No. 12-

IN THE

Supreme Court of the United States

RBS CITIZENS, N.A. d/b/a CHARTER ONE and CITIZENS FINANCIAL GROUP, INC.,

Petitioners,

v.

SYNTHIA G. ROSS, JAMES KAPSA, and SHARON WELLS, on behalf of themselves and all others similarly situated,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

MARK W. BATTEN
PROSKAUER ROSE LLP
One International Place
Boston, MA 02110
(617) 526-9600

MARK D. HARRIS
Counsel of Record
ELISE BLOOM
PROSKAUER ROSE LLP
Eleven Times Square
New York, NY 10036
(212) 969-3000
mharris@proskauer.com

AMANDA D. HAVERSTICK
PROSKAUER ROSE LLP
One Newark Center
Newark, NJ 07102
(973) 274-3000

Counsel for Petitioners

243014

QUESTIONS PRESENTED

1. Whether it is consistent with *Wal-Mart Stores, Inc. v. Dukes* to hold that a defendant to a Rule 23(b)(3) class action has no right to raise statutory affirmative defenses on an individual basis if the class seeks "only" monetary relief.

2. Whether a district court can conclude that the Rule 23(a)(2) commonality requirement is satisfied when a class claims the denial of overtime pay, without resolving whether dissimilarities in the class would preclude it from establishing liability on a class-wide basis.

PARTIES TO THE PROCEEDING

There are no additional parties to the proceedings other than those listed in the caption. Despite being part of the official case caption, Sharon Wells was voluntarily dismissed from the case on her own motion and is no longer a party to the proceeding.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioners state that no publicly held company owns 10% or more of the stock of RBS Citizens, N.A. or Citizens Financial Group, Inc. ("CFG"). CFG is the parent company of RBS Citizens, N.A. RBSG International Holdings Limited and RBS CBFM North America Corporation, neither of which is publicly held, are the parent companies of CFG.

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INTRODUCTION

In *Wal-Mart Stores, Inc. v. Dukes*, this Court reaffirmed the importance of the commonality requirement for class actions under Rule 23. As *Dukes* set forth, a party seeking class certification cannot rest on mere allegations that the action is suited for class treatment. The party must "affirmatively demonstrate" that there is "*in fact*" at least one common question of law or fact—meaning a contention of such a nature that it will resolve an issue "central to the validity of each one of the [class members'] claims in one stroke." The Court stressed, in particular, that a court evaluating class certification must consider whether dissimilarities in the class would defeat the party's ability to prove such a common question.

The Court also held that Rule 23, like every other rule of civil procedure, cannot be applied in a way that abridges a defendant's right to raise statutory affirmative defenses. Hence, a class cannot be certified—and commonality cannot be found—on the premise that the defendant will not be allowed to present its defenses to individual claims for relief on an individual basis.

In the decision below, the Seventh Circuit violated both of these holdings. The case involves two classes of current and former employees of Charter One Bank who brought claims for denial of overtime pay under a state wage-and-hour law. Although the company's official policy was to pay overtime to any eligible employee who worked more than 40 hours in a given week, the classes claimed the existence of an "unofficial" policy to deny overtime pay at the company, which they tried to prove with a sampling of declarations from individual class members

describing their personal job experiences. In affirming class certification, the Seventh Circuit failed to consider whether the lack of uniformity in class members' alleged experiences—or the affirmative evidence of dissimilarities in those experiences—disproved the existence of any unlawful overtime policy that applied class-wide.

The Seventh Circuit also rejected Charter One's challenge to commonality based on its right to individual determinations of its statutory defenses—for example, defenses that individual employees did not work more than 40 hours per week without overtime pay, that the company did not know that employees were working off-the-clock, or that the employees were exempt from the overtime requirements altogether. The Seventh Circuit held that Charter One did not have the right to raise those defenses on an individual employee basis. Astonishingly, the court justified that result by holding that *Dukes* only protected the substantive rights of defendants in Rule 23(b)(2) class actions for *equitable* backpay damages, not in 23(b)(3) class actions for *monetary* damages—a distinction that finds no support in the language or the logic of *Dukes*.

Each of the Seventh Circuit's rulings does violence to the holding of *Dukes*, as well as to fundamental principles of law embodied in Rule 23, the Rules Enabling Act, and the Due Process clause. Most disturbingly, the court's decision dramatically alters the standards for Rules 23(a)(2) and 23(b)(3) on both ends of the litigation process. A plaintiff class would be able to win certification without a full vetting of whether the evidence can actually generate common answers to all class members' claims. And at the same time, a defendant would be blocked from defeating certification by demonstrating its right to litigate

its defenses on an individualized basis. That latter ruling, in particular, not only violates long-standing precedents of this Court, but also creates a split with the majority of circuits. Other circuits hold that any interpretation of Rule 23(b)(3) that abridges substantive rights is prohibited. The fact that the Seventh Circuit rendered its decision in a wage-and-hour dispute is even more alarming because of the acute potential for abuse that class actions pose in this area of law.

This Court should grant the petition in order to clarify and restore *Dukes*' standards for both the Rule 23 commonality element and the scope of the Rules Enabling Act. If the "rigorous analysis" of class claims and defenses that *Dukes* requires is to mean anything at all, the decision below must be reversed.

OPINIONS BELOW

The decision of the Seventh Circuit is reported at 667 F.3d 900 (7th Cir. 2012). App. 1a-19a. The Seventh Circuit's order denying a petition for rehearing *en banc* is not reported. App. 40a-41a. The district court's decision certifying the two classes is not reported. App. 20a-39a.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on January 27, 2012. By order dated April 3, 2012, the Seventh Circuit denied rehearing *en banc*. On June 21, 2012, Justice Kagan extended the time to file a petition for a writ of certiorari to and including August 1, 2012. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND RULES INVOLVED

Pertinent portions of Federal Rule of Civil Procedure 23 and the Rules Enabling Act, 28 U.S.C. § 2072, are set forth at App. 42a-43a.

STATEMENT OF THE CASE

A. The Illinois Overtime Requirements and Exemptions

The Illinois Minimum Wage Law (IMWL), like its federal counterpart, the Fair Labor Standards Act (FLSA), provides that employees are entitled to overtime pay for hours worked in excess of forty per week. 820 I.L.C.S. § 105/4a(1). To qualify for overtime, an employee must show that he or she worked more than forty hours without compensation and that the employer had actual or constructive knowledge of the uncompensated work. *Kellar v. Summit Seating Inc.*, 664 F.3d 169, 173 (7th Cir. 2011) (FLSA); *DeMarco v. Nw. Mem'l Healthcare*, No. 10 C 397, 2011 WL 3510896, at *3 (N.D. Ill. Aug. 10, 2011) (IMWL elements same as FLSA elements).

The IMWL sets forth several categories of employees who are exempt from overtime, including any employee "employed in a bona fide executive [or] administrative" capacity. 820 I.L.C.S. § 105/4a(2)(E) (adopting FLSA executive and administrative exemptions). The executive exemption applies to an employee whose "primary duty" is managerial and who, among other criteria, customarily and regularly directs the work of two or more other employees, and either has authority to hire or fire or

provides input into those types of employment actions. *See* 29 C.F.R. § 541.100 (2003 & 2012). The administrative exemption applies to an employee whose "primary duty" is both performing office or non-manual work directly related to management policies or general business operations and exercising discretion and independent judgment. *See id.* § 541.200. Establishing either exemption is an affirmative defense of the employer. *Kellar*, 664 F.3d at 173.

Governing regulations and Department of Labor (DOL) guidelines provide that the applicability of an exemption depends on what job duties an employee actually performs and how an employee actually spends his or her work time. The employee's job title, job description, and the like are not determinative. Rather, it is the employee's "*actual* job duties" that matter. DOL Administrator's Interpretation No. 2010-10 (Mar. 24, 2010) (emphasis added; citation omitted); *see also* 29 C.F.R. § 541.103 (the determination of an employee's "primary duty" for purposes of the executive and administrative exemptions "must be based on all the facts in a particular case").

Consistent with these regulatory guidelines, courts conduct a fact-intensive analysis of an individual employee's actual day-to-day job experiences to determine if the employee falls within a statutory exemption. Even if two employees at the same employer have the same job position or title, their qualification for an exemption may differ, depending on the specifics of the duties for which they are in fact responsible and the way they actually spend their time on the job. *Smith v. Johnson & Johnson*, 593 F.3d 280, 283 n.1, 285 (3d Cir. 2010) (FLSA administrative exemption); *see also Ale v. Tenn.*

Valley Auth., 269 F.3d 680, 688-89 (6th Cir. 2001) (FLSA executive and administrative exemptions).

B. Proceedings Below

1. Charter One is a retail bank with more than 100 branches throughout Illinois.[1] Each branch is run by a branch manager ("BM"), working with one or more assistant branch managers ("ABMs"). According to the official ABM job description, an ABM is responsible for assisting the BM in all aspects of daily operations, including supervising branch employees such as bankers and tellers. For purposes of the applicable state and federal overtime laws, BMs and ABMs are classified as falling within the executive or administrative exemption, while the employees they supervise are classified as non-exempt. Charter One's official policy is to compensate all its employees properly for all time worked. Non-exempt branch employees are paid on an hourly basis at a time-and-a-half premium rate for all time worked beyond 40 hours per week.

Respondents are former Charter One branch employees who brought suit in 2009 after they were fired for misconduct. Their suit asserts a denial of overtime pay in violation of the IMWL.[2] Respondents sought

1. Petitioners are the corporate owners of Charter One Bank and operate the Illinois branches under the Charter One brand name.

2. Respondents also assert claims under the FLSA, but proceedings under that statute have been litigated on a separate track, and no ruling as to collective certification of those claims has reached the appellate level or is raised by this petition.

certification under Rule 23(b)(3) for two classes of current and former Charter One branch employees who were "subject to Charter One's unlawful compensation policies of failing to pay overtime compensation for all hours worked in excess of forty per work week": an "ABM" class, defined to include all ABMs; and an "Hourly" class, defined to include all employees in non-exempt branch positions. App. 4a.

In support of ABM class certification, Respondents argued that ABMs were misclassified as exempt because, despite their official job description, all ABMs allegedly spent the majority of their time on non-exempt tasks. They submitted form declarations from 24 of the estimated 300-member ABM class, in which the declarants attested to spending between 50% and 95% of their time on non-exempt tasks.[3] In opposition, Charter One submitted declarations from other ABMs who described in detail their daily job tasks, which were primarily exempt. Charter One also submitted declarations from ABMs' supervisors who attested that ABMs are expected to perform primarily exempt duties and to their knowledge did so.

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3. Plaintiffs' declarations were all attorney-drafted, boilerplate forms. The ABM forms asked putative class members selected by class counsel to fill in the blank to indicate what percentage of time was spent on "non-exempt" tasks and to check whether the ABM "did" or "did not" perform a variety of listed exempt tasks. For example: "I do/did not have the authority to hire any employees," "I do/did not provide advice to Charter One'[s] upper management." Similarly, the Hourly class forms listed four different unlawful overtime practices, pre-defined by class counsel, and asked putative class members to check the box next to the ones they had experienced, if any.

In support of the Hourly class, Respondents contended that notwithstanding Charter One's lawful official overtime policy, upper management "dictated" an "unofficial policy" of denying overtime pay, using one of four different methods: (1) instructing employees not to record time worked beyond 40 hours per week; (2) erasing or modifying recorded overtime hours; (3) providing "comp time" instead of overtime pay; and (4) requiring that work be performed during unpaid breaks. *Id*. at 34a. Respondents submitted form declarations from 96 of the estimated more than 1,000 Hourly class members, each of whom alleged one or more of the methods for being denied overtime pay. Subsequent depositions of many of these declarants revealed a lack of uniformity among the alleged overtime practices. Several declarants conceded that certain BMs followed Charter One's official overtime policy at certain branches or during certain time periods.[4] Some also admitted that they were in fact paid for all overtime work, contrary to their declarations.

2. Despite this record of material inconsistencies among members of each class, and over Charter One's objection, the district court certified both classes pursuant to Rule 23(b)(3). The court reasoned that Rule 23 "should be liberally construed to support the policy favoring the maintenance of class actions." App. 25a. It described the Rule 23(a)(2) commonality requirement as a "low hurdle

4. Respondent (and class representative) Kapsa, for example, testified that the practices of two of his branch managers were polar opposites: one paid overtime regularly, whereas another permitted none at all. Kapsa Dep. 57, 74, 88, 92-93, 178, 183-84, Mar. 11, 2010. Respondent (and class representative) Ross allegedly experienced a different practice: she claimed she was paid for up to two overtime hours per week. Ross Dep. 101, 102, 170, Mar. 10, 2010.

easily surmounted." *Id.* at 26a. Accordingly, it analyzed commonality only in the context of determining whether common issues predominated over individual ones.

As to the ABM class, the court held that the misclassification question was common to members of that class. *Id.* The court believed that the "primary duty" test as to whether an employee should be classified as exempt did not require an individualized analysis of each employee's actual duties. *Id* at 37a. While it acknowledged that Charter One had countered Respondents' 24 declarations with evidence that many ABMs in fact performed primarily exempt duties, the court held (without explanation) that the "primary duty" test made those dissimilarities irrelevant. *Id.* at 38a.

As to the Hourly class, the court recognized that Charter One's official overtime policy was lawful on its face. It ruled, however, that the number of declarations Respondents had submitted alleging denials of overtime pay allowed an "inference" that there was a common question as to whether a company-wide policy to deny overtime existed. *Id.* at 35a. At the same time, the court acknowledged that there were relevant individual issues for determination, such as whether any individual BMs knew or should have known that any Hourly class member was working off-the-clock. *Id.* at 35a-36a. The court said that such questions were "more relevant" to the determination of individual damages rather than liability. *Id.* at 36a. To the extent they did bear on liability, according to the court, "solutions can be devised to make the inquiry fair, efficient, and manageable." *Id.* It did not explain what those "solutions" would be.

3. Charter One petitioned for review of the class certifications under Rule 23(f). The Seventh Circuit granted the petition only on the narrow question of whether the district court had sufficiently defined the class and the class claims, issues, or defenses under Rule 23(c)(1)(B). Following oral argument, this Court decided *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), holding that plaintiffs must *prove* that there is a common question in order to win certification, and that the right of a defendant to raise individual statutory defenses to liability cannot be abridged. The court requested briefing on whether *Dukes* "alter[ed]" the proper commonality analysis in this case. App. 5a n.2.

The Seventh Circuit held that *Dukes* was distinguishable, primarily because the plaintiffs there were required to prove individual discriminatory intent to sustain their Title VII claims, whereas the Hourly and ABM class plaintiffs here "maintain[ed] a common claim" that Charter One enforced an unlawful policy to deny earned overtime pay. App. 18a. The court looked to the declarations submitted by Respondents in support. It acknowledged that there were "slight variations" in the company practices alleged by Respondents' declarants. *Id.* But it deemed those variations "not relevant" in light of the common claims the classes were maintaining. *Id.* The court did not specifically analyze Charter One's contrary evidence, nor did it determine whether the dissimilarities in the classes would prevent Respondents from *proving* the existence of an unlawful class-wide policy.

In response to Charter One's argument that the ABM class lacked commonality because Charter One could demonstrate that many individual ABM class members performed primarily exempt duties, the court held that the

company "has no such statutory right" to raise individual exemption defenses, because the classes were seeking "only" monetary relief through a 23(b)(3) class. *Id.* at 16a n.7. The court reasoned that *Dukes*' holding on individual defenses applied only to an employer's right to avoid equitable damages under Title VII in a 23(b)(2) case, not individual monetary relief in the form of overtime pay in a 23(b)(3) case. *Id.*

The Seventh Circuit also expressly affirmed the district court's holding that the two classes' claims of unlawful policies at Charter One were "the *only* claims that require resolution at trial." *Id.* at 14a (emphasis in original). According to the Seventh Circuit, whatever defenses Charter One sought to raise were "merely issues of trial strategy or proof," as opposed to "overall . . . issues necessitating resolution," notwithstanding their statutory basis. *Id.* Elsewhere, the court went even further, declaring that an individualized assessment of each ABM's job duties "*is not relevant*" to the claim that an unlawful company-wide policy existed. *Id.* at 18a (emphasis added).

REASONS FOR GRANTING THE PETITION

I. THE SEVENTH CIRCUIT'S DENIAL OF PETITIONERS' RIGHT TO RAISE THEIR STATUTORY DEFENSES VIOLATES THE RULES ENABLING ACT AND CREATES A CIRCUIT CONFLICT.

The Seventh Circuit held that Charter One was not entitled to raise individual statutory defenses to the misclassification claims of individual ABM class members, and therefore rejected Charter One's challenge

to commonality. The court reasoned that although *Dukes* recognized the right of a defendant to raise individual defenses to class members' claims, that holding only applied in the context of a Rule 23(b)(2) class seeking equitable damages. App. 16a n.7. Where a class is certified under Rule 23(b)(3) and seeks "only" monetary damages, however, the Seventh Circuit held there was no such right. *Id*. The court reached this result even though *Dukes* itself drew no distinction between types of Rule 23(b) classes or forms of relief sought.

The court's decision not only distorts *Dukes*, but also violates the Rules Enabling Act and flies in the face of bedrock principles of due process that this Court has affirmed repeatedly. That decision is so contrary to long-standing precedent that it should be summarily reversed. At the least, the Court should grant plenary review to clarify that *Dukes* meant no such distinction and to resolve the circuit conflict on this issue that the decision below creates.

That a rule of procedure cannot trump the demands of substantive law has been settled law since Congress first delegated to this Court in the Rules Enabling Act the power to prescribe rules of practice and procedure, under the express proviso that no rule could "abridge, enlarge, nor modify the substantive rights of any litigant." *See Sibbach v. Wilson & Co.*, 312 U.S. 1, 17 (1941) (citing Rules Enabling Act, 48 Stat. 1064 (currently codified at 28 U.S.C. §§ 2072)). At no time since that delegation has this Court wavered in its strict enforcement of the limits imposed by the Act. To the contrary, this Court has repeatedly held that no rule of civil procedure, including Rule 23, can be construed or applied so as to alter a substantive

right of any party, including a defendant. *E.g.*, *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431 (2010); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997). Parallel due process principles similarly guarantee a defendant the "opportunity to present every available defense" before it can be held accountable for allegedly unlawful conduct. *Philip Morris USA v. Williams,* 549 U.S. 346, 353 (2007) (quoting *Lindsey v. Normet,* 405 U.S. 56, 66 (1972)).

Dukes adhered completely to these principles. The plaintiff class there sought certification under Rule 23(b)(2) for backpay relief. According to Title VII's remedial scheme, if the employer could show that it took adverse employment action against an employee for any reason other than discrimination, then it would not be liable for backpay to that employee. *Dukes* held that the employer had the right to "individualized determinations" of each putative class member's claim for individual backpay relief. *Dukes*, 131 S. Ct. at 2560. It rejected use of a "Trial by Formula," under which the employer's liability to a representative subset of class members would be extrapolated to the class as a whole, holding that such a procedure would violate the Rules Enabling Act. *Id.* at 2561. The Court concluded that "a class cannot be certified on the premise that [the defendant-employer] will not be entitled to litigate its statutory defenses to individual claims." *Id.* (citing 28 U.S.C. § 2072(b); *Ortiz*, 527 U.S. at 845).

Just like the Title VII liability defense to claims for individual monetary backpay relief at issue in *Dukes*, an employer has a statutory liability defense to claims

for *all* forms of relief under the IMWL. The IMWL expressly provides that employees "employed in a bona fide executive, administrative, or professional capacity" are not eligible for overtime pay. 820 I.L.C.S. § 105/4a(E). In an individual action, Charter One indisputably would have the right to raise such defenses as a shield against liability. *E.g.*, *Urnikis-Negro v. Am. Family Prop. Servs.*, 616 F.3d 665, 670 (7th Cir. 2010), *cert. denied*, 131 S. Ct. 1484 (2011). The plain force of the Rules Enabling Act is that Charter One cannot lose its right to show that individual employees were properly classified as exempt simply because they seek to aggregate their claims into a class action.

The Seventh Circuit inexplicably read *Dukes* as a *limitation* on the established principle that a procedural rule cannot abridge substantive defense rights, postulating that *Dukes* applied only to Rule 23(b)(2) actions for equitable relief. But *Dukes* drew no such distinction. The statutory defenses at issue there happened to concern equitable backpay relief, but that fact was irrelevant to the logic of the Court's decision. All that mattered was that Wal-Mart had a right by statute to contest the individual *Dukes* plaintiffs' claims—just as Charter One has a right by statute to contest individual ABM plaintiffs' claims.[5]

5. Further, there is no intrinsic difference between Title VII "equitable" backpay relief and other forms of monetary relief, such as the overtime pay that ABMs seek here. As this Court has held, under Title VII, backpay is equitable "only in the narrow sense" that it may be awarded by a court along with other equitable relief. *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 218 n.4 (2002). Tellingly, at least one of the cases that the Court GVR'd in light of *Dukes* involved plaintiffs who had sought class treatment to recover statutory overtime pay, as here. *See Chinese Daily News, Inc. v. Wang*, 132 S. Ct. 74 (2011).

The notion that a defendant's right to raise statutory defenses would somehow be weaker in a 23(b)(3) class action than in a 23(b)(2) class action reverses *Dukes'* own logic. *Dukes* held that claims for individual relief—such as backpay in that case or overtime pay here—belong in Rule 23(b)(3), precisely because they require "'complex individualized determinations.'" *Id.* at 2560 (quoting *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 415 (5th Cir. 1998)). It was in order to avoid such determinations that the Court considered whether backpay could be justified as relief that was merely incidental to the uniform class-wide declaratory and injunctive relief available under Rule 23(b)(2). The Court rejected that proposal because the employer's right to raise statutory defenses on an individual basis could not be abridged. If the employer has such a right in a 23(b)(2) action, surely it would have it in a 23(b)(3) action that already contemplates the necessity of individual proceedings beyond class-based proceedings.

The Seventh Circuit's holding that a defendant in a 23(b)(3) class action for individual monetary relief loses the right to raise individual statutory defenses also conflicts with the decisions of every other circuit that has reached the issue. These circuits have repeatedly held that the Rules Enabling Act applies to 23(b)(3) classes and prevents the class action device from abridging substantive defenses. *See, e.g., Sacred Heart Health Sys., Inc. v. Humana Military Healthcare Servs., Inc.*, 601 F.3d 1159, 1176 (11th Cir. 2010) (ratification and waiver affirmative defenses to breach of contract claims); *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 232 (2d Cir. 2008) (individual defenses to fraud claims), *abrogated in part on other grounds by Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639 (2008); *In re Fibreboard Corp.*,

893 F.2d 706, 709, 711-12 (5th Cir. 1990) (defenses against injury and causation in products liability action); *see also Sepulveda v. Wal-Mart Stores Inc.*, 275 F. App'x 672 (9th Cir. 2008) (affirming denial of 23(b)(3) certification of misclassification claims because statutory exemption defenses must be determined individually), *motion for reh'g granted and adhered to in relevant part*, 464 F. App'x. 636, 637 (9th Cir. 2011); *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 192-93 (3d Cir. 2001) (affirming denial of 23(b)(3) certification in non-misclassification case); *Windham v. Am. Brands, Inc.*, 565 F.2d 59, 66 (4th Cir. 1977) (affirming denial of 23(b)(3) certification in non-misclassification case). These courts recognized no difference regarding a defendant's right to raise all defenses among types of Rule 23 actions or the kind of relief sought.

The Seventh Circuit's decision is incompatible with these cases and will cause confusion and uncertainty about the standards for class certification. If the Court does not summarily reverse, it should at least grant the petition in order to resolve the conflict within the circuits and to clarify the meaning of *Dukes*.

II. THE SEVENTH CIRCUIT FAILED TO DETERMINE WHETHER DISSIMILARITIES AMONG CLASS MEMBERS PREVENTED THEM FROM PROVING THE EXISTENCE OF AN UNLAWFUL COMPANY-WIDE POLICY TO DENY OVERTIME.

In addition to erring in its approach to Petitioners' challenges to commonality, the Seventh Circuit misapprehended the nature of plaintiffs' burden to affirmatively prove commonality. Its failure to assess

the significance of dissimilarities among class members departed from the mandatory course laid out in *Dukes*. And it also created conflicts with decisions by the Ninth Circuit, which has consistently rejected attempts to certify classes in misclassification cases that turn on the individual facts of each employee's actual duties, and by the Fifth Circuit, which requires consideration of dissimilarities before a court can hold that a class satisfies Rule 23(a)(2).

A. The Court Failed To Assess Whether Dissimilarities In Job Experiences "Impede The Generation Of Common Answers," Contrary To *Dukes*.

The Seventh Circuit held that plaintiffs satisfied the Rule 23(a)(2) commonality requirement for both classes because they alleged that Charter One maintained an unlawful "unofficial policy" to deny overtime. App. 17a. In the court's eyes, that was the "glue" holding together members of both the ABM and the Hourly classes. *Id.* at 19a. The district court, however, which had issued its class certification order before *Dukes* was decided, did not conduct a "rigorous analysis" of the record evidence to determine whether there were dissimilarities within the plaintiff classes that would prevent proof of a common question. The Seventh Circuit repeated that error. Had it adopted the correct approach, it would have determined that the plaintiffs fell far short of establishing a necessary common question under *Dukes*.

Dukes held that a party seeking class certification must "affirmatively demonstrate" its compliance with Rule 23—including, in particular, by showing that there is "*in fact*" a common contention of law or fact to satisfy

Rule 23(a)(2). 131 S. Ct. at 2551 (emphasis in original). The district court's duty is to "probe behind the pleadings" and determine, after a "rigorous analysis," whether there is a common contention capable of class-wide resolution, where the answer to such contention would resolve an issue central to each class member's substantive claim. *Id.* In assessing commonality, *Dukes* stressed the importance of "focus[ing] on the dissimilarities between the putative class members . . . in order to determine (as Rule 23(a)(2) requires) whether there *is* [e]ven a single [common] question." *Id.* at 2256 (emphasis in original; citation omitted). The reason is that "[d]issimilarities within the proposed class are what have the potential to impede the generation of common answers." *Id.* at 2551 (citation and quotation omitted). In other words, if the answer to the supposed common question would not resolve an issue relevant to all of the putative class members, then there is no commonality.

The Seventh Circuit distinguished *Dukes* on two grounds. It reasoned that whereas the Title VII claims at issue in *Dukes* required proof of "individual discriminatory intent," the IMWL claims of plaintiffs here did not. App. 17a. It also noted that the size of the *Dukes* class was far larger than either of the classes at issue here. *Id.*

Neither of those distinctions is significant. The question is not whether plaintiffs' proof depends on individual *intent*, but whether it depends on individual *issues*.[6] To establish liability, plaintiffs must show that

6. Indeed, the *Dukes* plaintiffs claimed both intentional discrimination and disparate impact discrimination—the latter of which requires no proof of intent. 131 S. Ct. at 2548; *see also id.* at 2551 ("[T]he mere claim by employees of the same company that they have suffered a Title VII injury, or *even a disparate-impact*

each class member was eligible for overtime, actually earned overtime wages that were not paid, and did so with the employer's knowledge. They must also overcome any exemptions based on the duties class members actually performed and the way they actually spent their work time.[7] Those issues are as irreducibly individual as the central question in *Dukes*. The size of the class is also a red herring. *Dukes* did not lay down a rule for million-member classes only; the principles it announced flow from the text of Rule 23, which applies to all class actions in federal court alike. Fed. R. Civ. P. 1.

The Seventh Circuit also failed to perform a proper analysis of the dissimilarities within each class, despite *Dukes*' teaching that dissimilarities are a litmus test of commonality. Here, those dissimilarities were striking. Charter One submitted undisputed evidence that many ABM class members performed primarily exempt functions. For the Hourly class, Charter One submitted evidence that the company expected that its official overtime policy would be followed at all branches and that branch managers had no knowledge that Hourly employees were working off-the-clock. The Hourly class

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Title VII injury, gives no cause to believe that all their claims can productively be litigated at once.") (emphasis added).

7. It does not matter that some of these factors are technically affirmative defenses. "The 'defense' is in reality the 'mirror image' of plaintiffs' claim—plaintiffs claim they were legally entitled to overtime, and [the employer] counters that they were not." *Myers v. Hertz Corp.*, 624 F.3d 537, 551 (2d Cir. 2010) (claim for overtime wages under FLSA and New York law), *cert. denied*, 132 S. Ct. 368 (2011). Moreover, while the employer may bear the ultimate burden of proving the merits of any exemption argument, at the certification stage the plaintiffs have the obligation to show that they can satisfy Rule 23's requirements. *Id.*

members themselves admitted substantial differences in the overtime pay practices they experienced, depending on the branch and the branch manager—including many that were lawful. The court conceded that "there might be slight variations" in Charter One's overtime practices and in the exact duties that each ABM performs. App. 18a. It deemed those variations irrelevant, however, because both classes "maintain a common *claim*" that the company followed an unlawful policy. *Id.* (emphasis added).

The Seventh Circuit's reasoning is fatally flawed. The fact that the classes maintained a common claim does not solve the problem that the classes themselves were not homogeneous with respect to the way they were (or were not) affected by the alleged unlawful policy. The whole teaching of *Dukes* is that plaintiffs must *prove* commonality rather than simply allege that they were all treated similarly—especially where the evidence shows that some were *not* treated similarly. Put another way, the issue is not whether plaintiffs "maintain" a common claim, but whether they can *sustain* it with common evidence.

In *Dukes* itself, this Court concluded that despite the plaintiff class's allegation of a company-wide discriminatory policy, the class was unable to provide "convincing proof" that such a policy existed. 131 S. Ct. at 2556. Hence, certification failed. Key to that conclusion was the Court's rigorous analysis of the "anecdotal evidence" supplied by the plaintiffs, which it concluded was insufficient to show a "common mode" of exercising discretion at the company, even in combination with statistical evidence showing company-wide gender disparities. Respondents here did not even attempt any statistical evidence to bind their individual anecdotes. When the Seventh Circuit emphasized the importance of

plaintiffs' maintaining a common claim, it adhered to the approach that *Dukes* rejected. Its decision violates *Dukes* and therefore must be reversed.

B. The Court's Ruling Regarding The ABM Class Is Irreconcilable With Decisions Of The Ninth Circuit And The Fifth Circuit.

The Seventh Circuit's commonality ruling as to the ABM class also creates a conflict with the standards for certification in the Ninth and Fifth Circuits. The Ninth Circuit has consistently rejected Rule 23 certification in misclassification cases where the ultimate question is what class members actually do in their jobs on a daily basis, and where the only evidence of misclassification consists of individuals' dissimilar reports of their own job experiences. Likewise, the Fifth Circuit recently vacated certification where the district court failed to consider dissimilarities among the class members challenging Texas' treatment of children in state protective services. The panel's decision cannot be reconciled with these cases.

In *Vinole v. Countrywide Home Loans, Inc.*, the Ninth Circuit rejected certification of a class of home loan consultants who claimed they were misclassified as exempt under California wage-and-hour law, which exemptions are analogous to those in the IMWL and FLSA. 571 F.3d 935, 938 (9th Cir. 2009). Their employer categorized them as falling within the "outside salesperson" exemption. That exemption applies to any employee who works more than half his working time away from the employer's place of business, and entails a "primary duty" analysis like the executive and administrative exemptions at issue here. The consultants contended that they were primarily engaged in non-exempt activities inside the office, and

they submitted a number of declarations from individual employees in support of that contention. The employer submitted other declarations from employees with experiences that conflicted with those from the plaintiffs.

The Ninth Circuit upheld the decision of the district court that the plaintiffs could not satisfy the requirement of Rule 23(b)(3) to show that common issues predominated over individual issues. In light of the fact that the time individual consultants spent outside the office "varie[d] greatly," the court held that the determination of the plaintiffs' claims would require "a fact-intensive, individual analysis of each employee's exempt status." *Id.* at 938, 947. That problem could not be solved by any so-called "innovative procedural tools" such as "questionnaires, statistical or sampling evidence, representative testimony, separate judicial or administrative mini-proceedings, expert testimony, etc." *Id.* at 947. Given the irreducibly individual nature of the question at issue—how each employee spent his or her time on the job—none of those "tools" would help. Where there was no "standard policy governing how employees spend their time" that could serve as common evidence on the propriety of class-wide exemption, and there was evidence of variation in job duties, the exemption question was not a common one, and class certification was inappropriate. *Id.* at 946-47, 948.

Similarly, in *Marlo v. United Parcel Service, Inc.*, a misclassification case involving supervisors at UPS, the Ninth Circuit agreed with the district court that the plaintiffs had failed to provide "common proof" that class members' primary duty was performance of non-exempt work. 639 F.3d 942, 946 (9th Cir. 2011). As here, the executive and administrative exemptions

required individualized proof, and the totality of the evidence showed great variation in supervisors' actual duties. Neither an annual survey conducted by UPS, nor a telephone survey of some 160 supervisors, nor the declarations submitted by the parties could supply the needed common evidence. To the contrary, the "variations in job duties . . . appear to be a product of employees working at different facilities, under different managers, and with different customer bases." *Id.* at 949. Hence, the supervisors' qualifications for exemption was not a common question, and thus common issues could not predominate. *See also Delodder v. Aerotek Inc.*, No. 10-56755, 2012 WL 862819 (9th Cir. Mar. 15, 2012) (affirming denial of class certification where evidence showing diversity in plaintiff recruiters' actual work activities made class certification of their misclassification claims inappropriate).

That these cases were decided under Rule 23(b)(3)'s predominance requirement, rather than under Rule 23(a)(2)'s commonality requirement, does not lessen the conflict. *Vinole* and *Marlo* were decided before *Dukes* strengthened the commonality requirement, at a time when many courts evaluated the existence of common questions as part of the more demanding predominance requirement. In both cases, the reason that common issues did not predominate was that determining class members' actual job duties was held to present individual questions—in direct conflict with the decision below.

Indeed, the four-Justice partial dissent in *Dukes* argued that the majority's commonality standard "blend[ed]" courts' prior interpretation of Rule 23(a)(2) with the more demanding Rule 23(b)(3)—reasoning that the majority's examination of class members' differences

mimicked the traditional predominance test, and its focus on whether such differences could impede common adjudication duplicated the traditional superiority test. *See* 131 S. Ct. at 2565-66 (Ginsburg, J., concurring in part and dissenting in part). While disputing those characterizations, the *Dukes* majority agreed that examination of the differences among class members was an important factor in determining whether even one common question existed for purposes of Rule 23(a)(2). *See id.* at 2556. When deciding that misclassification plaintiffs could not satisfy Rule 23(b)(3), the Ninth Circuit's reliance on the same standards that *Dukes* ultimately held apply to Rule 23(a)(2) makes its decisions directly relevant to—and irreconcilable with—the decision below.

Likewise, the Fifth Circuit has held that under *Dukes,* dissimilarities within a class *must* be considered as part of the commonality analysis under Rule 23(a)(2). In *M.D. v. Perry*, the court considered whether a class consisting of 12,000 children in state protective services could sue as a 23(b)(2) class to challenge certain "systemic failures" in the administration of that agency. 675 F.3d 832, 835 (5th Cir. 2012). The court determined that some of the claims of the class required individualized inquiry—for example, whether the state's conduct in particular instances "shock[ed] the conscience." *Id.* at 843. The district court, however, failed to consider whether there were dissimilarities in the class that would prevent it from asserting a common question that would resolve an issue central to all claims. The Fifth Circuit vacated the class certification and remanded, directing the district court to consider any dissimilarities "with reference to the *elements and defenses* and requisite proof for each of the proposed class claims." *Id.* (emphasis added).

To be sure, there are misclassification cases that do satisfy commonality—in particular, where a detailed job description exists for a position that requires employees to perform primarily non-exempt duties, or there is a comprehensive task list that requires all employees in a given position to perform the same non-exempt job tasks every day. In such cases, the propriety of exemption can be decided "in one stroke" since the same evidence will determine the validity of the exemption defense for all class members at once. *See*, *e.g.*, *Damassia v. Duane Reade, Inc.*, 250 F.R.D. 152, 159-60 (S.D.N.Y. 2008) (class certification appropriate if duties "are largely defined by comprehensive corporate procedures and policies" that the parties agree apply uniformly); *cf. Morgan v. Family Dollar Stores, Inc.*, 551 F.3d 1233, 1248-51 (11th Cir. 2008) (FLSA collective certification appropriate where class members' common job description set forth detailed list of stock clerk, janitorial, and other non-exempt daily tasks). Tellingly, those are cases where there are by definition no material dissimilarities within the class, and thus no obstacles to commonality. But here, any common class policies do not provide a comprehensive list of required daily job duties; Respondents primarily rely on anecdotal testimony from a subset of the class who say their actual job duties deviated from and were inconsistent with their exempt job description; and a rigorous analysis of all the evidence reveals wide variation in class members' actual duties. In those circumstances, class certification is inappropriate. *Damassia*, 250 F.R.D. at 159-60.

The Court should review the Seventh Circuit's rejection of *Dukes*' required commonality analysis and resolve the conflict it creates with the Ninth and Fifth Circuits.

III. THE DECISION BELOW WILL EXACERBATE THE HEAVY BURDEN PLACED ON EMPLOYERS BY THE RISING TIDE OF WAGE-AND-HOUR LITIGATION.

This Court has long recognized the unique dangers posed by class action litigation. The burden imposed by the broad discovery necessary before a class trial, coupled with the risk of a potentially bankrupting judgment, combine to create an *in terrorem* effect that often forces defendants into settlements far out of proportion to the merits of the case. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 741-43 (1975); *see also* Fed. R. Civ. P. 23(f), Committee Notes on Rules, 1998 Amendment (certification "may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability"). Accordingly, the judicial act of certification is often "the most significant decision rendered . . . in these class-action proceedings," because it unleashes the substantial financial pressures inherent in that mechanism. *Deposit Guar. Nat'l Bank v. Roper,* 455 U.S. 326, 339 (1980).

Nowhere is this more true than in the wage-and-hour setting. To take just one set of statistics, over the past decade or so, only 0.25% of all wage-and-hour class actions in California proceeded to trial, with the overwhelming majority being resolved beforehand, primarily through settlement with the classes and their counsel.[8] Nationwide, employers paid some $1.77 billion to settle the 139 most

8. Michael D. Singer, *Settling Wage and Hour Class Actions in Light of Recent Legal Developments*, CA Labor & Employment Bulletin, 311, 311 (Sept. 2010).

recently resolved wage-and-hour class cases, for an average of $12.8 million per case.[9] As one witness recently testified before Congress, "when you look at the threat of these . . . lawsuits and you understand the risks of going to trial, decisions are made on a business level to make payments that are dramatic compromises."[10]

There is no doubt that these financial realities have contributed to the explosion in the number of wage-and-hour actions filed nationwide during the past decade. Between 2002 and 2012, the number of FLSA claims brought annually (either independently or in combination with state wage law claims) increased by more than 250%.[11] Between 2010 and 2011 alone, the single-year increase was more than 15%.[12] The lion's share of these filings have been class actions or FLSA-based collective

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9. *See* Dr. Denise Martin, *et al., Recent Trends in Wage and Hour Settlements,* NERA 2 (Mar. 22, 2011).

10. *The Fair Labor Standards Act: Is It Meeting the Needs of the Twenty-First Century Workplace?*, Hearing Before the Subcomm. on Workforce Protections of the H. Comm. on Educ. & the Workforce, 112th Cong. 2, 29 (2011) (statement of Richard L. Alfred).

11. In the 12-month period ending March 31, 2002, there were 2,035 filings. Administrative Office of the U.S. Courts ("AO"), *Federal Judicial Caseload Statistics* ("*FJCS*") 46 (2002). In the 12-month period ending March 31, 2012, there were 7,064 filings. Kevin P. McGowan, *FLSA Lawsuits Hit Record High in 2012, Continuing Recent Trend of Sharp Growth*, 145 Daily Lab. Rep., Jul. 27, 2012.

12. In the 12-month period ending March 31, 2010, there were 6,081 filings. AO, *FJCS* 48 (2010). For 2011, there were 7,006 filings. AO, *FJCS* 48 (2011).

actions. Indeed, since 2002, wage-and-hour aggregate actions filed in federal courts have been more numerous than any other type of class or collective action, far outnumbering Title VII class actions such as *Dukes*.[13] In 2011, a staggering *90%* of all state and federal statutory claims filed as class or collective actions involved wage-and-hour allegations.[14]

While *Dukes* restored some measure of balance to the class action process, the decision below undoes several of the basic safeguards that it erected. By allowing classes to be certified where plaintiffs allege an "unofficial" policy that did not affect all class members in the same manner, the decision hollows out the *Dukes* commonality standard. And eliminating the ability of employers to raise defenses on an individual basis not only prevents them from demonstrating dissimilarities at the certification stage, but literally disables their defenses at the merits stage.

This Court's review is needed to ensure that the requirements of Rule 23 are not jettisoned by the Seventh Circuit's approach, which reduces the obligations on plaintiff classes even as it eliminates defendants' abilities to defend themselves. Nowhere is that need as urgent as in the wage-and-hour setting, where a tidal wave of litigation is overwhelming so many of the Nation's employers.

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13. *See* Nancy Montwieler, *Wage-Hour Class Actions Surpassed EEO In Federal Courts Last Year, Survey Shows*, 56 Daily Lab. Rep., at C-1, Mar. 22, 2002.

14. Laurent Badoux, *Trends in Wage and Hour Litigation Over Unpaid Work Time and the Precautions Employers Should Take*, ADP, 2011, at 1.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

August 1, 2012

Respectfully submitted,

MARK W. BATTEN
PROSKAUER ROSE LLP
One International Place
Boston, MA 02110
(617) 526-9600

MARK D. HARRIS
Counsel of Record
ELISE BLOOM
PROSKAUER ROSE LLP
Eleven Times Square
New York, NY 10036
(212) 969-3000
mharris@proskauer.com

AMANDA D. HAVERSTICK
PROSKAUER ROSE LLP
One Newark Center
Newark, NJ 07102
(973) 274-3000

Counsel for Petitioners

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, DECIDED JANUARY 27, 2012

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 10-3848

SYNTHIA G. ROSS, JAMES KAPSA, and SHARON WELLS, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellees,

v.

RBS CITIZENS, N.A. d/b/a CHARTER ONE and CITIZENS FINANCIAL GROUP, INC.,

Defendants-Appellants.

April 12, 2011, Argued
January 27, 2012, Decided

JUDGES: Before KANNE and EVANS*, Circuit Judges and CLEVERT, District Judge.**

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* Circuit Judge Evans died on August 10, 2011, and did not participate in the decision of this case, which is being resolved by a quorum of the panel under 28 U.S.C. § 46(d).

** The Honorable Charles N. Clevert, Jr., United States District Court for the Eastern District of Wisconsin, sitting by designation.

Appendix A

KANNE, *Circuit Judge*. Synthia Ross, James Kapsa, and Sharon Wells[1] filed this class action against RBS Citizens, N.A. doing business as Charter One (a related entity, Citizens Financial Group, Inc. is also named but for simplicity, it need not be mentioned) for allegedly violating the Fair Labor Standards Act, 29 U.S.C. § 216(b), and the Illinois Minimum Wage Law ("IMWL"), 820 ILCS § 105/1 *et seq*. The central claim is that the plaintiffs and other similarly situated employees and former employees of Charter One were denied overtime pay to which they were entitled. For the IMWL claim, the district court granted the plaintiffs' motion to certify two classes. Charter One challenges the district court's class certification order solely on the ground that it did not comply with Rule 23(c)(1)(B) of the Federal Rules of Civil Procedure. Following oral argument, the Supreme Court clarified the Rule 23(a) commonality element in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011). Shortly thereafter, we requested the parties file statements of position addressing whether the class certification order satisfied *Dukes*. We now affirm.

I. BACKGROUND

Charter One operates more than 100 bank branches in Illinois. Most are traditional stand-alone branches, and the rest are small "in-store" branches usually located inside places like supermarkets. The branches are organized into seven regions, each with a regional manager who

1. Plaintiff Wells worked for Charter One in Ohio. She is not a party to this appeal because she has no claim against Charter One under the Illinois Minimum Wage Law.

reports to the state director. Employees at the Illinois branches are organized, for overtime purposes, into two categories: "exempt" and "non-exempt." The non-exempt category is comprised of employees who do more routine tasks--like tellers and personal bankers--all of whom are eligible to receive overtime pay when they work more than forty hours per week. The exempt category is comprised of branch managers and assistant branch managers ("ABMs"). These employees are ineligible to receive overtime pay.

Synthia Ross began working as a teller at a Chicago branch in 2000 and was later promoted to teller manager before her employment terminated in 2007. James Kapsa was hired as an ABM at a branch in St. Charles, Illinois, in 2007 and became acting branch manager for a short period of time before switching roles to become a personal banker. Kapsa spent time at several other Illinois branches before his employment terminated in 2009. Ross alleges that Charter One has an unofficial policy of denying overtime pay to its non-exempt employees by: (1) instructing them not to record hours worked per week over forty; (2) erasing or modifying recorded overtime hours; (3) giving them "comp time" instead of paying overtime; and (4) requiring them to perform work during unpaid breaks. Kapsa alleges that Charter One illegally denies ABMs overtime pay by misclassifying their positions as exempt even though ABMs spend the majority of their time performing non-exempt work. Charter One denies that any such unofficial policy exists, and further contends that ABMs are correctly classified as exempt employees.

Appendix A

Plaintiffs sought to certify two classes for the IMWL claim--the "Hourly" class and the "ABM" class. The proposed Hourly class definition is:

> All current and former non-exempt employees of [Charter One] who have worked at their Charter One retail branch locations in Illinois at any time during the last three years, who were subject to [Charter One's] unlawful compensation policies of failing to pay overtime compensation for all hours worked in excess of forty per work week.

The proposed ABM class definition is:

> All current and former Assistant Branch Manager employees of [Charter One] who have worked at their Charter One retail branch locations in Illinois at any time during the last three years, who were subject to [Charter One's] unlawful compensation policies of failing to pay overtime compensation for all hours worked in excess of forty per work week.

In a carefully reasoned seventeen-page opinion and order, Judge Lefkow found that the plaintiffs satisfied the four class-action prerequisites of Federal Rule of Civil Procedure 23(a), namely: numerosity, commonality, typicality, and adequacy of representation. She also found that the plaintiffs satisfied Rule 23(b)(3), which requires that "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 district court then certified both classes as opt-out classes under Rule 23(b)(3) based on the proposed class definitions.

Charter One filed this timely interlocutory appeal pursuant to Rule 23(f). On September 14, 2011, following oral argument, we asked the parties to file statements of position describing whether the certified classes satisfy the *Dukes* conception of commonality.

II. Analysis

Charter One appealed the district court's certification order, and this interlocutory appeal is now before us on (1) the very narrow issue of whether the district court judge's certification order complied with Rule 23(c)(1)(B)[2] and (2) whether the two certified classes satisfy the commonality prerequisite post-*Dukes*. We review class certification decisions for an abuse of discretion. *Ervin v. OS Rest. Servs., Inc.*, 632 F.3d 971, 976 (7th Cir. 2011). But, "[i]f a

2. In the guise of suggesting that a remand would be futile, Charter One devotes a fair portion of its briefs arguing that both certified classes are fundamentally unsuitable for class treatment. But, our November 30, 2010, order granting defendant's motion for leave to appeal pursuant to Rule 23(f) limited our review to "the sole issue of whether the district court complied with Rule 23(c)(1)(B)." Thus, we decline to review Charter One's suitability argument to the extent it does not directly respond to our September 14, 2011, order requesting position statements discussing whether *Dukes* alters the district court's commonality analysis.

district court's findings rest on an erroneous view of the law, they may be set aside on that basis." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 402, 110 S. Ct. 2447, 110 L. Ed. 2d 359 (1990) (quotation marks omitted); *Ervin*, 632 F.3d at 976.

A. Defining the Class and the Class Claims, Issues, or Defenses

Rule 23(c)(1)(B) was added to the Federal Rules in 2003. The Rule provides, "An order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g)." Fed. R. Civ. P. 23(c)(1)(B). Although we touched briefly on the importance of properly defining the class, claims, issues, and defenses in *Spano v. Boeing Co.*, 633 F.3d 574 (7th Cir. 2011),[3] the exact contours of Rule 23(c)(1)(B) is an issue of first impression for us. *See also Simer v. Rios*, 661 F.2d 655, 670 (7th Cir. 1981) (pre-subsection (c)(1)(B) case finding that proper class identification "alerts the court and parties to the burdens that such a process might entail" and "insures that those actually harmed by defendants' wrongful conduct will be the recipients of the relief eventually provided").

3. In *Spano*, referring to classes certified under Rule 23(b)(1), we wrote, "[T]he most important part of that order is the place where it defines the class. This is a vital step. Both the scope of the litigation and the ultimate *res judicata* effect of the final judgment depend on the class definition." 633 F.3d at 583-84 (citations omitted). We ultimately reversed the district court's certification order, and thus, had no need to fully interpret Rule 23(c)(1)(B).

Only the Third Circuit has fully addressed the meaning of Rule 23(c)(1)(B). *Wachtel ex rel. Jesse v. Guardian Life Ins. Co. of Am.*, 453 F.3d 179 (3d Cir. 2006).[4] The *Wachtel* court started its analysis, as it must, with the rule's text. *See Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450, 122 S. Ct. 941, 151 L. Ed. 2d 908 (2002). The Third Circuit reasoned:

> To "define" a thing or concept is "to state precisely or determinately [its boundaries]; to specify" or "[t]o frame or give a precise description" of a thing. Oxford English Dictionary (2d ed. 1989). According to the Rule, those things to be defined in a certification order include the "class *and* the class claims, issues, or defenses. . . ." Fed. R. Civ. P. 23(c)(1)(B) (emphasis added). The above elements occur in a conjunctive, undifferentiated list, indicating that the requirement to "define" the "class claims, issues or defenses" is identical to the requirement to define the "class" itself within a given certification order. *Id.* Furthermore, the use of the definite article "the" before "class claims, issues, or defenses" connotes comprehensiveness and specificity, rather than illustrative or partial treatment, in defining those aspects of class action certification.

4. The First Circuit, in dictum, adopted the reasoning in *Wachtel. In re Pharm. Indus. Average Wholesale Price Litig.*, 588 F.3d 24, 38-41 (1st Cir. 2009).

Wachtel, 453 F.3d at 185.

We find this interpretation persuasive, especially when read in conjunction with the history and purpose of the 2003 amendments to Rule 23. Although the Advisory Committee Notes accompanying these amendments do not specifically address subsection (c)(1)(B), the published report of the Standing Committee on Rules of Practice and Procedure introduced the proposed Rule 23 amendments by noting that the Rule 23(c)(1)(B) requirement "facilitates application of the interlocutory-appeal provision of Rule 23(f) by requiring that a court . . . define the class it is certifying and identify the class claims, issues, and defenses." Comm. on Rules of Practice and Procedure, Judicial Conference, *Report of the Judicial Conference*, 8, 11 (Sept. 2002). Without a precise definition of the class, claims, issues, and defenses, it would be exceedingly difficult for this court to review the propriety of a class certification order.

The Third Circuit's plain reading of the Rule is also supported by the Federal Rule's apparent move towards the creation of voluntary trial plans. In observing courts' increased use of class-action trial plans, the Advisory Committee noted that the "critical need is to determine how the case will be tried." Fed. R. Civ. P. Rule 23 advisory committee's note. The justification for a clear trial plan applies with equal force to subsection (c)(1)(B). In other words, there is a critical need to define the class, claims, issues, and defenses so the parties can adequately prepare for trial. *See also Simer*, 661 F.2d at 670.

Given the text, history, and purpose of Rule 23 and the importance we ascribed to precise class definitions in *Spano* and *Simer*, we agree with the Third Circuit's interpretation of subsection (c)(1)(B). *Wachtel*, 453 F.3d at 187-88. Therefore, we hold that the appropriate substantive inquiry for Rule 23(c)(1)(B) is "whether the precise parameters defining the class and a complete list of the claims, issues, or defenses to be treated on a class basis are readily discernible from the text either of the certification order itself or of an incorporated memorandum opinion." *Id.* at 185. This means that an order (or incorporated opinion) must include two elements: "(1) a readily discernible, clear, and precise statement of the parameters defining the class or classes to be certified, and (2) a readily discernible, clear, and complete list of the claims, issues or defenses to be treated on a class basis." *Id.* at 187-88. The question confronting us now is whether the district judge's certification order meets this standard. Although there might be some room for the district court to have drafted a clearer certification order, we find the trial court did not abuse its discretion in defining the class and the class claims, issues, or defenses for both the Hourly and ABM classes.

1. Defining the Class

Charter One first challenges whether the class was properly defined. The district court's certification order created an Hourly class and an ABM class both of which included employees and former employees "who were subject to defendants' *unlawful* compensation policies" (emphasis added). Charter One contends that the class

certification order creates a conditional class that hinges on whether its overtime policy was unlawful. To the defendant, the term "unlawful" suggests that the court must first determine liability before class membership can be determined. Without a precise class definition, Charter One warns that it is impossible to send notice to class members as required by Rule 23(c)(2)(B).

Although there is perhaps some minor ambiguity in the certification order, the district court's memorandum opinion accompanying the order eliminates any potential for confusion. In fact, Judge Lefkow concluded in her Rule 23(b)(3) predominance analysis that an unlawful policy could be inferred based on "the number of people making the same allegations across branches, managers, positions, and time frames." *Ross v. RBS Citizens, N.A.*, No. 09 CV 5695, 2010 U.S. Dist. LEXIS 107779, 2010 WL 3980113, at *6 (N.D. Ill. Oct. 8, 2010). For purposes of class certification, Judge Lefkow found that *all* current and former employees who have worked at an Illinois Charter One location within the last three years were subject to an unlawful overtime policy, and as such, qualify as class members. Thus, the certification order, when read in conjunction with the memorandum opinion, leaves no doubt about which employees and former employees constitute the class.

Furthermore, the potential harms of a poorly-defined class are not implicated by the district court's alleged lack of precision. For example, our review of the certification order and memorandum opinion was in no way diluted by an imprecise class definition. As we have already made

clear, we read Judge Lefkow's well-reasoned seventeen-page opinion and order to define both classes as consisting of all Hourly and ABM employees and former employees who have worked at Charter One during the previous three years. Similarly, the *Simer* justifications for a clear class definition do not come into play. Here, employees and former employees within the past three years are on notice of how their rights might be affected by litigating this dispute as a class because the plaintiffs' proposed notice mirrors the district court's certification order.[5] Ultimately, we find that the district court defined the class in a manner that is "readily discernible from the text either of the certification order itself or of an incorporated memorandum opinion." *Wachtel*, 453 F.3d at 185.

2. Defining the Class Claims, Issues, or Defenses

Charter One also asserts that the district court

5. The plaintiffs' Motion for Approval of Class Notices and the attached proposed notice for the Hourly class is directed to "current and former Charter One Illinois bankers, personal bankers, tellers, teller managers, head tellers and senior tellers working at Charter One's Illinois retail branch locations who were employed in this position from October 23, 2006 to the present." Further, the description of the Hourly claim specifically mentions four mechanisms Charter One allegedly employed in failing to pay overtime. Likewise, the proposed notice for the ABM class is directed to "all current and former Charter One Illinois assistant branch managers who were employed in this position from October 23, 2006 to the present." The description of the ABM lawsuit explains the claim as one of incorrect classification of ABMs as exempt personnel. Both class-notice documents leave little room for confusion among potential class members.

abused its discretion by identifying only two claims for trial instead of identifying a comprehensive list of claims, issues, or defenses. *See Wachtel*, 453 F.3d at 188 (affirming the district court's definition of the class, but remanding because the district court failed to identify a comprehensive list of claims, issues, or defenses). Charter One concedes that the district court properly identified two claims, but it identifies seven additional questions that the district court purportedly should have discussed as claims or issues.[6] Without a comprehensive list of issues, Charter One warns that the parties cannot adequately prepare for trial and potential class members cannot make informed decisions about whether to opt out of the class.

Like the district court's definition of the class, we find no abuse of discretion in how Judge Lefkow defined the class issues, claims, or defenses. To begin, Charter One's heavy reliance on *Wachtel* is misplaced. There, the Third Circuit chided the district court for using the Latin phrase *inter alia* ("among other things") because the very use of that phrase suggests that the list of common issues is intentionally incomplete. 453 F.3d at 189. The district court in this case did not make the same mistake. The *Wachtel* court also found the district court's treatment of the claims, issues, and defenses to be "unclear, intermittent, and incomplete," with nothing in the certification order that "evidences an intent to explicitly define which claims, issues, or defenses are to be treated on a class basis." *Id.*

6. For example, Charter One contends that it is unclear whether its actual or constructive knowledge of each alleged IMWL violation will be tried on a common basis or through some type of individual proceeding.

Here, the district court's opinion does not suffer from the same deficiencies as the Third Circuit found in *Wachtel*. Rather, the plaintiffs' claims that will be tried as a class are "readily discernible" from the district court's order and accompanying opinion. For example, Judge Lefkow clearly identified the Hourly class's claim that they were subject to a company policy that intentionally failed to pay lawfully earned overtime. *Ross*, 2010 U.S. Dist. LEXIS 107779, 2010 WL 3980113, at *6 ("[T]he common issue of whether a company-wide policy existed to deny overtime will predominate over the variations in methods used to accomplish the alleged policy."). The district court went so far as to identify four possible ways in which the plaintiffs claimed they had been forced to work off-the-clock, although Judge Lefkow appropriately left room for the introduction of other types of evidence illustrating the nature of Charter One's unlawful policy. *Id*. Explicit identification of this claim and four possible types of evidence is exactly the type of clarity and completeness required by Rule 23(c)(1)(B). Likewise, the district court clearly identified the ABM class's claim that their primary duty was to perform non-exempt work under an unlawful company policy. 2010 U.S. Dist. LEXIS 107779, [WL] at *7 ("[T]he relevant inquiry is what an ABM's primary duty is."). The district court also stated that the application of any IMWL exemptions (e.g., executive or administrative exemptions) should be tried as a class rather than through individualized inquiries. *Id*.

Ultimately, the claims identified by the district court are the *only* claims that require resolution at trial and the district court appropriately found that these claims will be

litigated as a class. The seven questions raised by Charter One are merely issues of trial strategy or proof, rather than overall claims or issues necessitating resolution. If we read Rule 23(c)(1)(B) to require a district court to list any possible method of proof, as Charter One appears to suggest, the length of such an order would border on the absurd. Here, the district court rightfully identified the two critical claims and the potential for an exemption defense, and found that it is all best litigated as a class.

B. Commonality

Following oral argument in this case, the Supreme Court clarified the Rule 23(a)(2) commonality prerequisite in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. at 2541. Shortly thereafter, we issued an order asking the parties to file brief statements of position describing whether the certified classes satisfy *Dukes*. We find that *Dukes* does not change the district court's commonality result, and as such find that the district court properly certified both classes.

The commonality prerequisite requires the plaintiff to show that "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). The Supreme Court has interpreted commonality as requiring the plaintiff to show that class members "have suffered the same injury," *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 157, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982); *Dukes*, 131 S. Ct. at 2551, but notably "[t]his does not mean merely that they have all suffered a violation of the same provision of law," *Dukes*, 131 S. Ct. at 2551. "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 litigation." *Id.* (emphasis in original). To satisfy the commonality element, it is enough for plaintiffs to present just one common claim. *Id.* at 2556.

In *Dukes*, a nationwide class of 1.5 million current and former female employees from 3,400 stores sued Wal-Mart, alleging that the company engaged in a pattern or practice of gender discrimination in violation of Title VII of the Civil Rights Act of 1964. *Id.* at 2547. A Title VII disparate-treatment suit of course requires that plaintiffs show proof of discriminatory motive or intent. *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335-36, 97 S. Ct. 1843, 52 L. Ed. 2d 396 (1977); *Dukes*, 131 S. Ct. at 2552 ("[I]n resolving an individual's Title VII claim, the crux of the inquiry is the reason for a particular employment decision."). In *Dukes*, the Court reversed the district court's certification order on the grounds that the plaintiff could not offer "significant proof that Wal-Mart operated under a general policy of discrimination." *Dukes*, 131 S. Ct. at 2553, 2556 (a policy allowing discretion "is just the opposite of a uniform employment practice that would provide the commonality needed for a class action") (quotation marks omitted). In reversing class certification, the Court found that there was no unifying motive theory holding together "literally millions of employment decisions." *Id.* at 2552.

In the present case, Charter One attempts to find significant similarities with *Dukes*. Charter One's principal

contention is that both classes' claims require the same significant and time-consuming individualized liability inquiries that the Supreme Court found problematic in *Dukes*. For the Hourly class, Charter One argues that there are at least four ways in which plaintiffs were denied overtime, and sifting through such individualized evidence should preclude a commonality finding. Similarly for the ABM class, Charter One contends that a factfinder would be required to individually determine whether each ABM performed non-exempt duties.[7] The defendant makes one additional argument regarding the ABM class. Namely, Charter One branch managers are vested with the same kind of discretion as the store managers in *Dukes* and such discretion limits the ability of the court to find common claims.

Despite Charter One's best efforts to fit the present case into the *Dukes* mold, there are significant distinctions. Perhaps the most important distinction is the size of the class and the type of proof the *Dukes* plaintiffs were

7. Misreading *Dukes*, Charter One also contends that it has a statutory right to present its affirmative exemption defenses on an individualized basis, and thus, there is no commonality. However, the *Dukes* passage the defendant cites in support of its argument discusses how the Ninth Circuit improperly certified a Rule 23(b)(2) class that sought equitable relief. In so ruling, the Court struck down the Ninth Circuit's attempt to circumvent 42 U.S.C. § 2000e-5(g)(2)(A) by holding that Wal-Mart had a statutory right to avoid *equitable* damages by showing that "it took an adverse employment action for any reason other than discrimination." *Dukes*, 131 S. Ct. at 2560-61 (emphasis added). Charter One has no such statutory right because both classes are seeking only monetary relief through a Rule 23(b)(3) class.

required to offer. *See, e.g., Youngblood v. Family Dollar Stores, Inc.*, No. 09 Civ. 3176 (RMB), 2011 U.S. Dist. LEXIS 115389, 2011 WL 4597555, at *4 (S.D.N.Y. Oct. 4, 2011) (distinguishing Dukes on the ground that New York's version of the FLSA does not require "an examination of the subjective intent behind millions of individual employment decisions"); *Bouaphakeo v. Tyson Foods, Inc.*, No. 5:07-cv-04009-JAJ, 2011 U.S. Dist. LEXIS 95814, 2011 WL 3793962, at *2 (N.D. Iowa Aug. 25, 2011) (reasoning that because "*Dukes* was a Title VII case, the focus of the inquiry in resolving each individual's claim was 'the reason for [the] particular employment decision'"). In *Dukes*, 1.5 million nationwide claimants were required to prove that thousands of store managers had the same discriminatory intent in preferring men over women for promotions and pay raises. Here, there are 1,129 Hourly class members and substantially fewer ABMs, all of whom are based only in Illinois. The plaintiffs' IMWL claim requires no proof of individual discriminatory intent. Instead, the plaintiffs' theory, supported by ninety-six Hourly class declarations and twenty-four ABM class declarations, is that Charter One enforced an unofficial policy in Illinois denying certain employees overtime pay that was lawfully due. All ninety-six Hourly declarations specifically allege that the declarant had been denied lawfully due overtime compensation. Eighty-nine declarations further allege that Charter One had a policy instructing the declarant not to record earned overtime. Meanwhile, the majority of the ABM declarants assert that they primarily performed non-exempt work. Although there might be slight variations in how Charter One enforced its overtime policy, both classes maintain a common claim

that Charter One broadly enforced an unlawful policy denying employees earned-overtime compensation. This unofficial policy is the common answer that potentially drives the resolution of this litigation. *Dukes*, 131 S. Ct. at 2551.

Appellant's final criticism of the ABM class equating Wal-Mart managers' promotion discretion with the limited discretion vested in Charter One branch managers is misplaced. Specifically, the plaintiffs in *Dukes* alleged that the discretion given to Wal-Mart managers is what caused female employees to experience disparate treatment. *Id.* at 2548. The Supreme Court was clearly unable to infer a common claim from an allegation that on its face suggested store managers exercised significant discretion. *Id.* at 2554. Here, the ABM class contends, and is supported in part by twenty-four ABM declarations, that a company-wide policy in Illinois requires ABMs to perform non-exempt work in violation of the IMWL. Although there again might be slight variations in the exact duties that each ABM performs from branch to branch, the ABMs maintain a common claim that unofficial company policy compelled them to perform duties for which they should have been entitled to collect overtime. Contrary to Charter One's assertion, an individualized assessment of each ABM's job duties is not relevant to a claim that an unlawful company-wide policy exists to deny ABMs overtime pay.

Ultimately, the glue holding together the Hourly and ABM classes is based on the common question of whether

an unlawful overtime policy prevented employees from collecting lawfully earned overtime compensation. For that reason, we find that the district court's certification order satisfies the commonality prerequisite and the district court properly granted class certification.

III. Conclusion

For the foregoing reasons, we AFFIRM the district court's order certifying an Hourly and ABM class for the plaintiffs' IMWL claims.

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION, FILED OCTOBER 8, 2010

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

No. 09 CV 5695

SYNTHIA G. ROSS, JAMES KAPSA, and SHARON WELLS, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

RBS CITIZENS, N.A. d/b/a CHARTER ONE and CITIZENS FINANCIAL GROUP, INC.,

Defendants.

October 8, 2010, Decided
October 8, 2010, Filed

JUDGES: JOAN HUMPHREY LEFKOW, United States District Judge.

OPINION BY: JOAN HUMPHREY LEFKOW

Appendix B

OPINION AND ORDER

Plaintiffs, Synthia Ross, James Kapsa, and Sharon Wells, filed this putative class/collective action against RBS Citizens, N.A., doing business as Charter One Bank ("Charter One"), and Citizens Financial Group, Inc. (collectively, "defendants") for violation of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 216(b), and the Illinois Minimum Wage Law ("IMWL"), 820 Ill. Comp. Stat. § 105/1 et seq. Before the court is plaintiffs' motion for class certification of the IMWL claim. The court's jurisdiction of the FLSA claims rests on 29 U.S.C. § 216(b) and of the IMWL claim on 28 U.S.C. § 1367. For the following reasons, the motion [#68] is granted.

BACKGROUND

Charter One has approximately 102 banking branches in Illinois, of which eighty-eight are traditional branches and fourteen are in-store branches. Traditional branches are freestanding operations. In-store branches are housed inside another retail establishment, such as a supermarket. These branches are organized into seven regions (six traditional regions, one in-store region), each with a regional manager. Each regional manager reports to a state director. Employees at Charter One's Illinois branches fall into the following nonexempt positions: teller, teller manager, head teller, senior teller, personal banker,

and banker (collectively, "nonexempt employees").[1] These employees are entitled to receive overtime pay. Charter One also employs assistant branch managers ("ABMs") and branch managers at each branch who are classified as exempt and not paid overtime.

Ross worked as a bank teller from 2000 to 2005 at the Charter One Beverly Branch, a traditional branch, at 1367 W. 103rd St., Chicago, Illinois. She was promoted to teller manager in 2005. Ross was terminated from this position on February 10, 2007 due to issues she had with balancing currency. Ross testified that these issues arose because she was distracted by a robbery attempt that had occurred several weeks prior to her termination.

Kapsa began his employment with Charter One as an ABM in March 2006 at an in-store Charter One branch located at 2732 E. Main St., St. Charles, Illinois. For approximately three to four months of this time, Kapsa was the acting branch manager, as the previous branch manager departed and was not immediately replaced. In February 2007, Kapsa switched to part-time employment as a personal banker at the St. Charles location, working approximately one to two days a week with no overtime involved. In April 2008, he resumed full-time employment. In April 2009, he transferred to Charter One's in-store branch at 1290 E. Chicago Ave., Naperville, Illinois. Kapsa also spent short periods of time

1. These roles (and titles) may differ depending on whether an individual is employed at a traditional or in-store branch. Traditional branches reportedly employ teller managers, tellers, and bankers, while in-store branches only employ bankers, although these bankers also perform teller functions.

at in-store branches located at 3115 111th St., Naperville, Illinois, and 12690 S. State Route 59, Plainfield, Illinois, where he occasionally filled in when those branches were short-staffed. In September 2009, Kapsa was terminated for incentive fraud.

Plaintiffs seek to certify two classes, one of nonexempt employees ("the hourly class"), represented by both Ross and Kapsa, and the other of ABMs ("the ABM class"), represented by Kapsa. The proposed definition of the hourly class is:

> All current and former non-exempt employees of Defendants who have worked at their Charter One retail branch locations in Illinois at any time during the last three years, who were subject to Defendants' unlawful compensation policies of failing to pay overtime compensation for all hours worked in excess of forty per work week.

Third Am. Compl. P 38. Plaintiffs allege that Charter One has a policy of denying overtime pay to its Illinois nonexempt employees for off the clock work in violation of the IMWL. Specifically, they allege that (1) Charter One instructs its nonexempt employees to record hours worked over forty per week, (2) Charter One occasionally erases or modifies nonexempt employees' recorded overtime hours, (3) Charter One provides comp time to nonexempt employees instead of paying overtime, and (4) Charter One requires its nonexempt employees to perform work during unpaid breaks. Plaintiffs have submitted ninety-six statements of potential hourly class members who

worked at eighty-five branches under fifty-three different managers. All claim to have been denied overtime during their employment and over eighty-six percent of these individuals indicated that the allegations above applied to their experiences.

The proposed definition of the ABM class is:

> All current and former Assistant Branch Manager employees of Defendants who have worked at their Charter One retail branch locations in Illinois at any time during the last three years, who were subject to Defendants' unlawful compensation policies of failing to pay overtime compensation for all hours worked in excess of forty per work week.

Third Am. Compl. P 72. Kapsa alleges that Charter One misclassified these employees in that they spent the majority of their time performing nonexempt work, which would entitle them to overtime pay. Kapsa has submitted twenty-four statements from ABMs that detail the type of work they typically engaged in. The overwhelming majority indicate that over seventy-five percent of their time was spent on nonexempt work.

LEGAL STANDARD

A party seeking to certify a class action must meet two conditions. First, the movant must show the putative class satisfies the four prerequisites of Rule 23(a): (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy of representation. Fed. R. Civ. P. 23(a); *Oshana v. Coca-Cola Co.*, 472 F.3d 506, 513 (7th Cir. 2006); *Rosario v. Livaditis*,

963 F.2d 1013, 1017 (7th Cir. 1992). Second, the action must qualify under at least one of the three subsections of Rule 23(b). Fed. R. Civ. P. 23(b); *Rosario*, 963 F.2d at 1017; *Hardin v. Harshbarger*, 814 F. Supp. 703, 706 (N.D. Ill. 1993). Here, plaintiffs seek certification under Rule 23(b)(3), which requires a finding that "questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3).

Courts retain broad discretion in determining whether a proposed class meets the Rule 23 certification requirements. *Keele v. Wexler*, 149 F.3d 589, 592 (7th Cir. 1998). While the requirements of Rule 23 should be liberally construed to support the policy favoring the maintenance of class actions, *King v. Kansas City S. Indus.*, 519 F.2d 20, 25-26 (7th Cir. 1975), the moving party bears the burden of showing that the requirements for class certification have been met. *Hardin*, 814 F. Supp. at 706.

DISCUSSION

I. Rule 23(a) Requirements[2]

A. Commonality

For the commonality requirement to be met, "there must exist 'questions of law or fact common to the class.'"

2. Defendants do not challenge that plaintiffs have satisfied the numerosity requirement.

Keele, 149 F.3d at 594; Fed. R. Civ. P. 23(a)(2). This has been characterized as a "low hurdle easily surmounted," *Scholes v. Stone, McGuire & Benjamin*, 143 F.R.D. 181, 185 (N.D. Ill. 1992) (citation omitted) (internal quotation marks omitted), and "[a] common nucleus of operative fact is usually enough." *Keele*, 149 F.3d at 594 (citation omitted) (internal quotation marks omitted); *Rosario*, 963 F.2d at 1017-18; *see also Tylka v. Gerber Prods. Co.*, 178 F.R.D. 493, 496 (N.D. Ill. 1998) (noting that if at least one question of law or fact is common to the class, then commonality is satisfied). A common nucleus exists where the class members' claims hinge on the same conduct of the defendants. *Tylka*, 178 F.R.D. at 496.

Plaintiffs allege that members of the hourly class were subjected to the same policy of failure to pay for overtime work. A policy applicable to a class of employees is enough to establish a common question of fact or law. *See Barragan v. Evanger's Dog & Cat Food Co.*, 259 F.R.D. 330, 334 (N.D. Ill. 2009) (alleged denial of overtime pay sufficed to establish a common issue of law or fact). Similarly, whether the ABM class was misclassified as exempt is a question common to members of that class.

B. Typicality

To meet the typicality requirement, the named plaintiffs' claims or defenses must be typical of the class. Fed. R. Civ. P. 23(a)(3); *Keele*, 149 F.3d at 594. The typicality requirement focuses on the class representatives; indeed, "[a] plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives rise to

the claims of other class members and his or her claims are based on the same legal theory." *Keele*, 149 F.3d at 595 (citations omitted) (internal quotation marks omitted); *De La Fuente v. Stokely-Van Camp, Inc.*, 713 F.2d 225, 232 (7th Cir. 1983) (citations omitted) (internal quotation marks omitted). The existence of defenses against certain class members does not defeat typicality. *Wagner v. NutraSweet Co.*, 95 F.3d 527, 534 (7th Cir. 1996). "Typical does not mean identical, and the typicality requirement is liberally construed." *Gaspar v. Linvatec Corp.*, 167 F.R.D. 51, 57 (N.D. Ill. 1996).

Defendants argue that Kapsa is not typical of the ABM class because he worked only at an in-store branch that was consistently understaffed. While there may be some differences between an ABM's job duties at in-store and traditional branches,[3] factual distinctions between the named plaintiffs' claims and those of other class members do not necessarily undermine typicality. *De La Fuente*, 713 F.2d at 232; *Owner-Operator Indep. Ass'n, Inc. v. Allied Van Lines, Inc.*, 231 F.R.D. 280, 282 (N.D. Ill. 2005) (stating that the typicality requirement presents a "low hurdle . . . , which requires neither complete coextensivity or even substantial identity of claims"). The legal theory on which Kapsa's and the ABM class's claim is based is the same. Their claim arises out of the same

3. The job descriptions and job performance standards are the same for ABMs at in-store and traditional branches, however. While the application of these standards may differ between in-store and traditional branches, the use of them across the board undercuts defendants' claim that Kapsa is atypical of the class he seeks to represent.

allegedly standardized unlawful conduct, Charter One's misclassification of them as exempt employees. This is sufficient to satisfy the typicality requirement.[4]

Similarly, Kapsa's and Ross's claims are typical of the hourly class as they are based on the same legal theory, a failure to pay wages as required for work that was performed off the clock. While Ross's branch may have been busier than others and her duties heavier than those of a teller or banker, these factual distinctions are not enough to make her claim atypical. *See Oshana*, 472 F.3d at 514 (typicality met despite "some factual variations" between named plaintiffs' claims and those of other class members). As discussed below with respect to adequacy, the fact that Ross and Kapsa are no longer Charter One employees does not bar certification. Finally, any potential defenses defendants may have against these particular plaintiffs, such as tardiness, do not undermine typicality. *See Wagner*, 95 F.3d at 534 ("Typicality under Rule 23(a)(3) should be determined with reference to the company's actions, not with respect to particularized defenses it might have against certain class members.").

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4. Defendants also argue that, because Kapsa does not consider himself a representative of ABMs at traditional branches, his claim is not typical. This argument, however, is belied by the record. Kapsa did not state that he represented only in-store ABMs, but rather just that he only has personal knowledge of in-store branch policies. A class representative need only have a "limited understanding of" the claim. *Miller v. Material Scis. Corp.*, No. 97 C 2450, 1999 U.S. Dist. LEXIS 10628, 1999 WL 495490, at *4 (N.D. Ill. June 28, 1999).

C. Adequacy of Representation

To meet Rule 23's adequacy of representation requirement, "the representative must be able to 'fairly and adequately protect the interests of the class.'" *Keele*, 149 F.3d at 594 (quoting Fed. R. Civ. P. 23(a)(4)). The requirement has "two parts: 'the adequacy of the named plaintiff's counsel, and the adequacy of representation provided in protecting the different, separate, and distinct interest' of the class members." *Retired Chi. Police Ass'n*, 7 F.3d at 598 (quoting *Sec'y of Labor v. Fitzsimmons*, 805 F.2d 682, 697 (7th Cir. 1986) (en banc)). The burden of demonstrating the class representative's adequacy is not heavy. *Sledge v. Sands*, 182 F.R.D. 255, 259 (N.D. Ill. 1998).

Defendants do not contest that plaintiffs' counsel is adequate. Rather, they challenge Ross's and Kapsa's ability to represent the class due to their alleged lack of credibility and integrity. Because the lead plaintiffs will act as fiduciaries for the absent plaintiffs, the court can examine their integrity and credibility in determining whether they are adequate class representatives. *Searcy v. eFunds Corp.*, No. 08 C 985, 2010 U.S. Dist. LEXIS 31627, 2010 WL 1337684 (N.D. Ill. Mar. 31, 2010) ("The honesty and credibility of a class representative is a relevant consideration when performing the adequacy inquiry 'because an untrustworthy plaintiff could reduce the likelihood of prevailing on the class claims.'" (citation omitted)); *Kaplan v. Pomerantz*, 132 F.R.D. 504, 508-510 (N.D. Ill.1990). "A class is not fairly and adequately represented if class members have antagonistic or conflicting claims," *Rosario*, 963 F.2d at 1018 (citation

omitted), and a plaintiff with credibility problems may be considered to have interests antagonistic to the class. *Kaplan*, 132 F.R.D. at 510. Credibility problems do not automatically render a proposed class representative inadequate, however, and some courts in this district have found credibility to be irrelevant. *See Levie v. Sears, Roebuck & Co.*, 496 F. Supp. 2d 944, 950 (N.D. Ill. 2007) ("Credibility is not a requirement of a class representative, and whether or not a plaintiff is credible is irrelevant to that person's ability to be a class representative."); *Streeter v. Sheriff of Cook Cnty*, 256 F.R.D. 609, 613 (N.D. Ill. 2009); *Phipps v. Sheriff of Cook Cnty.*, 249 F.R.D. 298, 301 (N.D. Ill. 2008) (citing *Levie*). Where credibility has been considered, courts have generally found inadequacy only where the representative's credibility is questioned on issues directly relevant to the litigation or there are confirmed examples of dishonesty, such as a criminal conviction for fraud. *See, e.g.*, *Brown v. Yellow Transp., Inc.*, No. 08 C 5908, 2009 U.S. Dist. LEXIS 94693, 2009 WL 3270791, at *3 (N.D. Ill. Oct. 9, 2009); *Roe v. Bridgestone Corp.*, 257 F.R.D. 159, 168-69 (S.D. Ind. 2009) (collecting cases); *Stanich v. Travelers Indem. Co.*, 259 F.R.D. 294, 312-315 (N.D. Ohio 2009); *Lapin v. Goldman Sachs & Co.*, 254 F.R.D. 168, 177 (S.D.N.Y. 2008) ("[O]nly when attacks on the credibility of the representative party are so sharp as to jeopardize the interests of absent class members should such attacks render a putative class representative inadequate." (citation omitted) (internal quotation marks omitted)).

Both Kapsa and Ross were terminated from their positions with Charter One for integrity violations. Ross had balancing problems several times in the month prior to

her termination. The court declines to place much weight on this, however. Ross testified that she was a victim of an attempted robbery while at work several weeks prior to her termination, which resulted in her having difficulty concentrating while in that environment. The fact that she had worked for Charter One (or its predecessors) for more than six years apparently without similar incident supports her explanation and undermines defendants' contention that she is an inadequate class representative. Moreover, while the reason for her termination raises a credibility issue, it does not directly bear on the issues in this litigation. Kapsa was terminated for engaging in incentive fraud, specifically, opening shell accounts so as to accumulate points toward incentives. Kapsa denies having done so. In light of a lack of documentary evidence regarding the number of hours worked that Kapsa claims not to have been paid for, defendants argue that the reason for his termination bears directly on whether Kapsa's testimony can be trusted. They posit that a willingness to open shell accounts to acquire incentives correlates to a willingness to provide false testimony if it would lead to greater monetary gain. Such a generalized and speculative credibility attack, particularly when considered against the many statements plaintiffs have submitted that support Kapsa's testimony, is not "so sharp that they jeopardize the interests of absent class members."[5] *Lapin*, 254 F.R.D. at 177. Similarly, Kapsa's and Ross's purported

5. Whether Kapsa's actions were unethical is not a question the court can answer on this record. Defendants have omitted portions of Kapsa's deposition testimony, making it difficult for the court to determine whether he gave an explanation for the conduct underlying his termination on top of his general disagreement that he engaged in incentive fraud.

false or contradictory testimony that defendants cite to does not warrant denial of class certification. Although some of the examples cited are disconcerting, many are taken out of context or simply clarify or further expand upon previous statements.

Defendants' challenges to the extent of Kapsa's and Ross's interest in the litigation also fail. "A class representative . . . needs to have only a limited understanding of and a minimal interest in the litigation, as well as a basic understanding of the class composition." *Miller v. Material Scis. Corp.*, No. 97 C 2450, 1999 U.S. Dist. LEXIS 10628, 1999 WL 495490, at *4 (N.D. Ill. June 28, 1999). Ross and Kapsa meet this requirement. The fact that Ross is seeking compensation for overtime she was not paid is not surprising; most plaintiffs generally seek monetary damages, particularly in a case alleging failure to pay overtime, as in this one. While Ross testified that she would not accept a settlement if the class received money but she did not, this does not mean she would sell out the class for her own benefit but rather that she would seek some sort of benefit for both the class and herself, which is natural in the context of a class action. *See Rand v. Monsanto Co.*, 926 F.2d 596, 599 (7th Cir. 1991) ("Class actions assemble small claims--usually too small to be worth litigating separately, but repaying the effort in the aggregate. A representative plaintiff gains nothing from the collective proceeding."). Ross did not testify that she was unaware of the contours of the class she seeks to represent, only that she seeks to represent current employees to the extent they are subject to the same policies. *Cf. Massengill v. Bd. of Educ., Antioch Cmty. High Sch.*, 88 F.R.D. 181, 186 (N.D. Ill. 1980) (proposed

class representative was inadequate where, among other things, she was unaware of the composition of the class). That Kapsa and Ross no longer work at Charter One does not defeat class certification nor necessarily imply that they would not seek changes to Charter One's policies and procedures, and their submitted testimony is not to the contrary.[6] Kapsa and Ross do not have to be the ideal class representatives. They need not be perfect, only adequate. *See Stanich*, 259 F.R.D. at 318. On the record before it, the court finds them to be so.

II. Rule 23(b)(3) Requirements

Rule 23(b)(3) provides that a class can be maintained if "questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and . . . a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3). To determine whether predominance and superiority are satisfied, courts examine "the substantive elements of plaintiffs' claims, the proof necessary for those elements, and the manageability of trial on those issues." *Reed v. Advocate Health Care*, 268 F.R.D. 573, 2009 WL 3146999, at *4 (N.D. Ill. 2009) (citing *Simer v. Rios*, 661 F.2d 655, 672-73 (7th Cir. 1981)).

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6. Although Ross testified that any such changes made would not affect her and she personally sought money, this is not an admission that she would not advocate for such changes. Ross has no disincentive to ask for such relief on behalf of the class and counsel is undoubtedly aware of Ross's responsibility to adequately represent the class with respect to injunctive relief.

Appendix B

A. Predominance

"Although related to Rule 23(a)'s commonality requirement, 'the predominance inquiry is far more demanding.' To satisfy this aspect of Rule 23(b)(3), 'the plaintiff must show that common issues not only exist but outweigh the individual questions. The common questions must be central to all claims.'" *Pavone v. Aegis Lending Corp.*, No. 05-c-1529, 2006 U.S. Dist. LEXIS 62157, 2006 WL 2536632, at *4 (N.D. Ill. Aug. 31, 2006) (quoting, *inter alia*, *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623-24, 117 S. Ct. 2231, 2250, 138 L. Ed. 2d 689 (1997)). Plaintiffs need only show that common proof will predominate with respect to their claims. *Driver v. AppleIllinois, LLC*, 265 F.R.D. 293, 311 (N.D. Ill. 2010).

1. The Hourly Class

Although Charter One officially had a policy stating that all hours worked would be compensated, plaintiffs argue that an unofficial policy existed to deny the hourly class of overtime. They claim this policy was dictated by upper management and was implemented in several ways, including telling employees that they could not record overtime hours, altering time sheets, instructing employees to alter their timesheets to remove overtime hours, offering future time off in lieu of overtime pay, and automatically deducting time for breaks not taken. Plaintiffs have submitted sworn statements from ninety-six potential class members, who together worked at eighty-five of Charter One's branches (approximately eighty-three percent of Charter One's Illinois branches) under fifty-three different managers. All respondents

stated they were denied overtime, with over eighty-five percent indicating this occurred in the ways enumerated above. Seventy-eight percent reported that managers relayed that they had been instructed not to pay overtime.[7] Time records also demonstrate significant modifications to employees' recorded time.[8] Defendants argue that determining whether overtime was denied would require individualized, or at least branch by branch, manager by manager, determinations, citing to deposition testimony of some of the individuals who submitted statements and their own submitted declarations that undercut claims of unpaid overtime. The court concludes, however, that the number of people making the same allegations across branches, managers, positions, and time frames has reached a point from which it may be inferred that the common issue of whether a company-wide policy existed to deny overtime will predominate over the variations in methods used to accomplish the alleged policy. The complexity of proof is a problem plaintiffs will have to address in presenting their case on the merits but it does not negate predominance of the central, common issue.

Defendants further argue that to prove liability individual inquiries will be required as to whether an individual recorded all time worked each week and, if

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7. The court understands defendants' point that statements calling for yes or no answers have limitations. Nonetheless, the statements are remarkably uniform in their support of plaintiffs' theory.

8. Analysis of these modifications will be necessary to determine whether they reveal a standard practice of removing overtime hours.

not, the reason why; whether an individual worked over forty hours in that week and, if so, whether that time was paid; whether an individual's manager instructed the individual to work overtime or at least knew that overtime was being worked; whether an individual's manager removed overtime that was recorded and, if so, whether the change was lawful; and whether the amount of overtime that was not paid was *de minimis.* These inquiries, however, are more relevant to a determination of an individual's damages. Courts have not traditionally found individualized questions of damages to prevent class certification. *See Kohen v. Pac. Inv. Mgmt. Co.*, 244 F.R.D. 469, 476 (N.D. Ill. 2007) ("Inquiry into matters of damage is not ordinarily made at the class certification stage."), *aff'd*, 571 F.3d 672, 677 (7th Cir. 2010); *Katz v. Comdisco, Inc.*, 117 F.R.D. 403, 412 (N.D. Ill. 1987); *see also Arreola v. Godinez*, 546 F.3d 788, 801 (7th Cir. 2008) ("Although the extent of each class member's personal damages might vary, district judges can devise solutions to address that problem if there are substantial common issues that outweigh the single variable of damages amounts."). To the extent such inquiries will be necessary to a determination of liability, solutions can be devised to make the inquiry fair, efficient, and manageable.

2. The ABM Class

Defendants argue that Kapsa has not presented any common method of establishing that the ABM class was misclassified as exempt and that making such a determination would involve an individualized assessment of the way each ABM spends his or her time. As another court in this district noted, however, "the criteria used

to determine whether employees can be classified as [executive or] administrative workers do not require an individualized employee-by-employee inquiry."[9] *AON Corp. Wage & Hour Emp't Practices Litig.*, No. 08 C 5802, 2010 U.S. Dist. LEXIS 34888, 2010 WL 1433314, at *7 (N.D. Ill. Apr. 8, 2010). In evaluating whether an employee qualifies for the executive or administrative exemptions, the court looks to what the employee's "primary duty" is. 29 C.F.R. §§ 541.100, 541.200. "The use of the term 'primary duty' implies that the applicability of the [executive or] administrative exception focuses on the core work functions of the employees at issue and does not require a detailed individualized inquiry as to the day-to-day tasks performed." *AON Corp.*, 2010 U.S. Dist. LEXIS 34888, 2010 WL 1433314, at *7. In addition to their reliance on the ABMs' uniform job description and performance standards,[10] plaintiffs have submitted

9. The court assumes that ABMs are classified as exempt under the executive or administrative exemptions. The standards used to determine if these exemptions to the IMWL's overtime provisions apply are the same as those used in the FLSA context. 820 Ill. Comp. Stat. § 105/4a(2)(E). These standards are found at 29 C.F.R. pt. 541.

10. The Ninth Circuit has recently held that reliance on uniform exemption policies to the near exclusion of other relevant factors is an abuse of discretion. *In re Wells Fargo Home Mortg. Overtime Pay Litig.*, 571 F.3d 953, 955 (9th Cir. 2009). Considering such a policy in conjunction with other factors, however, is not impermissible. *Id.* at 957 ("An internal policy that treats all employees alike for exemption purposes suggests that the employer believes some degree of homogeneity exists among the employees. This undercuts later arguments that the employees are too diverse for uniform treatment. Therefore, an exemption policy is a permissible factor for consideration under Rule 23(b)(3).").

declarations from twenty-four ABMs indicating that a majority of their time was spent on nonexempt job duties. Defendants have countered these declarations with their own and have highlighted differences in the tasks performed by ABMs based on staffing levels, the size and type of branch, the branch manager, and the busyness of the branch. While there obviously is some variation in ABM duties across branches, the relevant inquiry is what an ABM's primary duty is. The court is not convinced that individualized analyses of each employee's duties will be necessary to this inquiry.

B. Superiority

In considering the satisfaction of the superiority requirement, the court will look at "(A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action." Fed. R. Civ. P. 23(b). In this case, these factors favor the use of a class action to adjudicate the IMWL claims. The court is not aware of any pending suits brought by individual class members. This suggests that members of the class do not have strong incentive to individually control the prosecution of their cases. Concentrating separate actions based on the same underlying conduct in one action promotes judicial economy and efficiency and consistency of judgments. Although some difficulties may be encountered in managing the class action, the class is

relatively small, and the court is confident that the parties can devise solutions to address these issues and ensure that the adjudication of the case is both fair and efficient.

CONCLUSION AND ORDER

Because plaintiffs have satisfied the necessary elements of Rule 23(a) and Rule 23(b)(3), the court grants plaintiffs' motion for class certification [#68]. The hourly class is defined as: All current and former non-exempt employees of defendants who have worked at their Charter One retail branch locations in Illinois at any time during the last three years, and who were subject to defendants' unlawful compensation policies of failing to pay overtime compensation for all hours worked in excess of forty per work week. The ABM class is defined as: All current and former Assistant Branch Manager employees of defendants who have worked at their Charter One retail branch locations in Illinois at any time during the last three years, and who were subject to defendants' unlawful compensation policies of failing to pay overtime compensation for all hours worked in excess of forty per work week. James Kapsa and Synthia Ross are appointed class representatives of the hourly class. James Kapsa is appointed class representative of the ABM class. Brendan Donelon of Donelon, P.C. is appointed class counsel for both classes.

Dated: October 8, 2010

Enter: /s/ Joan H. Lefkow

JOAN HUMPHREY LEFKOW

United States District Judge

APPENDIX C — ORDER DENYING PETITION FOR REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, DATED APRIL 3, 2012

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 10-3848

SYNTHIA G. ROSS, JAMES KAPSA, and SHARON WELLS, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellees,

v.

RBS CITIZENS, N.A. d/b/a CHARTER ONE, and CITIZENS FINANCIAL GROUP, INC.,

Defendants-Appellants.

April 3, 2012, Decided

JUDGES: Before MICHAEL S. KANNE, Circuit Judge, CHARLES N. CLEVERT, JR., District Judge.*

*The Honorable Charles N. Clevert, Jr., Chief Judge of the United States District Court for the Eastern District of Wisconsin, sitting by designation.

Appendix C

ORDER

On consideration of the petition for rehearing en banc, no judge in active service has requested a vote on the petition for rehearing en banc. It is, therefore, **ORDERED** that petition for rehearing en banc is **DENIED**.

APPENDIX D — EXCERPTS FROM RELEVANT STATUTES AND RULES

RULES ENABLING ACT., 28 U.S.C. § 2072.

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals.

(b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

* * *

FEDERAL RULE OF CIVIL PROCEDURE 23.

(a) Prerequisites. 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.

Appendix D

(b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:

* * *

(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.

* * *