No. 12-165

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

REPLY BRIEF

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CORPORATE DISCLOSURE STATEMENT

The corporate disclosure statement was set forth at page (iii) of the Petition and there are no changes to that statement.

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INTRODUCTION

The Seventh Circuit stated that Charter One "has no such statutory right" to raise exemption defenses to individual overtime claims "because both classes are seeking only monetary relief through a Rule 23(b)(3) class." Pet. App. 16a n.7. Respondents do not attempt to defend that ruling or the reasoning behind it because it is plainly indefensible. Instead, they are reduced to arguing that the court did not mean what it said, or that its meaning was unclear. Neither of those maneuvers can save the ruling—a key ground on which the Seventh Circuit incorrectly rejected Charter One's challenge to commonality. Accordingly, it is entirely appropriate for this Court to summarily reverse that decision, or set it for plenary review.

The Seventh Circuit's other ruling is also deeply flawed. Contrary to the teaching of *Dukes,* the court affirmed class certification without deciding whether dissimilarities within the putative classes would prevent the purported common questions from generating common answers. In particular, the court ignored the problem that several class members, by their own admission, were not denied overtime compensation, or were properly classified as exempt from overtime requirements on the basis of their actual job duties.

Respondents argue that the court acknowledged the existence of those dissimilarities. But that is not enough under *Dukes*, which requires "rigorous analysis" of the evidence to determine whether Rule 23 is satisfied "in fact." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011). If mere recognition (and dismissal)

of dissimilarities among putative class members as "slight variations"—without further examination—passes muster, Pet. App. 17a, 18a, then rigorous analysis under *Dukes* is meaningless. Indeed, in contrast to the Seventh Circuit, other circuits have held that where a district court fails to evaluate dissimilarities that relate to the elements and defenses of the class claims, class certification must be denied. *See* Pet. 15-16.[1] In order to clarify and reaffirm the type of rigorous analysis that must be performed before a class is certified, this Court should grant the petition.

ARGUMENT

I. THE SEVENTH CIRCUIT PROHIBITED CHARTER ONE FROM ASSERTING ITS STATUTORY DEFENSES, IN VIOLATION OF THE RULES ENABLING ACT AND IN CONFLICT WITH *DUKES* AND OTHER CIRCUITS.

1. Respondents make no effort to defend the Seventh Circuit's ruling that a defendant has no right to raise affirmative exemption defenses to individual plaintiffs' claims when the latter seek "only" monetary relief through a Rule 23(b)(3) action. Pet. App. 16a n.7. Instead, Respondents argue that the court's ruling on that point is merely "ambiguous" "dicta." Opp. 13, 2. Their attempt to sweep that decision under the rug is wholly meritless.

The Seventh Circuit's decision is plainly not dicta. Under Illinois law, the fact that an individual employee falls within a statutory exemption is an affirmative

1. Respondents do not refute this conflict.

defense to a claim of denial of overtime compensation, and the applicability of the exemption turns upon the actual job duties performed by that individual. *See* Pet. 4-5. As Charter One argued below, because the company has statutory affirmative defenses to individual claims, Respondents' claims cannot be resolved by a class-wide determination of liability. If the court had accepted Charter One's argument—as it should have done—the company's assertion of its statutory defenses would have been dispositive on the existence of commonality, one of the prerequisites for certification. Thus, the court's rejection of that argument—regardless of its placement in a footnote—is the very model of a holding, not dicta. *See Seminole Tribe of Fl. v. Florida*, 517 U.S. 44, 66-67 (1996). Respondents' characterization of the holding as dicta is particularly not credible since *they* argued below that Charter One could not raise individual statutory defenses to challenge commonality, and convinced the court of their position. *See, e.g.*, Appellees' Statement of Position, No. 10-3848, at 12 (Oct. 14, 2011).

Respondents' assertion that "[t]he court's reasons for finding commonality . . . do not depend on the manner in which defendants will be able to present defenses," Opp. 14, is also wrong. At the certification stage, the plaintiffs must show that their claims are capable of common proof, and overcoming defenses is as critical as proving the elements of the cause of action. "[I]t does not matter that exemption in this case may technically be termed an 'affirmative defense.' 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).

2. Respondents also claim that the court's ruling is somehow "ambiguous." Opp. 13. But there is nothing ambiguous about the court's statement that Charter One "has no such statutory right" to raise individual exemption defenses. Pet. App. 16a n.7. Indeed, the court went so far as to state that individualized assessment of the actual job duties performed by ABMs "*is not relevant* to a claim that an unlawful company-wide policy exists to deny ABMs overtime pay." *Id.* at 18a (emphasis added). Those statements are flatly wrong because the class action device cannot be used to deprive any party of its substantive rights. *See, e.g., Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1443 (2010) (plurality opinion).

In a creative rendering of the court's ruling, Respondents posit that the decision would not prevent Charter One from raising its statutory defenses at the "relief stage." Opp. 13. The decision, of course, says no such thing. And, ironically, that interpretation would only confirm the untenability of the ruling. As this Court has recognized, certification is often the most critical stage of any class action. *See Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980). Preventing Charter One from raising its defenses during the certification and merits stages would strip the company of its power to defend against liability altogether, leaving it able only to mitigate damages—that is, if it were not forced to settle first. Respondents' attempt to reconcile the court's decision with Charter One's substantive rights does nothing to cure the Rules Enabling Act violation.

The idea that the requirements of commonality depend on whether a class action seeks monetary or injunctive relief, or proceeds under one subsection of Rule 23(b) or another, is a blatant misconstruction of *Dukes*. It should be soundly rejected.

II. THE SEVENTH CIRCUIT'S APPROACH TO ANALYZING DISSIMILARITIES WITHIN THE CLASSES CONFLICTS WITH *DUKES* AND CREATES A SPLIT WITH THE NINTH AND FIFTH CIRCUITS.

Respondents make various attempts to square the Seventh Circuit's approach. They argue that *Dukes* carries less weight in smaller, state-wide class actions. *See* Opp. 5-6. They maintain that the Seventh Circuit did consider variances within the classes, but found that they did not defeat commonality. *See id.* at 9. Respondents also contend that there is no circuit split, *see id.* at 10-12, and that the court's decision is of little import, *see id.* at 14. None of these arguments is persuasive.

1. Echoing the Seventh Circuit's hollow distinctions, Respondents begin by trying to distinguish between "the size of the classes, nature of claims, and proof offered here" and the million-claimant, nation-wide discrimination case in *Dukes*. *Id.* at 5-6. The suggestion that smaller putative classes warrant less rigorous commonality analysis is unsustainable.

Dukes is not limited to its unique circumstances. To the contrary, in cases where this Court intends to limit its analysis to the underlying facts, it does so in unequivocal terms. *See e.g., CSX Transp., Inc. v. Ala. Dep't of Revenue*, 131 S. Ct. 1101, 1114 (2011) ("[O]ur decision in this case

is limited."); *Bush v. Gore*, 531 U.S. 98, 109 (2000) ("Our consideration is limited to the present circumstances."); *Kentucky v. Whorton*, 441 U.S. 786, 789 (1979) (noting that when the Court does not wish to create a general rule of law, it will "explicitly" limit its holding). There is no similar explicit limitation in *Dukes*. And implying such a limitation would be inconsistent with this Court's rational in *Dukes*, as well as with this Court's ruling that "Rule 23 provides a one-size-fits-all formula for deciding the class-action question." *Shady Grove*, 130 S. Ct. at 1437. This argument, therefore, fails out of the gate.

2. Respondents' main argument is that the district court and Seventh Circuit merely applied "settled law" to the evidence presented at the certification proceeding, Opp. 6, and that the Seventh Circuit recognized dissimilarities within the classes, but found them insufficient to negate commonality, *see* Opp. 9. Thus, they contend that the petition for review amounts only to a request for error correction of an unfavorable decision. *See id.* at 8-10.

The decisions that the lower courts actually rendered belie Respondents' characterizations. If the district court applied "settled law," it was plainly the wrong law. That court stated that commonality was a "low hurdle easily surmounted" and satisfied by demonstrating "[a] common nucleus of operative facts." Pet. App. 26a (citations omitted). *Dukes* rejected those descriptions of the Rule 23(a) requirement. *See Dukes*, 131 S. Ct. 2551. Rather, *Dukes* held that a 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. 131 S. Ct. at 2551 (quoting *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 161 (1982)

(internal quotation marks omitted)). According to *Dukes*, it is particularly critical to examine dissimilarities in a class, because they "have the potential to impede the generation of common answers." 131 S. Ct. at 2551 (internal quotation marks omitted). But in its Rule 23(a) commonality analysis, the district court did not consider differences within the classes *at all*. *See* Pet. App. 26a.

Although the Seventh Circuit paid lip service to *Dukes*'s requirements, it so watered down the required analysis as to render it meaningless. The court acknowledged that there were "slight variations" in the enforcement of overtime policies within both putative classes and in the actual job duties performed by ABMs. *Id.* at 17a-18a. But its immediate (and only) response to those dissimilarities was to answer that "both classes maintain a common claim that Charter One broadly enforced an unlawful policy." *Id*. That unofficial policy, in the court's view, was "the common answer that potentially drives the resolution of this litigation." *Id.* at 18a (citing *Dukes*, 131 S. Ct. at 2551).

The court's response was a non sequitur. Under *Dukes*, the fact that a class "maintain[s] a common claim" does not solve the problem that the class members are dissimilarly situated. To the contrary, the undisputed fact that there were many ABMs and hourly employees who did *not* experience any unlawful overtime practices means that the litigation would likely *not* generate answers common to all class members. But the Seventh Circuit did not even consider such matters. If a passing reference to dissimilarities is sufficient under *Dukes*, without resolving whether those dissimilarities make the plaintiffs' claims resistant to class-wide resolution, then the "rigorous analysis" requirement is a charade.

Respondents attempt to escape this truth by accusing Charter One of misrepresenting the record, even as they misrepresent it themselves. Their claim that Charter One had "uniform job descriptions and detailed policies spelling out exactly what each ABM is to do at work each day," Opp. 4, is simply not true. Rather, the ABM job descriptions note general job functions, not daily job duties. ABM Job Descriptions, SA001-002. Similarly, the minimum-expectations documents lists general duties that ABMs are expected to perform on an "as assigned," "as directed," and "as communicated" basis. ABM Minimum Performance Expectations, SA003-006. These documents confirm the plethora of functions and considerations that make every ABM's actual job duties unique. Thus, Charter One's position that individual inquiries will be required to determine whether Respondents can satisfy Rule 23(a) is undeniable—a determination that would have been plain had the Seventh Circuit analyzed, as opposed to simply acknowledged, these dissimilarities.

Similarly, Respondents' claim that "none of the declarants testified that he or she was paid for all overtime worked," Opp. at 4, is plainly incorrect. The record contains declarations from seven hourly employees who attest that they were paid for *all* overtime. Respondents' statement to the contrary is sustainable only if they completely ignore the evidence presented by Charter One. Respondents do not even respond to the point raised in the petition, that two of their own class representatives attested to at least three levels of overtime pay—total, partial, or none, depending on the branch manager. *See* Pet. 8 n.4. Thus, determining the validity of the employees' denial of overtime claims will require the fact-finder to drill down into individual employees' circumstances, including

whether they were actually paid for overtime, how much, by whom, and when. Under these conditions, the overtime claims of the Hourly employees are not amenable to one-stroke, class-wide resolution—the inevitable conclusion of applying *Dukes*'s rigorous analysis requirement and the heart of the Seventh Circuit's legal failure.

The fundamental problem with the Seventh Circuit's decision is not that it reached the wrong result. *See* Opp. 9. It is that it applied the wrong test, affirming a decision that applied another wrong test. Tellingly, the phrase "rigorous analysis" appears *nowhere* in the decision below or in Respondents' brief. That is because neither lower court conducted a rigorous analysis to determine whether there was in fact a common contention capable of class-wide resolution. If the courts below had applied the correct test, these would-be classes would not have survived.

3. Respondents' attempt to harmonize the decision below with decisions of the Ninth and Fifth Circuits is unpersuasive. *See* Opp. 10-12. While the Ninth Circuit's decisions were concerned with predominance, their core logic is utterly incompatible with the Seventh Circuit's ruling on commonality. Both *Vinole* and *Marlo* recognized that class treatment is unsustainable in a wage-and-hour action where the plaintiffs' claims "require a fact-intensive, individual analysis of each employee's exempt status." *Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935, 947 (9th Cir. 2009); *see also Marlo v. United Parcel Serv., Inc.*, 639 F.3d 942, 948-49 (9th Cir. 2011). That is exactly the position that the Seventh Circuit rejected. It misses the point to say that predominance is determined by a multi-factor analysis, *see* Opp. 11, because

the Ninth Circuit zeroed in on only one factor, the need to conduct an "inquiry into each [employee's] exempt status," *Vinole*, 571 F.3d at 947—which is the central concern of commonality as well.[2]

Nor are the asserted distinctions with the Fifth Circuit's decision in *Perry* persuasive. Respondents repeat their error of arguing that *Dukes*'s teaching is limited to one particular type of "substantive claim[]," whether it is Title VII, state wage-and-hour laws, or due process. Opp. 12. They miss the nub of the conflict. The Fifth Circuit vacated the class certification order and remanded because the district court failed to investigate dissimilarities within the putative classes "with reference to the elements and defenses and requisite proof for each of the proposed class claims." *M.D. v. Perry,* 675 F.3d 832, 843 (5th Cir. 2012). The Seventh Circuit, on the other hand, believed it was sufficient merely to note the existence of dissimilarities without considering, much less resolving, whether they would prevent the common resolution of the plaintiffs' claims. That conflict, at its core, is about what a "rigorous analysis" requires.

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2. Recently, this Court granted certiorari in *Comcast Corp. v. Behrend*, No. 11-864, 80 U.S.L.W. 3442 (U.S. June 25, 2012), to address whether a court may certify a class action without resolving whether plaintiffs introduced admissible evidence to demonstrate compliance with Rule 23. Although *Comcast* and this case both concern misconstructions of *Dukes*, each raises a different issue. As *amici curiae* in support of Charter One argue, the Seventh Circuit's decision, along with *Comcast*, gives this Court the "perfect opportunity" to address the "full panoply of ways in which plaintiffs and lower courts [are] attempt[ing] to undermine and limit *Dukes*." *See* Brief of Retail Litigation Center et al. as Amici Curiae in Support of Petitioners at 11, 14.

4. Finally, Respondents attempt to minimize the overall importance of the Seventh Circuit's decision and suggest that resolution of the issues it raises can await a later case. *See* Opp. 1, 14. But a number of district courts have already cited the decision below for the proposition that certification is appropriate even where "variations among class members likely d[o] exist," and to otherwise limit *Dukes*'s application.[3] The influence of the Seventh Circuit's decision on district courts, where most class actions begin and end, is undeniable. And in the area of wage-and-hour litigation—the most lucrative and statistically dominant category of aggregate actions filed in state and federal court today—the purposeful and steady regression of *Dukes* should be stopped in its tracks. *See* Pet. 8-10.

3. *See, e.g.*, *Driver v. AppleIllinois, LLC*, No. 06-6149, 2012 WL 689169, at *3 (N.D. Ill. March 2, 2012); *Whitlock v. FSL Mgmt. LLC, Inc.*, No. 10-CV-00562, 2012 WL 3274973, at *8 (W.D. Ky. Aug. 10, 2012); *Morris v. Affinity Health Plan, Inc.*, No. 09 Civ. 1932, 2012 WL 1608644, at *2 (S.D.N.Y. May 8, 2012); *Cuevas v. Citizens Fin. Group, Inc.*, No. 10-CV-5582, 2012 WL 1865564, at *1 (E.D.N.Y. May 22, 2012); *Ripley v. Sunoco, Inc.*, No. 10-1194, 2012 WL 2402632, at *4 (E.D. Pa. June 26, 2012); *Jimenez v. Allstate Ins. Co.*, No. 10-CV-0846, 2012 WL 1366052, at *12 (C.D. Cal. Apr. 18, 2012); *In re Heartland Payment Sys. Inc. Customer Data Sec. Breach Litig.,* 851 F. Supp. 2d 1040, 1054 (S.D. Tex. 2012).

CONCLUSION

The petition for a writ of certiorari should be granted.

October 1, 2012

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