts from relying on plaintiffs' allegations of sufficiently common proof," and require the courts to resolve factual disputes in the process of making findings that plaintiffs have met Rule 23's requirements. *In re New Motor Vehicles Canadian Export Antitrust Litig.*, 522 F.3d 6, 24 (1st Cir. 2008). See also *Tardiff,*

Class Certification, The Merits, And Expert Evidence, 11 Geo. Mason L. Rev. 1, 8 & n.54 (2002) ("the circuit courts that have considered where the merits fence sits have split" into "two major camps"); Randy J. Kozel & David Rosenberg, *Solving The Nuisance-Value Settlement Problem: Mandatory Summary Judgment*, 90 Va. L. Rev. 1849, 1891 n.69 (2004) ("How much of *Eisen* survives *Falcon* is an open question, and one on which appellate courts have split."); Ian Simmons & Alexander P. Okuliar, *Rigorous Analysis In Antitrust Class Certification Rulings: Recent Advances On The Front Line*, Antitrust 72, 72–73 (Fall 2008) ("The Supreme Court has not accepted review of a class certification ruling for over a decade following the decision in *Amchem*, but a circuit split is opening on the *Eisen/Falcon* dichotomy, and the time may be right for the Court to provide further guidance").

[6] The First Circuit's analysis of the split omitted the Third Circuit, which had not aligned itself until its opinion in *In re Hydrogen Peroxide Antitrust Litigation*, 552 F.3d 305, 320 (3d Cir. 2008) (holding that "a district court errs as a matter of law when it fails to resolve a genuine legal or factual dispute relevant to determining the [Rule 23] requirements"), which issued nine months after the First Circuit's 2008 assessment of the split.

365 F.3d at 4–5 & n.5. The First Circuit similarly has permitted courts to resolve factual disputes that overlap with the merits. *Bowe v. Polymedica Corp.*, 432 F.3d 1, 6 (1st Cir. 2005).

A. The Eleventh Circuit and Five Other Circuits Generally Require District Courts To Accept Allegations In the Pleadings.

The Eleventh Circuit's decision below to vacate the district court's denial of class certification mirrors the approach adopted by the District of Columbia, Sixth, Eighth, Ninth, and Tenth Circuits.

The District of Columbia Circuit has held that district courts may not assess issues that are disputed in the pleadings. In *McCarthy v. Kleindienst*, plaintiffs sought certification under Rule 23(b)(3) of a class of 7,000 individuals who were arrested during a Vietnam War protest. 741 F.2d 1406, 1407–08 (D.C. Cir. 1984). Defendants opposed certification on the ground that defendants had pled the existence of probable cause as an affirmative defense to liability. *Id.* at 1413 n.8. The district court agreed and denied class certification. The D.C. Circuit affirmed, holding that examining a factual dispute over the affirmative defense in the pleadings "would be impermissible at this stage of the proceedings." *Id.* at 1413. In support, the court noted that this Court's opinion in *Eisen v. Carlisle & Jacqueline* prohibited courts from "conduct[ing] a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action." *Id.* (quoting *Eisen*, 417 U.S. at 177).

The Sixth Circuit took a similar view in *Daffin v. Ford Motor Company*, where it held that the court was barred from considering whether the named plaintiff was atypical as a result of an affirmative defense that could bar part of the class from recovery. 458 F.3d 549, 552–54 (6th Cir. 2006). In *Daffin*, plaintiffs sued Ford for a vehicle defect on a theory of breach of express warranty. *Id.* at 550. Ford contended that many proposed class members could not recover under the terms of their vehicles' warranty because the defect had not manifested itself. *Id.* at 552. Further, Ford asserted that the named plaintiff, whose vehicle manifested the defect, was thus not typical of the class as a whole. The Sixth Circuit rejected Ford's argument as an improper challenge at this stage to a "merits issue": "The court may ultimately accept or reject [Ford's] reading of the contract, but a court should not 'conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action.'" *Id.* (quoting *Eisen*, 417 U.S. at 177–78). Accord *Beattie v. CenturyTel, Inc.*, 511 F.3d 554 (6th Cir. 2007) (refusing to consider whether affirmative defense precluded finding of typicality).

The Eighth Circuit has adopted a similar approach. In *Blades v. Monsanto*, plaintiffs alleged that the defendant engaged in a price-fixing conspiracy with other producers of genetically modified seeds to increase the prices of such seeds to the plaintiffs. 400 F.3d 562, 565 (8th Cir. 2005). The district court denied class certification. The Eighth Circuit reversed, holding that a district court's discretion to examine the facts is limited. According to the Eighth Circuit, the district court must take the

allegations in the complaint as true, but it can "resolve disputes going to the factual setting of the case." *Id.* at 567. "[S]uch disputes may be resolved only insofar as resolution is necessary to determine the nature of the evidence that would be sufficient, *if the plaintiff's general allegations were true*, to make out a prima facie case for the class." *Id.* (emphasis added).

The Ninth Circuit's decision in *Blackie v. Barrack*, which also holds that a district court must assume the truth of the plaintiff's allegations, similarly restricts the district court's discretion to examine the facts underlying plaintiffs' claims. 524 F.2d 891, 902 n.17 (9th Cir. 1975).[7] The defendants in *Blackie*

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[7] Although *Blackie* was decided before this Court's decision in *Falcon*, *Blackie* continues to be a leading case on this issue in the Ninth Circuit. See, e.g., *In re Live Concert Antitrust Litig.*, 247 F.R.D. 98, 107–10 (C.D. Cal. 2007) (analyzing *Blackie* to determine "whether the Court may make factual findings in determining whether the requirements of Rule 23 are satisfied"). See also *In re Coord. Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 691 F.2d 1335, 1342 (9th Cir. 1982) (holding, in a post-*Falcon* decision, that "in determining whether to certify the class, the district court is bound to take the substantive allegations of the complaint as true").

Indeed, district courts in the Ninth Circuit still apply *Blackie's* standard even after the Ninth Circuit held in *Dukes v. Wal-Mart, Inc.*, 509 F.3d 1168 (9th Cir.2007), that "courts are not only 'at liberty to' but must 'consider evidence which goes to the requirements of Rule 23 [at the class certification stage] even [if] the evidence may also relate to the underlying merits of the case,' *Dukes*, 509 F.3d at 1177 n.2. See, e.g., *Kamar v. Radio Shack Corp.*, 254 F.R.D. 387, 392 (C.D. Cal. 2008). Moreover, *Blackie* plainly is still a leading case in this circuit in the wake of the Ninth Circuit's order to vacate the *Dukes* decision and to rehear the case *en banc*. See *Dukes v. Wal-Mart, Inc.*, 556 F.3d 919 (9th Cir. 2009) (granting rehearing *en banc*).

challenged certification on the ground that the district court had certified a class solely on speculation that Rule 23 was satisfied, "rather than determining, before certifying the class, that the requirements of [Rule 23] were in fact met." *Id.* at 900. Specifically, the district court "condition[ed] the conclusion that a common question exists on plaintiffs' proof of the allegations; *i.e.*, if plaintiffs prove their allegation of X, X will be a question of fact or law common to the class." *Id.* at 900 n.16. The Ninth Circuit rejected defendants' argument because "[t]he court is bound to take the substantive allegations of the complaint as true." *Id.* at 902 n.17. And because the Supreme "Court made clear in [*Eisen*] that [the Rule 23] determination does not permit or require a preliminary inquiry into the merits," the Ninth Circuit concluded that "the district judge is necessarily bound to some degree of speculation by the uncertain state of the record on which he must rule." *Id.* at 901.

Likewise, the Tenth Circuit requires district courts to presume that the parties' allegations are true when determining whether to certify a class. In *Shook v. El Paso County*, for example, the court of appeals held that in conducting its "rigorous analysis" "the court must accept the substantive allegations of the complaint as true, although it need not blindly rely on conclusory allegations which parrot Rule 23 and may consider the legal and factual issues presented by plaintiff's complaints." 386 F.3d 963, 968 (10th Cir. 2004) (internal quotation marks omitted). See also *Vallario v. Vandehey*, 554 F.3d 1259, 1265 (10th Cir. 2009); *J.B. ex rel. Hart v. Valdez*, 186 F.3d 1280, 1289–90 (10th Cir. 1999). Similarly, in *Thiessen v. General Electric Capital*, the

Tenth Circuit held that the district court erred in making findings on commonality and predominance issues that overlapped with merits issues, because those findings "encompasse[d] factual issues relevant to [the] trial." 267 F.3d 1095, 1106–08 (10th Cir. 2001).

The District of Columbia, Sixth, Eighth, Ninth, and Tenth Circuits, along with the Eleventh Circuit in the decision below, thus hold that district courts cannot go beyond the parties' allegations in the process of deciding whether plaintiffs have met their burden of satisfying Rule 23's requirements.

B. Six Other Circuits Permit A District Court Broader Discretion To Evaluate Whether A Case Should Proceed As A Class Action.

The First, Second, Third, Fourth, Fifth, and Seventh Circuits have permitted district courts far more latitude at the class certification stage. These circuits have held that courts are not bound by allegations in pleadings. Instead, these circuits allow district courts to make class determinations based upon the facts adduced during class discovery.

In contrast to the Eleventh Circuit's decision below, the First Circuit has held that "the district court was entitled to look beyond the pleadings in ... its resolution of the class-certification question." *Bowe v. Polymedica Corp.*, 432 F.3d 1, 6 (1st Cir. 2005). In *Bowe*, the district court's class certification inquiry "went well beyond the four corners of the pleadings, considering both parties' expert reports and literally hundreds of pages of exhibits." *Id.* at 5. The First Circuit rejected plaintiffs' argument "that a

district court should not engage in a weighing of competing evidence at the class-certification stage, and should instead confine its review to the allegations raised in the plaintiff's complaint." *Id.* Specifically, the court of appeals reaffirmed its "view [that] a court has the power to test disputed premises early on if and when the class action would be proper on one premise but not another." *Id.* at 6 (quoting *Tardiff v. Knox County*, 365 F.3d 1, 4–5 (1st Cir. 2004)).

The Second Circuit has held that "a district judge may certify a class only after making *determinations* that each of the Rule 23 requirements has been met." *Miles v. Merrill Lynch & Co., Inc.*, 471 F.3d 24, 41 (2d Cir. 2006) (emphasis added). Such determinations "can be made only if the judge resolves factual disputes relevant to each Rule 23 requirement and finds that whatever underlying facts are relevant to a particular Rule 23 requirement have been established." *Id.* The court added that this "obligation to make such determinations is not lessened by overlap between a Rule 23 requirement and a merits issue, even a merits issue that is identical with a Rule 23 requirement." *Id.* In a subsequent opinion, the Second Circuit clarified that "the standard of proof applicable to evidence proffered to meet" the Rule 23 requirements is "preponderance of the evidence." *Teamsters Local 445 Freight Div. Pension Fund v. Bombardier Inc.*, 546 F.3d 196, 202 (2d Cir. 2008). See also *Loftin v. Bande*, __ F.3d __, 2009 WL 2169197 at *9-10 (2d Cir. Jul. 22, 2009) (reversing class certification because district court "was required to find, by a preponderance of the evidence, that [named plaintiff] is both an adequate and typical representative of the class").

Similarly, the Third Circuit in *Johnston v. HBO Film Management* affirmed a district court's denial of class certification on the ground that the evidence in the "well-developed record" rebutted allegations in the pleadings. 265 F.3d 178, 186 (3d Cir. 2001). The *Johnston* plaintiffs were a group of investors in a limited partnership who brought claims for federal RICO violations against a group of defendants who had allegedly marketed the investment opportunity. *Id.* at 181. The district court concluded that the evidence from class discovery failed to support plaintiffs' allegations of uniform misrepresentations, and thus it declined to certify the class. *Id.* at 186. On appeal to the Third Circuit, therefore, the "issue ... [was] whether in making a class certification decision the court must take as true the allegations in the complaint where those allegations are unsupported, and in some instances rebutted, by a well-developed record." *Id.* The court of appeals affirmed, concluding that it was "not only ... appropriate, but also necessary, for the district court to examine the factual record underlying plaintiffs' allegations in making its certification decision." *Id.* at 189.

The Fourth Circuit applied this same standard in *Gariety v. Grant Thornton LLP* to reverse a district court's class certification order. 368 F.3d 356 (4th Cir. 2004). Plaintiffs in *Gariety* in part alleged that Grant Thornton committed securities fraud in connection with the demise of a bank. *Id.* at 359–60. Plaintiff sought certification of a class comprised of "persons who purchased [the bank's] stock." *Id.* at 361. "Pointing to the allegations of their complaint," plaintiffs argued that they were entitled to a presumption of reliance at the Rule 23 stage. *Id.* The

district court certified the class over Grant Thornton's objection that "plaintiffs were not entitled to the presumption because [the bank's] stock was not in fact traded on an efficient market." *Id.* The Fourth Circuit reversed, "conclud[ing] that, by accepting the plaintiffs' allegations for purposes of certifying a class in this case, the district court failed to comply adequately with the procedural requirements of Rule 23." *Id.* at 365. "Because the district court concededly *failed to look beyond the pleadings and conduct a rigorous analysis* of whether [the bank's] shares traded in an efficient market," the Fourth Circuit remanded "to permit the district court to conduct the analysis and make the findings required by Rule 23(b)(3)." *Id.* at 367 (emphasis added).

Likewise, the Fifth Circuit in *Oscar Private Equity Investments v. Allegiance Telecom* vacated a certification order because the district court had also relied only on plaintiff's allegations. 487 F.3d 261, 266 (5th Cir. 2007). As in *Gariety*, the *Oscar* defendants attacked a presumption of reliance because "[w]ithout [it], questions of individual reliance would predominate, and the proposed class would fail." *Id.* at 264. The district court rejected defendants' challenge on the ground that "the class certification stage is not the proper time for defendants to rebut lead Plaintiffs' fraud-on-the-market presumption." *Id.* at 266. The Fifth Circuit reversed, holding that "the district court must consider all evidence, both for and against loss causation, at the class certification stage." *Id.* Because plaintiffs' "evidence ... is little more than well-informed speculation," the court of appeals held that "the district court abused its discretion in

finding that plaintiffs made a showing sufficient to establish loss causation." *Id.* at 266, 271.

The Seventh Circuit also has held that a district court abuses its discretion by certifying a "class without resolving factual and legal disputes that strongly influence the wisdom of class treatment." *Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672, 675 (7th Cir. 2001). In that case, the district court certified a national class of individuals who had purchased machine tools manufactured by defendant, alleging that the defendant made fraudulent misrepresentations about the tools. *Id.* at 673. In certifying the class, the district court assumed that because "class determination is made at the pleading stage of the action, the substantive allegations in the complaint are accepted as true for purposes of the class motion." *Id.* at 675. The Seventh Circuit disagreed, holding that the district court should have made "whatever factual and legal inquiries are necessary under Rule 23" "[b]efore deciding whether to allow a case to proceed as a class action." *Id.* at 676. "The proposition that a district judge must accept all of the complaint's allegations when deciding whether to certify a class cannot be found in Rule 23 and has nothing to recommend it." *Id.* at 675. "Plaintiffs cannot tie the judge's hands by making allegations relevant to both the merits and class certification." *Id.* at 677.

The approach of these courts of appeals are flatly inconsistent with the Eleventh Circuit's decision below, which held that the district court abused its discretion by not deferring to the plaintiffs' allegations in the complaint. These courts have noted that such deference "frustrat[es] the district court's

responsibilities for taking a 'close look' at relevant matters, for conducting a 'rigorous analysis' of such matters, and for making 'findings' that the requirements of Rule 23 have been satisfied." *Gariety*, 368 F.3d at 365 (quoting *Amchem*, 521 U.S. at 615, *Falcon*, 457 U.S. at 161, and Fed. R. Civ. P. 23(b)(3)). Accord *Bell v. Ascendant Solutions, Inc.*, 422 F.3d 307, 312 n.9 (5th Cir. 2005); *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 316 n.15 (3d Cir. 2008). "Certifying classes on the basis of incontestable allegations in the complaint moves the court's discretion to the plaintiff's attorneys—who may use it in ways injurious to other class members, as well as ways injurious to defendants." *Szabo*, 249 F.3d at 677.[8] This Court should grant certiorari to resolve the deep division that exists between the courts of appeals.

II. This Case Raises An Important Question Concerning The District Court's Discretion To Determine Whether A Suit May Proceed As A Class Action.

The issue presented by this petition is a critical issue with which all regional circuits have struggled. As the Third Circuit observed recently, "little guidance is available on the subject of the proper

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[8] See also *Gariety*, 368 F.3d at 365 ("If it were appropriate for a court simply to accept the allegations of a complaint at face value in making class action findings, every complaint asserting the requirements of Rule 23(a) and (b) would automatically lead to a certification order."); *Oscar*, 487 F.3d at 267 ("We cannot ignore the *in terrorem* power of certification, continuing to abide the practice of withholding until 'trial' a merit inquiry central to the certification decision, and failing to insist upon a greater showing.")

standard of 'proof' for class certification." *Hydrogen Peroxide*, 552 F.3d at 316. See also *Miles v. Merrill Lynch & Co., Inc.*, 471 F.3d 24, 33 n.4 (2d Cir. 2006) ("Apart from *Falcon* and *Eisen,* the Supreme Court has said little about meeting Rule 23 requirements.").

The opinion below too narrowly confines a district court's discretion and requires certification even if the key allegations supporting class certification lack a scintilla of evidence in support. Nothing in Rule 23 requires that a district court so restrict its inquiry. Rule 23(c)(1)(A) provides that "the court must determine by order whether to certify the action as a class action," and that this determination must be made "[a]t an early practicable time after a person sues or is sued as a class representative." *Id.* Rule 23(b)(3) provides that a damages class may be certified "if the court *finds*" that common questions predominate and that a class action is a superior method of adjudicating the controversy. *Id.* (emphasis added). See also *id.* (identifying "matters pertinent to these *findings*") (emphasis added).

The Eleventh Circuit's artificial restriction of a district court's discretion is especially inappropriate given the importance of the certification decision itself. "A district court's ruling on the certification issue is often the most significant decision rendered" in the course of a class action. *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980). And, although "[c]lass actions serve an important function in our system of civil justice," they also "present ... opportunities for abuse." *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 99–100 (1981). Indeed, this Court has noted that the "potential for misuse of the class action

mechanism is obvious." *Deposit Guar. Nat'l Bank,* 445 U.S. at 339.

Rule 23's requirement that a case meet all of the hurdles in that rule reflects a recognition that certification imposes an "intense pressure to settle," which exists even where the underlying claim lacks merit. *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298–99 (7th Cir. 1995). See also *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 784–85 (3d Cir. 1995) ("*GMC Pickup*") (acknowledging that "class actions create the opportunity for a kind of legalized blackmail: a greedy and unscrupulous plaintiff might use the *threat* of a large class action, which can be costly to the defendant, to extract a settlement far in excess of the individual claims' actual worth"); Judge Henry J. Friendly, Federal Jurisdiction: A General View 120 (1973) (discussing "blackmail settlements"). Accordingly, "[d]istrict courts must be especially alert to identify frivolous claims brought to extort nuisance settlements; they have broad power and discretion vested in them by Fed. Rule Civ. Proc. 23 with respect to matters involving the certification and management of potentially ... frivolous class actions." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 345 (1979).

Similarly, the "drafters designed the procedural requirements of Rule 23, especially the requisites of subsection (a), so that the court can assure, to the greatest extent possible, that the actions are prosecuted on behalf of the actual class members in a way that makes it fair to bind their interests." *GMC Pickup*, 55 F.3d at 785. In conducting this analysis under Rule 23(a), the court plays the "important role of protector of absentees' interests." *Id.* at 784.

Accordingly, the court performs its certification analysis by acting "in a sort of fiduciary capacity, by approving appropriate representative plaintiffs and class counsel." *Id.* at 784–85.

In order to ensure that all of these interests are served, this Court has explained that district courts "have broad power and discretion vested in them by [Rule] 23 with respect to matters involving the certification" of class actions. *Reiter*, 442 U.S. at 344–45. See also *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 630 (1997) (Breyer, J., concurring in part and dissenting in part) (noting that "[t]he law gives broad leeway to district courts in making class certification decisions"). The district court should not defer to plaintiffs' allegations in its Rule 23 analysis because "an order certifying a class usually is the district judge's last word on the subject; there is *no later test of the decision's factual premises* (and, if the case is settled, there could not be such an examination even if the district judge viewed the certification as provisional)." *Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672, 675 (7th Cir. 2001) (emphasis added).

The Eleventh Circuit's holding below—like that of many of its sister circuits—too narrowly confines a district court's discretion in determining whether Rule 23's criteria have been met. Indeed, under the holdings of these courts, all a named plaintiff must do to obtain certification is artfully craft a complaint and offer a method of calculating damages across the class. On this view, a district court lacks any discretion to look behind the allegations to determine, for example, if *in fact* the putative class members

actually have common questions and if named plaintiffs' claims are truly typical.

Plaintiffs in this case alleged that a single enterprise and conspiracy exists and has depressed the wages of almost 50,000 workers. Before deciding whether to certify the class, the district court examined the record to determine if those 50,000 workers in actuality shared common issues and, if so, whether the named plaintiffs' claims were typical of the rest of the putative class. See Pet. App. 2a–56a. The court concluded that they did not share common issues for a number of critical reasons. Most importantly, the district court found that despite extensive class discovery, plaintiffs could point to not a shred of evidence supporting the notion that a single enterprise or conspiracy existed. See *id.* at 74a, 75a n.4, 90a–91a. Without one, however, nothing tied the claims of class members together, especially given the evidence showing that wages were set, temporary agencies were retained, and hiring decisions were made on a decentralized basis involving hundreds of people working independently. See, e.g., *id.* at 74a (finding that "the evidence in the record indicates that [Mohawk's] operations ... are extremely decentralized," including with respect to hiring, "wage-setting practices," and "use of temporary employment agencies").

The Eleventh Circuit, however, cast aside the district court's findings and largely required the court to defer to plaintiffs' unsupported allegations. Indeed, under the holding below (and in other circuits), district courts must certify classes in cases alleging almost any RICO enterprise or conspiracy—no matter how far-fetched or lacking in evidentiary

support. In fact, had plaintiffs below alleged that the enterprise consisted of *every* employer of hourly workers in Georgia, the Eleventh Circuit's decision on class certification would not change: a district would be forced to find that prerequisites such as commonality and typicality exist and the only issue is whether plaintiffs could show a common method of proving injury.

Restraints such as those imposed by the decision below are flatly inconsistent with the discretion Rule 23 delegates to district courts.[9] This Court should grant certiorari to clarify the discretion district courts have in determining whether to certify class actions.

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[9] Although testing a plaintiff's allegations at the pleading stage has divided this Court, even the dissent in those cases acknowledged that a plaintiff's allegations could be tested at the class certification stage. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 593 n.13 (2007) (Stevens, J., dissenting) (approving of Second Circuit's view that "a district court may not certify a class without ruling that each Rule 23 requirement is met, even if a requirement overlaps with a merits issue").

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Honorable Court grant this petition. This Court should grant the petition to resolve the conflict among the courts of appeals as to whether a district court abuses its discretion by going beyond the allegations in the complaint and examining the factual record to determine whether the named plaintiffs have satisfied the class certification requirements of Federal Rule of Civil Procedure 23.

Respectfully submitted,

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