No. 12-20605

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

IN RE WELLS FARGO WAGE AND HOUR EMPLOYMENT PRACTICES LITIGATION (NO. III)

ON PETITION FOR WRIT OF MANDAMUS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

MULTI-DISTRICT LITIGATION CASE NO. H-11-2266

BRIEF FOR CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER AND URGING ISSUANCE OF THE WRIT OF MANDAMUS OVERTURNING THE DISTRICT COURT'S ORDER

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STATEMENT OF INTERESTED PARTIES

Pursuant to Rules 26.1(a) and 29(c) of the Federal Rules of Appellate Procedure and Fifth Circuit Rule 28.2.1, the undersigned counsel of record for the Chamber certifies as follows:

The number and style of this case is No. 12-20605, *In re Wells Fargo Wage and Hour Employment Practices Litigation (No. III)*. *Amicus* has no parent corporation, and no publicly held company owns 10% or more of any of its stock.

The Chamber also certifies that the following listed entities and persons have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal:

1. Those persons and attorneys listed by the Petitioner in its principal opening brief;

2. Chamber of Commerce of the United States of America;

3. Julian W. Poon, Eugene Scalia, James C. Ho, and Thomas M. Johnson, Jr., of Gibson, Dunn & Crutcher LLP, counsel for the Chamber;

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4. Robin S. Conrad and Shane B. Kawka of the National Chamber Litigation Center, Inc;

CERTIFICATE OF INTERESTED PERSONS (cont'd)

5. The National Chamber Litigation Center, Inc.

/s/ *Julian W. Poon*
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TABLE OF CONTENTS

Page

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 1

ARGUMENT 5

I. Courts Are Bound To Apply Rule 23's Procedural Protections, Which Are Grounded In Due Process, And May Not Create Common-Law Class Actions Untethered to Rule 23..8

II. Rule 23(a) Applies To Claims Brought Under The Fair Labor Standards Act. 11

III. *Dukes* Sets Forth The Standard Governing Whether There Are "Common" Questions Of Law Or Fact Under Rule 23(a). 16

IV. By Circumventing The Procedural Guarantees Mandated By Rule 23 And The Due Process Clause, The Two-Stage Certification Procedure Causes Substantial Undue Prejudice To Employers and Employees. 20

A. "Conditional" Certification Permits Pre-Certification Notice To Employees Who May Not Be Eligible Class Members...21

B. "Conditional" Certification Requires Defendants To Engage In Needless Discovery Before Class Certification Is Determined. 23

C. "Conditional" Certification Can Limit Communications Between Employers And Their Employees, Harming Workplace Morale and Diminishing Chances of Settlement...25

D. "Conditional" Certification Imperils The Due Process Rights Of Absent Plaintiffs. 26

CONCLUSION 29

TABLE OF AUTHORITIES

Page(s)

Cases

Acevedo v. Allsup's Convenience Stores, Inc.,
600 F.3d 516 (5th Cir. 2010) 5

Am. Pipe & Constr. Co. v. Utah,
414 U.S. 538 (1974).................... 4, 13, 21

Amchem Prods. v. Windsor,
521 U.S. 591 (1997).................... 2, 9, 10, 27

Bankers Life & Casualty Co. v. Holland,
346 U.S. 379 (1953)....................21

Califano v. Yamasaki,
442 U.S. 682 (1979).................... 3, 4, 11, 16

Camp v. Lockheed Martin Corp.,
1998 U.S. Dist. LEXIS 5800 (S.D. Tex. Apr. 22, 1998)....................7

Castano v. American Tobacco Co.,
84 F.3d 734 (5th Cir. 1996) 10, 29

Cherner v. Transitron Electronic Corp.,
201 F. Supp. 934 (D. Mass. 1962)....................22

Dolan v. Project Constr. Corp.,
725 F.2d 1263 (10th Cir. 1984) 14

Gen. Tel. Co. of the Southwest v. Falcon,
457 U.S. 147 (1982).................... 17, 23

Hansberry v. Lee,
311 U.S. 32 (1940)....................8, 27

Herman & Maclean v. Huddleston,
459 U.S. 375 (1983)....................14

Hoffmann-La Roche Inc. v. Sperling,
493 U.S. 165 (1989)....................23

TABLE OF AUTHORITIES (*cont'd*)

Page(s)

In re Wells Fargo Home Mortg. Overtime Pay Litig.,
268 F.R.D. 604 (N.D. Cal. 2010) 18

In re Wells Fargo Wage & Hour Employees Practices Litig.,
2012 U.S. Dist. LEXIS 112769 (S.D. Tex. Aug. 10, 2012) .... *passim*

Jackson v. Stinnett,
102 F.3d 132 (5th Cir. 1996) 10

Johnson v. Big Lots Stores, Inc., 2007 U.S. Dist. LEXIS 96151 (E.D.
La. Aug. 21, 2007)..7

Johnson v. Georgia Highway Express, Inc.,
417 F.2d 1122 (5th Cir. 1969) 17

La Chapelle v. Owens-Illinois, Inc.,
513 F.2d 286 (5th Cir. 1975) 15

Lee v. United States Sec. Assocs.,
2008 U.S. Dist. LEXIS 28578 (W.D. Tex. Apr. 8, 2008) 28

Lentz v. Spanky's Rest. II, Inc.,
491 F. Supp. 2d 663 (N.D. Tex. 2007) 7

Lusardi v. Xerox Corp.,
118 F.R.D. 351 (D.N.J. 1987) 5, 7

Mooney v. Aramco Services Co.,
54 F.3d 1207 (5th Cir. 1995) .... *passim*

Ortiz v. Fibreboard Corp.,
527 U.S. 815 (1999).. *passim*

Pan American World Airways, Inc. v. United States Dist. Court for Cent. Dist.,
523 F.2d 1073 (9th Cir. 1975) 21

Pentland v. Dravo Corp.,
152 F.2d 851 (3d Cir. 1945) 4, 12, 13, 16

Philip Morris USA v. Williams,
549 U.S. 346 (2007)..19

TABLE OF AUTHORITIES (*cont'd*)

Page(s)

Richards v. Jefferson County,
517 U.S. 793 (1996) 8

Ryan v. Staff Care, Inc.,
497 F. Supp. 2d 820 (N.D. Tex. 2007) 6

Sedtal v. Genuine Parts Co.,
2009 WL 2216593 (E.D. Tex. July 23, 2009) 6

Shushan v. University of Colorado,
132 F.R.D. 263 (D. Colo. 1990) 6, 7, 16, 27

Smith v. Bayer Corp.,
131 S. Ct. 2368 (2011) 9, 26

Taylor v. Sturgell,
553 U.S. 880 (2008) 2, 4, 7, 9

Tolentino v. C & J Spec-Rent Servs. Inc.,
716 F. Supp. 2d 642 (S.D. Tex. 2010) 5

Wal-Mart Stores, Inc. v. Dukes,
131 S. Ct. 2541 (2011) .... *passim*

Weight Watchers of Philadelphia, Inc. v. Weight Watchers Int'l, Inc.,
455 F.2d 770 (2d Cir. 1972) 26

Statutes

28 U.S.C. § 2071 7

28 U.S.C. § 2072 .... 7, 19

28 U.S.C. § 2073 7

28 U.S.C. § 2074 7

28 U.S.C. § 2075 7

28 U.S.C. § 2076 7

28 U.S.C. § 2077 7

29 U.S.C. § 216 .... 5, 12, 14, 19

Fed. R. Civ. P. 1 .... 3, 11

TABLE OF AUTHORITIES (*cont'd*)

Page(s)

Fed. R. Civ. P. 23 .... *passim*

Fed. R. Civ. P. 23, Advisory Committee Notes to the 2003 Amendments 23, 24

Other Authorities

Wright & Miller, 7A Fed. Prac. & Proc. § 1777 (3d ed.) 13

Rules

Fed. R. Civ. P. 81 11

INTEREST OF AMICUS CURIAE

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the Nation's business community.

The Chamber files this brief with the consent of all parties.[1]

SUMMARY OF ARGUMENT

The two-step "conditional" certification process applied by the District Court, purporting to interpret Section 16(b) of the Fair Labor Standards Act ("FLSA"), is a prime example of the "ever more 'adventuresome'" procedures that courts have adopted in recent decades in the class action context. *Amchem Prods.*

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[1] No party, counsel for a party, or person, other than the Chamber and its attorneys, authored this brief in whole or in part, or made a monetary contribution intended to fund preparation or submission of this brief.

v. Windsor, 521 U.S. 591, 617-18 (1997). The Supreme Court, however, has time and again disapproved of judicial innovations in class action cases that stray well beyond the text, structure, and history of Rule 23. *See id.* at 622 ("[f]ederal courts . . . lack authority to substitute for Rule 23's certification criteria a standard never adopted—that if a settlement is 'fair,' then certification is proper"); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999); *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2561 (2011). Rule 23's "procedural safeguards," the Court has explained, are "grounded in due process," and must be respected, lest parties' rights be left at the mercy of "amorphous balancing test[s]" created by courts. *Taylor v. Sturgell*, 553 U.S. 880, 898, 901 (2008).

The two-step "conditional" certification process is one such "amorphous" test that cannot be reconciled with Rule 23 or due process guarantees. Under Rule 23, a class cannot be certified unless and until a plaintiff can demonstrate that the Rule's prerequisites, "rigorous[ly] analy[zed]," are satisfied. *Dukes*, 131 S. Ct. at 2551 (internal citation omitted). Among other things, that "rigorous analysis" requires a plaintiff to show conclusively, prior to certification, "the capacity of a classwide proceeding to generate common answers [to common questions] apt to drive the resolution of the litigation." *Id.* (describing Rule 23(a)(2)).

Under the test applied by the District Court (and used by some, but not all, courts in this Circuit), however, plaintiffs can obtain "conditional" certification so

long as they satisfy a "light burden," based on "limited" discovery, on the question whether putative class members are "similarly situated." *In re Wells Fargo Wage & Hour Employees Practices Litig.*, 2012 U.S. Dist. LEXIS 112769, at *59-60, 63 (S.D. Tex. Aug. 10, 2012) ("Order"). The case then "proceeds as a representative action" until "discovery is largely complete," at which point the court will finally "make[] a factual determination on the similarly situated question." *Id.* at *59. The court denied that Rule 23 has any relevance to its analysis, based on its assumption that "the standards for Rule 23 certification and conditional certification of an FLSA collective action are *different*." *Id.* at *69. The court likewise held that the Supreme Court's recent decision in *Dukes* is "[in]applicable to the first-stage analysis." *Id.* at *72.

The court's conclusion that Rule 23 does not apply to the FLSA rests on a fundamental misunderstanding of the Federal Rules, the statute, and the Constitution. Rule 23 "govern[s] the procedure in *all* suits of a civil nature" unless Congress provides a "clear expression of [its] intent to exempt actions . . . from the [Rule's] operation." *Califano v. Yamasaki*, 442 U.S. 682, 700 (1979) (citing Fed. R. Civ. P. 1). There is no such "clear expression" in the FLSA. To the contrary, Congress adopted the "similarly situated" language in 1938 (and re-enacted it in 1947) to authorize federal and state courts to certify so-called "spurious" class actions under Rule 23 as it existed at the time. *See, e.g.*, *Pentland v. Dravo Corp.*,

152 F.2d 851, 853-56 (3d Cir. 1945). These actions could be certified only if they presented a "common question of law or fact," *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 545-46 (1974) (quoting Fed. R. Civ. P. 23 (1938))—the same standard in the current version of Rule 23(a)(2) that the Supreme Court last year authoritatively construed in *Dukes*. And under that standard, courts must conduct a "rigorous analysis" of commonality (and the other prerequisites of Rule 23), *Dukes*, 131 S. Ct. at 2551, not the "fairly lenient standard" applied by the District Court here, Order at *59.

While the FLSA adopted an "opt-in" mechanism that differs from the current Rule 23(b), there is nothing to suggest that Congress ever intended to exempt FLSA suits from Rule 23(a)'s requirements of numerosity, commonality, typicality, and adequacy—indeed, all indications are to the contrary. Even if there were some ambiguity as to this, it ought to be resolved in favor of applying the time-tested protections afforded in Rule 23—protections "grounded in due process," *Taylor*, 553 U.S. at 901—rather than a judicially invented "conditional" certification regime that is not grounded in the text, structure, or history of the FLSA or the Federal Rules. *Cf. Califano*, 442 U.S. at 700.

For these reasons, this Court should issue the prayed-for writ of mandamus directing the District Court to vacate its order and reconsider whether Plaintiffs' putative class satisfies the criteria in Rule 23(a).

ARGUMENT

Wells Fargo's petition for writ of mandamus (the "Petition") calls on the Court to resolve an issue previously reserved in *Mooney v. Aramco Services Co.*, 54 F.3d 1207, 1213 (5th Cir. 1995): What is the proper class certification procedure for suits brought under section 16(b) of the Fair Labor Standards Act ("FLSA"), which provides that an employee may bring an "action on behalf of himself . . . and other employees similarly situated"? 29 U.S.C. § 216(b); *see also Acevedo v. Allsup's Convenience Stores, Inc.*, 600 F.3d 516, 518-19 n.1 (5th Cir. 2010) (noting that *Mooney* "left this question open").

This issue remains "largely a matter of first impression for the circuit courts," but the district courts "divide along two basic lines." *Mooney*, 54 F.3d at 1213. The first approach, used by the District Court here and typified by *Lusardi v. Xerox Corp.*, 118 F.R.D. 351 (D.N.J. 1987), employs a "two-step analysis." *Mooney*, 54 F.3d at 1213. At the first step, the court applies a "fairly lenient standard," often based on no more than a limited review of the pleadings and affidavits, that "typically results" in "conditional certification" of a class. *Id.* at 1214.[2] Putative class members are then provided notice and an opportunity to

[2] Other courts in this Circuit have described the plaintiff's burden at this stage in similar terms. *See, e.g.*, *Tolentino v. C & J Spec-Rent Servs. Inc.*, 716 F. Supp. 2d 642, 652 (S.D. Tex. 2010) (noting that at this "fairly lenient stage, . . .

[Footnote continued on next page]

"opt-in," and the case proceeds as a representative action "throughout discovery." *Id.* Then, "usually . . . after discovery is largely complete and the matter is ready for trial," the defendant can move for "decertification," at which point the court will finally make a "factual determination" as to whether the putative class members are "similarly situated." *Id.* As this Court has observed, cases applying this approach are "remarkable" in that "they do not set out a definition of 'similarly situated,'" nor does the approach "give a recognizable form to an [FLSA] representative class, but lends itself [instead] to *ad hoc* analysis on a case-by-case basis." *Id.* at 1213.

By contrast, other district courts, typified by *Shushan v. University of Colorado,* 132 F.R.D. 263 (D. Colo. 1990), have held that Congress did not intend to create a completely new class action procedure for FLSA cases, but merely sought to limit the availability of class relief to persons who affirmatively "opt in" to the suit. *Id.* at 265; *Mooney*, 54 F.3d at 1214. These courts reason that "Congress intended the 'similarly situated' inquiry to be coextensive with Rule 23 class certification," and thus, courts should look at "'numerosity,' 'commonality,'

[Footnote continued from previous page]

Plaintiffs' statements suffice as evidence that other employees are 'similarly situated.'"); *Sedtal v. Genuine Parts Co.*, 2009 WL 2216593, at *3 (E.D. Tex. July 23, 2009)); *Ryan v. Staff Care, Inc.*, 497 F. Supp. 2d 820, 824 (N.D. Tex. 2007).

'typicality' and 'adequacy of representation' to determine whether a class should be certified." *Id.*

Especially in the wake of *Mooney*, district courts have lacked guidance on the proper approach for certifying FLSA class actions. *Compare Johnson v. Big Lots Stores, Inc.*, 2007 U.S. Dist. LEXIS 96151, at *12 (E.D. La. Aug. 21, 2007) (applying *Lusardi*), *with Camp v. Lockheed Martin Corp.*, 1998 U.S. Dist. LEXIS 5800, at *4 (S.D. Tex. Apr. 22, 1998) (deeming the *Shushan* approach "more persuasive"), and *Lentz v. Spanky's Rest. II, Inc.*, 491 F. Supp. 2d 663, 668 (N.D. Tex. 2007) (finding the "*Shushan* methodology to be preferable"). This Court should use this Petition as an opportunity to resolve the uncertainty and provide much-needed guidance to the courts of this Circuit.

To that end, the Chamber respectfully submits that the *Shushan* approach not only provides clarity as to the meaning of "similarly situated," but is also the only approach authorized under the Federal Rules, the FLSA, the Rules Enabling Act,[3] and the Due Process Clause. As explained below, courts do not have flexibility to create "common-law" class action devices untethered to Rule 23, because of the real potential that such devices will prejudice the rights of both the absent class members and defendants. *Taylor*, 553 U.S. at 901. The "conditional" class action

[3] 28 U.S.C. §§ 2071-2077.

used by the District Court below is prejudicial in precisely this way. It deprives employers of important procedural protections under Rule 23, such as the need for a "rigorous analysis" before putative class members receive notice and before the defendant incurs the expense of full merits discovery. This procedure also deprives opt-in class members of the assurance that their claims are being prosecuted by similarly-situated lead plaintiffs and competent class counsel, and that those who may have legitimate grievances do not end up having their claims for relief or recoveries compromised or shared with those who have never been aggrieved. Courts should not be permitted to deviate as dramatically as the District Court (and many other district courts) have from Rule 23's procedures in certifying a "conditional" class action.

I. Courts Are Bound To Apply Rule 23's Procedural Protections, Which Are Grounded In Due Process, And May Not Create Common-Law Class Actions Untethered to Rule 23.

At the core of due process lies the "deep-rooted historic tradition that everyone should have his own day in court." *Richards v. Jefferson County*, 517 U.S. 793, 797-98 (1996) (citing *Hansberry v. Lee*, 311 U.S. 32, 40 (1940)). Thus, the class action device is "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Dukes*, 131 S. Ct. at 2550. To ensure that this "exception" does not swallow the rule, and that parties to litigation retain minimum due process guarantees, the Supreme Court has required

strict adherence to Rule 23's "procedural safeguards," which are "grounded in due process." *Taylor*, 553 U.S. at 901.

The 1966 amendments to Rule 23, which created the rule as it exists today, "catalogue[d]" the types of class actions that could be brought in federal court. *Ortiz,* 527 U.S. at 833. This "catalogue" was intended to be exclusive, and the Rule "as now composed sets the requirements [that courts] are bound to enforce." *Amchem*, 521 U.S. at 620; *see also Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2380 (2011) ("Federal Rule 23 determines what is and is not a class action in federal court.").

Courts are therefore prohibited from creating a "common-law kind of class action" that deviates from Rule 23's text and structure. *Taylor*, 553 U.S. at 901. As the Supreme Court has explained, Rule 23's "protections, grounded in due process, could be circumvented were [courts] to approve a . . . doctrine that allowed courts to 'create de facto class actions at will.'" *Id.* Rather, "[i]n this area of the law, . . . crisp rules with sharp corners are preferable to a round-about doctrine of opaque standards." *Id.* As Professor Charles Alan Wright, the chief draftsman of the original Federal Rules, presciently observed, the "class action is a complex device that must be used with discernment," and courts must take care to avoid "creating a Frankenstein's monster" by "allow[ing] certification of what

purports to be a class action" but in reality is not. *Castano v. American Tobacco Co.*, 84 F.3d 734, 745 n.19 (5th Cir. 1996).

The prohibition against common-law class actions stems in part from the unique nature of the Federal Rules. The Rules "take effect after an extensive deliberative process involving many reviewers: a Rules Advisory Committee, public commenters, the Judicial Conference, [the Supreme] Court, [and] the Congress." *Amchem*, 521 U.S. at 620. In particular, the Rules Enabling Act "gave the Supreme Court the power to promulgate rules of practice and procedure for United States courts." *Jackson v. Stinnett*, 102 F.3d 132, 134 (5th Cir. 1996). Once the Supreme Court proposes new rules, they are then "subject to review by Congress," and "take effect only after the Supreme Court has presented them to Congress and after Congress has had seven months to review proposed rules or changes." *Id.* Thus, the Rules Enabling Act, by requiring both Supreme Court and Congressional approval in the rulemaking process, "limits judicial inventiveness," meaning that "[c]ourts are not free to amend a rule outside the process Congress ordered" in the Act. *Amchem*, 521 U.S. at 620. The District Court's two-stage certification process is precisely the type of "judicial inventi[on]" that the Rules Enabling Act prohibits.

The Supreme Court has also discouraged judicial innovation in class action procedure to guard against the risk of due process violations when courts engage in

"adventurous application" of the Federal Rules, such as the two-step process used here. *Ortiz*, 527 U.S. at 845. Indeed, "the Rules Enabling Act and the general doctrine of constitutional avoidance . . . jointly sound a warning of the serious constitutional concerns that come with any attempt" to deviate from Rule 23. *Id.* at 845. Therefore, "the burden of justification rests on the proponent of any departure from the traditional norm." *Id.* at 842.

II. Rule 23(a) Applies To Claims Brought Under The Fair Labor Standards Act.

These background principles, which mandate adherence to Rule 23 and its underlying due process guarantees, apply to lawsuits brought under the FLSA.

The Federal Rules of Civil Procedure "govern the procedure in the United States district courts in *all* suits of a civil nature." Fed. R. Civ. P. 1 (emphasis added). To be sure, Congress can adopt other procedures by statute, but Rule 23 presumptively applies unless there is a "clear expression of congressional intent to exempt actions brought under [a] statute from [Rule 23's] operation." *Califano v. Yamasaki*, 442 U.S. 682, 700 (1979).[4]

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[4] Rule 81 provides further evidence that Congress does not intend for the FLSA to be exempt from Rule 23. That rule lists seven laws that "provide other procedures" incompatible with one or more of the Federal Rules. Fed. R. Civ. P. 81(a)(6). The FLSA does not appear on that list. *Cf.* Petition at 18 (noting that the National Labor Relations Act, in contrast, appears on the list).

The FLSA does not contain a "clear expression of congressional intent" to exempt it entirely from Rule 23's operation. To the contrary, the FLSA historically has incorporated, and been interpreted in light of, Rule 23's procedural requirements.

The initial version of the FLSA, enacted in 1938 (the same year the Federal Rules of Civil Procedure were first promulgated), provided as follows:

> An action to recover the liability prescribed [thereunder] . . . may be maintained against any employer . . . in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated.

29 U.S.C. § 216(b) (1938). Neither the statute nor the legislative history provided guidance as to the meaning of "similarly situated." However, as a vast majority of courts at the time soon came to recognize, those words were intended to authorize FLSA actions to proceed as "spurious" class actions under the original version of Rule 23. *See, e.g.*, *Pentland v. Dravo Corp.*, 152 F.2d 851, 853-56 (3d Cir. 1945) (collecting cases).

"Under Rule 23 as it stood prior to its extensive amendment in 1966, . . . a so-called 'spurious' class action could be maintained when 'the character of the right sought to be enforced for or against the class is . . . several, and there is *a common question of law or fact* affecting the several rights and a common relief is

sought.'" *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 545 (1974) (quoting Fed. R. Civ. P. 23 (1938)); *see also Pentland*, 152 F.2d at 852 (interpreting "similarly situated" in the FLSA to authorize a "spurious class suit," in which "[t]he presence of numerous persons interested in *a common question of law or fact* warrants its use by persons desiring to clean up a litigious situation") (emphasis added). In a "spurious" class action, no plaintiff could be bound by the judgment unless he affirmatively opted in to the lawsuit. *See Pentland*, 152 F.2d at 853.[5]

Congress included the "similarly situated" language in enacting the FLSA because the FLSA authorized concurrent state-court jurisdiction, and Congress "did not assume that practice in all those courts would be [the same as] that under the new federal rules." *Id.* If state-court jurisdiction were not an issue, section 16(b) "might not have been necessary, assuming, of course, that judges in federal courts thoroughly understand the new federal rules and apply them correctly at all times." *Id.* In short, Congress intended class actions under the FLSA to be coextensive with, and incorporate, the new Rule 23 procedures that took effect the same year.

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[5] Prior to 1966, the "spurious" class suit was the only class action maintainable "based solely on common questions"—as opposed to a right to a common fund or common property. Wright & Miller, 7A Fed. Prac. & Proc. § 1777 (3d ed.).

In 1947, Congress amended Section 16(b) in the Portal-to-Portal Act, Pub. L. No. 80-49 (1947), to eliminate the option for employees to designate an "agent or representative" to maintain the action on their behalf, because that option had encouraged "excessive and needless litigation" and "champertous practices." *Dolan v. Project Constr. Corp.*, 725 F.2d 1263, 1267 (10th Cir. 1984) (quoting legislative history). Congress preserved the "similarly situated" language, however, and specified that "[n]o employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought." 29 U.S.C. § 216(b). By codifying the "opt-in" procedure already being applied by courts, Congress ratified the prevailing judicial interpretation of Section 16(b) as authorizing the "spurious" class action—consistent with Rule 23 as it existed at the time. *See Herman & MacLean v. Huddleston*, 459 U.S. 375, 384-85 (1983).

The 1966 amendments to Rule 23 abandoned the category of "spurious" class actions, but preserved the fundamental requirement that a plaintiff demonstrate that there are "questions of law or fact common to the class"—a requirement that remains a vital cornerstone of Rule 23 to this day. Fed. R. Civ. P. 23(a)(2). The new Rule also codified the typicality and adequacy requirements in

their present form.[6] These requirements "tend to merge" with "commonality" to "serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected." *Dukes*, 131 S. Ct. at 2551, n. 5.

The new Rule 23 differed from its predecessor (and from the FLSA) in one material respect—it no longer provided for "opt-in" class actions. Rather, the Rule consisted of two narrow, historical types of "mandatory" class actions in which parties had no choice whether or not to participate (23(b)(1) and (b)(2)), and a new type of class action in which parties were provided notice and an opportunity to "opt out" (23(b)(3)).

As this Court has observed, there is an "irreconcilable difference" between the opt-out mechanism in Rule 23(b)(3) and the opt-in procedure under the FLSA. *La Chapelle v. Owens-Illinois, Inc.*, 513 F.2d 286, 288 (5th Cir. 1975). But despite amending the FLSA several times since the 1966 revisions to Rule 23, Congress has never changed the "similarly situated" language that appeared in the original 1938 statute and in the 1947 Portal-to-Portal Act. Nor has Congress ever indicated its disapproval with how that language was originally construed by the courts—as

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[6] *See* Fed. R. Civ. P. 23(a)(3), (4).

requiring opt-in class members to show the existence of a "'common question of law or fact.'" *Pentland*, 152 F.2d at 852. Therefore, there is no evidence in the text, structure, or history of the FLSA that could provide a court with the "necessary clear expression of congressional intent" to deviate from Rule 23(a) when deciding whether to certify an FLSA class action. *Califano*, 442 U.S. at 700.

As the *Shusan* Court aptly observed:

> It does not seem sensible to reason that, because Congress has effectively directed the courts to alter their usual course and not be guided by rule 23's 'opt-out' feature in [FLSA] class actions, it has also directed them to discard the compass of rule 23 entirely and navigate the murky waters of such actions by the stars or whatever other instruments they may fashion.

132 F.R.D. at 266.

III. *Dukes* Sets Forth The Standard Governing Whether There Are "Common" Questions Of Law Or Fact Under Rule 23(a).

In *Dukes*, the Supreme Court clarified and expounded on the meaning of Rule 23(a)'s commonality requirement. *Dukes* thus supplies the governing standard that a court must apply when deciding whether to certify an FLSA class action—or any class action.

Dukes reaffirmed that Rule 23 is not a "mere pleading standard"; rather, a "party seeking class certification must affirmatively demonstrate his compliance with the Rule," and must do so "*prior* to certification." *Dukes*, 131 S. Ct. at 2551 (emphasis added). Indeed, courts must conduct a "*rigorous analysis*" to assure

[themselves] that Rule 23's criteria are satisfied, even though that will "[f]requently . . . entail some overlap with the merits of the plaintiff's underlying claim." *Id.* (citing *Gen. Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 160 (1982)).[7]

A "rigorous analysis" under Rule 23(a)(2)'s commonality requirement demands more than a showing that the members of the putative class "have all suffered a violation of the same provision of law." *Dukes*, 131 S. Ct. at 2551. Instead, the class members' claims must "depend upon a common contention" that "is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.* at 2551.

The District Court's analysis in this case cannot be reconciled with *Dukes*. In contrast to the "rigorous analysis" mandated by *Dukes*, the District Court applied a "fairly lenient standard" to conditionally certify a nationwide class of Wells Fargo's home mortgage consultants ("HMCs"), alleging that Wells Fargo

[7] In adopting this "rigorous analysis" requirement, the Supreme Court cited a concurring opinion by Judge Godbold of this Court, who reasoned that careful attention to Rule 23(a)(2)'s prerequisites is necessary to ensure that defendants "know how to defend" against class claims, and that class members are protected from "deprivation of due process." *Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122, 1126 (5th Cir. 1969) (Godbold, J., concurring).

improperly classified them as exempt outside sales employees. Order at *59. In keeping with other courts that apply the *Lusardi* approach, the District Court based its certification decision primarily on Plaintiffs' self-serving declarations, which it held "provided sufficient evidentiary support of their claims to assure the court that Plaintiffs are not simply using the court's power to issue notice to aid in a frivolous fishing expedition." *Id.* at *66. In stark contrast, however, the District Court brushed aside Wells Fargo's competing declarations as "happy camper" declarations that should not be afforded "significant weight" at the conditional certification stage, despite the fact that they showed "significant variation in the ways in which the members of the putative classes performed their jobs." *Id.* at *12, *56.

Indeed, the District Court even deemed irrelevant the fact that, in earlier litigation concerning the HMC position, the Northern District of California held (on remand from the Ninth Circuit) that a class of Wells Fargo HMCs could not be certified under Rule 23 because "an individual, fact intensive analysis would be required to determine how each HMC performs his or her duties." Order at *68 (citing *In re Wells Fargo Home Mortg. Overtime Pay Litig.*, 268 F.R.D. 604, 613 (N.D. Cal. 2010)). According to the District Court, this prior proceeding—which involved a voluminous record relating to the *same* HMC position—was beside the point because the standards under Rule 23 and the FLSA are "*different*." Order at

*63, *69. The District Court thus avoided having to weigh the available evidence and to decide whether, given the variation in the HMCs' job duties, class adjudication was capable of "generat[ing] common answers apt to drive the resolution of the litigation." *Dukes*, 131 S. Ct. at 2551. It avoided having to engage in any real—let alone rigorous—analysis, in other words, of whether the members of Plaintiffs' "conditionally"-certified class were "similarly situated" or not. 29 U.S.C. § 216(b).

The District Court also paid short shrift to the due process requirement that defendants be provided with "an opportunity to present every available defense" under the FLSA. *Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007). In *Dukes*, the Court rejected the plaintiffs' proposed "Trial by Formula," in which "[a] sample set of the class members would be selected," and then after their liability is determined, "[t]he percentage of claims determined to be valid would . . . be applied to the entire remaining class." 131 S. Ct. at 2561. The Supreme Court unanimously "disapprove[d] that novel project," because Rule 23 may not be interpreted to "abridge, enlarge or modify any substantive right." *Id.* (quoting the Rules Enabling Act, 28 U.S.C. § 2072(b)). Therefore, "a class cannot be certified on the premise that [a defendant] will not be entitled to litigate its statutory defenses to individual claims." *Id.*

The District Court violated this principle when it refused to consider Wells Fargo's evidence showing that each putative class member's individual job duties would have to be evaluated separately to determine the applicability of the outside sales exemption—reasoning that "Defendants' *merits-based arguments* are irrelevant at this time" (Order at *88 (emphasis added)). The court thus left consideration of whether these statutory defenses would render class action treatment inappropriate until "after discovery is largely complete and the matter is ready for trial" (*id.* at *61)—even though the matter might *never* proceed to trial because of the variety of individualized defenses that Wells Fargo has a constitutional right to raise. This approach is flatly inconsistent with what *Dukes* requires—a "rigorous analysis" of commonality before any class is certified.

IV. By Circumventing The Procedural Guarantees Mandated By Rule 23 And The Due Process Clause, The Two-Stage Certification Procedure Causes Substantial Undue Prejudice To Employers and Employees.

The practical consequence of the two-step certification procedure utilized here, which undermines protections provided by Rule 23 and the Due Process Clause, is to cause substantial undue prejudice to both employers and employees in FLSA class actions. Indeed, as the District Court itself recognized, "[a] decision to certify . . . is not without consequences," as "[t]oo much leniency" at the conditional certification stage could result in a "frivolous fishing expedition conducted by the plaintiff at the employer's expense." Order at *60. Moreover,

this process leaves open the possibility that certification may not be "revoked [until] the eve of trial . . . when it becomes obvious that manageability concerns make collective action impossible." *Id.* at *60. These consequences flow directly from violations of Rule 23 and its due process guarantees. Mandamus relief is thus appropriate in order to prevent this "clear abuse of discretion" which amounts to a "usurpation" of judicial power. *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 383 (1953).

A. "Conditional" Certification Permits Pre-Certification Notice To Employees Who May Not Be Eligible Class Members.

Under Rule 23, a court must first "determine[] that [an] action may be maintained as a class action" before a court can provide notice to absent class members. *Am. Pipe & Constr. Co.*, 414 U.S. at 547-48; *see also Pan American World Airways, Inc. v. United States Dist. Court for Cent. Dist.*, 523 F.2d 1073, 1079 (9th Cir. 1975). If this were not the case, then "by notice and joinder of unnamed members of a possible plaintiff class, a district court could circumvent Rule 23 by creating a mass of joined claims that resembles a class action but fails to satisfy the requirements of the rule." *Pan American*, 523 F.2d at 1079.

That is precisely what will result from the District Court's decision to "conditionally" certify a class action under the FLSA: notice may be sent to over

15,000 putative class members without the court ever determining whether those individuals are truly "similarly situated" in any meaningful way. Petition at 1.

As the Petition points out, the decision to provide notice and allow opt-ins at the "conditional" certification stage will, as a practical matter, often prove outcome-determinative, as relatively few employers are willing (or sometimes able) to incur the significant expense necessary to conduct full or close-to-full discovery to reach the (second) decertification stage. *See* Wells Fargo Br. 21 (noting that, in 2011, there were over 2,500 FLSA class actions filed, but only 24 reported decertification decisions). It could also have a negative impact on workplace morale or employer-employee relations, as many employees may equate a notice from the court (regardless of its content) with a meritorious lawsuit and wrongdoing by the employer. *See, e.g.*, *Cherner v. Transitron Electronic Corp.*, 201 F. Supp. 934, 936 (D. Mass. 1962) (declining to provide notice at early stage of "spurious" class action under former Rule 23 because "many persons would incorrectly infer that this Court regarded the plaintiffs' complaint as *prima facie* well-founded").

To be sure, courts have some discretion "to manage the process of joining multiple parties" in an FLSA class action, but that discretion must be exercised "in a manner that is orderly, sensible, and not otherwise contrary to statutory commands or *the provisions of the Federal Rules of Civil Procedure*." *Hoffmann-*

La Roche Inc. v. Sperling, 493 U.S. 165, 170 (1989) (emphasis added).[8] It is flatly inconsistent with the Federal Rules of Civil Procedure, and highly prejudicial, for a court to authorize notice to thousands of employees who may or may not have a right to participate in a class action, before conducting a "rigorous analysis" to ensure that the class can be properly certified. *Falcon*, 457 U.S. at 160.

B. "Conditional" Certification Requires Defendants To Engage In Needless Discovery Before Class Certification Is Determined.

Relatedly, Rule 23 provides that a district court must rule on a motion for class certification at "an early practicable time." Fed. R. Civ. P. 23(c)(1)(A). The purpose of this requirement is to provide the court with flexibility to postpone full merits discovery until after a class certification motion has been decided. *See* Fed. R. Civ. P. 23, Advisory Committee Notes to the 2003 Amendments.

By contrast, once a class is "conditionally" certified under the FLSA, courts typically do not make the second-stage "decertification" determination until "after discovery is largely complete and the matter is ready for trial." *Mooney*, 54 F.3d at

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[8] *Hoffmann-La Roche* held that "district courts have discretion, in appropriate cases, to implement [Section 16(b)] . . . by facilitating notice to potential plaintiffs." *Id.* at 169. The Court did not hold, nor did it even consider, whether district courts have discretion to certify "conditional" class actions without first conducting the "rigorous analysis" required under Rule 23. Where the means by which notice is provided conflicts with Rule 23, it does not constitute an "appropriate" exercise of the court's discretion. *Id.* at 169-70.

1214. That practice is highly—and unfairly—prejudicial to defendants, who must in the interim defend against a sprawling class action, even if the plaintiffs ultimately would never be able to prove commonality and the other requirements of Rule 23(a). Rule 23 does not permit "conditional" certification for precisely this reason. *See* Fed. R. Civ. P. 23, Advisory Committee Notes to the 2003 Amendments. Rather, under the Federal Rules, a plaintiff must *fully satisfy* Rule 23(a)'s criteria *prior* to certification. *Dukes*, 131 S. Ct. at 2551.

The "conditional" certification mechanism changes the dynamics of the certification procedure in important ways. While the burden of proving that employees are "similarly situated" remains with the plaintiff at both stages of the two-stage certification process, the *defendant* is the party who must file a motion to "decertify" the "conditional" class. Order at *60. Thus, after a class is conditionally certified, any prudent defendant will start developing evidence to support its decertification motion, which will often take the form of numerous additional depositions and written discovery requests directed at a sample of the "opt in" plaintiffs. In addition, many courts will—like the District Court here—enter scheduling orders providing that a defendant cannot move for decertification until the "eve of trial" (Order at *60)—that is, until merits discovery is complete. *See also Knott v. Dollar Tree Stores, Inc.*, 2012 U.S. Dist. LEXIS 133963 (N.D. Ala. Sept. 19, 2012) (decertifying nationwide class of store managers following

close of discovery). Inevitably, the effect of "conditional" certification is to impose additional, significant discovery costs on defendants.

These costs are particularly prejudicial when one considers that employers who litigate through second-stage decertification have a much better chance of establishing that the suit is inappropriate for class-wide adjudication. *See, e.g.*, *Mooney*, 54 F.3d at 1214 (noting the court's inability to locate a single case in which employees had succeeded at the decertification stage). Indeed, at the decertification stage, courts finally consider issues such as the availability of plaintiff-specific defenses, which employers have a constitutional right to raise under *Dukes* and will often defeat commonality in employment class actions. *See id.* at 1213 n.7. Courts' failure to conduct a rigorous analysis into the propriety of class certification at the outset of litigation needlessly prejudices defendants, particularly those who are forced to settle claims in the interim.

C. "Conditional" Certification Can Limit Communications Between Employers And Their Employees, Harming Workplace Morale and Diminishing Chances of Settlement.

Once a court conditionally certifies an FLSA action, many courts (like the District Court here (*see* Wells Fargo Br. 3), then proceed to issue orders that treat "opt-in" plaintiffs like represented parties, and that regulate communications between the defendant employer and the "opt-in" employees. This approach conflicts with the well-established principle under Rule 23 that putative class

members do not become represented parties unless and until a court certifies the class. *See, e.g.*, *Smith*, 131 S. Ct. at 2380.

This prohibition on an employer's communications with its own employees who may or may not be proper members of a certified class makes it challenging for the employer to address questions on, or correct misperceptions about, a lawsuit. And this in turn can have a serious detrimental impact on workplace morale. Moreover, the employer would be prohibited from negotiating or settling claims with the class members without class counsel present, which could prevent employers and employees from negotiating mutually beneficial settlements. There was no equivalent prohibition under the "spurious" class action procedures of the old Rule 23, on which Section 16(b) was based. *See, e.g.*, *Weight Watchers of Philadelphia, Inc. v. Weight Watchers Int'l, Inc.*, 455 F.2d 770, 773 (2d Cir. 1972). This is yet another way in which the "conditional" certification procedure deviates from the traditional class action model, to the detriment of employers and employees.

D. "Conditional" Certification Imperils The Due Process Rights Of Absent Plaintiffs.

Finally, "conditional" certification endangers the due process and other rights of employees who "opt into" the lawsuit. The procedural protections in Rule 23(a), as interpreted by *Dukes*, do not exist solely to benefit employers. Rather, those protections also "focus court attention on whether a proposed class has

sufficient unity so that absent members can fairly be bound by decisions of class representatives," including the decision to settle a case. *Amchem*, 521 U.S. at 621. This requirement for class cohesion has roots in the due process principle that a plaintiff must either appear personally in court or "ha[ve] his interests adequately represented by someone with the same interests who is a party." *Ortiz*, 527 U.S. at 846; *Hansberry*, 311 U.S. at 42-43 (due process requires that "members of a class not present as parties" be "adequately represented by parties who are present"). The "class cohesion" requirement is what "legitimizes representative action in the first place," and serves to prevent courts from approving class settlements based on their "gestalt judgment or overarching impression of the settlement's fairness." *Amchem*, 521 U.S. at 621, 623.

While opt-in class members are not "absent" in the same way that they are in a Rule 23(b)(3) class action, neither are they truly "present." An opt-in class member "does not formally appear before the court or file a pleading," "is . . . not named in the caption," and "would not ordinarily be served with papers." *Shushan*, 132 F.R.D. at 264. Rather, once an opt-in class member files a written consent, the "action is maintained by the named plaintiffs 'for and in behalf of' the person who has consented." *Id.* at 264.

Thus, when FLSA cases settle after the conditional certification stage, there is the potential for conflict between the named plaintiffs and the opt-in class

members—an intra-class conflict that courts must ensure does not interfere with individual class members' rights to due process and adequate representation. *See Amchem*, 521 U.S. at 625 ("The adequacy inquiry under Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent."); *Falcon*, 457 U.S. at 157 n.13. For example, in the FLSA context, some employees may have valid state-law claims that permit broader recovery, such as claims for punitive damages, whereas others may not. *See, e.g.*, *Lee v. United States Sec. Assocs.*, 2008 U.S. Dist. LEXIS 28578, at *25-26 (W.D. Tex. Apr. 8, 2008). Moreover, an across-the-board settlement could risk under-compensating employees with truly meritorious claims in favor of other employees with marginal or frivolous claims. *See Dukes*, 131 S. Ct. at 2559.

For these reasons, a court should assure itself that a putative FLSA class action in fact satisfies Rule 23(a)'s criteria well before the parties come to agree on the terms of a settlement. *Ortiz*, 527 U.S. at 821. In the many cases in which FLSA class actions settle after they have been "conditionally" certified, but before the decertification stage, the inquiry into whether the parties are "similarly situated" may never occur—a result that could prejudice both employers who are forced into settling potentially meritless class claims and any employees who would be bound by the court's class judgment.

CONCLUSION

Faced with the "opt-in" requirement of Section 16(b) of the FLSA, courts have taken one of two approaches. Some courts have applied Rule 23's requirements faithfully, including the Rule 23(a) prerequisites of numerosity, commonality, typicality, and adequacy. Other courts have used the "opt-in" requirement as a license to graft onto the FLSA judicially invented procedural requirements that depart from, and lack any foundation in, the statutory text or the Federal Rules. These judicially-created requirements include the concept of "conditional" class certification based on the kind of "light" or "lenient" review of pleadings and affidavits used by the District Court here; delay in making a full and final determination on certification until the "eve of trial"; and the requirement that defendants move to decertify the "conditional" class at or near the close of discovery. As between these two options, the Supreme Court, the FLSA, the Rules Enabling Act, and the Rules themselves have made clear which one the courts should follow: They should apply Rule 23(a).

The "conditional" class action is a "Frankenstein's monster" that combines many of the drawbacks of class action procedure without adding any attendant benefits. *Castano*, 84 F.3d at 745 n.19. It permits plaintiffs to impose massive costs and settlement pressure on defendants until shortly before trial. Should the class ultimately be decertified, the resources expended in the interim will never be

recovered by the parties or the court. This judicial creation also threatens to eviscerate time-tested procedural protections for employers and employees alike.

This Court should not allow district courts to continue to use the two-step process as a substitute for the Federal Rules that apply in every civil case. Rather, the Court should issue a writ of mandamus directing the District Court to vacate its "conditional" certification order and apply the requirements of Rule 23(a) to determine whether to certify an FLSA class action in this case.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE PURSUANT TO RULE 32(a)(7)

I hereby certify the following:

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 7,000 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2003 in Times New Roman 14-point font.

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CERTIFICATE OF SERVICE

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