IN THE

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

Case No. 19-1514

QUINTON HARRIS; GEOFFREY MILLER; NORMAN MOUNT; THOMAS TAYLOR; JOHN BAKER; and SCOTT ZINN,

Plaintiffs-Appellees

v.

UNION PACIFIC RAILROAD COMPANY,

Defendants-Appellant.

On Appeal from the United States District Court for the District of Nebraska
Civil Action No. 8:16-cv-00381 (Judge Joseph F. Bataillon)

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE NATIONAL ASSOCIATION OF MANUFACTURERS, AND THE NATIONAL RETAIL FEDERATION AS *AMICI CURIAE* IN SUPPORT OF APPELLANT

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CORPORATE DISCLOSURE STATEMENT

Amici curiae certify that they have no outstanding shares or debt securities in the hands of the public, and they do not have a parent company. No publicly held company has a 10% or greater ownership interest in *amici curiae.*

/s/ Adam G. Unikowsky

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All parties consent to the filing of this amicus brief.[1]

IDENTITY AND INTEREST OF AMICI

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It 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 sector, from every region of the country. One of the Chamber's most important responsibilities is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community.

The National Association of Manufacturers ("NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs more than 12 million men and women, contributes $2.25 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for more than three-quarters of all private-sector research and development in the nation. The NAM is the voice of the manufacturing community and the leading advocate for a

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *amici* affirm that no party or counsel for a party authored this brief in whole or in part and that no person other than *amici*, their members, or their counsel have made any monetary contributions intended to fund the preparation or submission of this brief.

policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

The National Retail Federation ("NRF") is the world's largest retail trade association, representing discount and department stores, home goods and specialty stores, Main Street merchants, grocers, wholesalers, chain restaurants, and internet retailers from the United States and more than 45 countries. Retail is the largest private-sector employer in the United States, supporting one in four U.S. jobs—approximately 42 million American workers—and contributing $2.6 trillion to annual GDP. NRF periodically submits *amicus curiae* briefs in cases raising significant legal issues, including employment-law issues, that are important to the retail industry at large and particularly to NRF's members.

Because businesses are almost always the defendants in class action litigation, they have a strong interest in ensuring that courts properly undertake the "rigorous analysis" required by Rule 23 before certifying a class. *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013). *Amici* have a vital interest in this case because the district court's application of Rule 23 here was plainly improper. Further, businesses regularly must fill job positions that require physical qualifications. For instance, a locomotive engineer must be able to see and climb into the cab; persons who suffer from vision loss, hearing loss, or fainting spells may be unable to perform certain functions safely. Businesses have an interest in ensuring that their employees can

safely perform the essential functions of their jobs. As explained in detail below, the district court's decision rested on fundamental confusions about class-action jurisprudence and its relationship to both the substantive elements and the methods of proof available under anti-discrimination statutes. *Amici* thus have a strong interest in seeing the district court's error corrected and ensuring that it does not become the law of this Circuit.

SUMMARY OF ARGUMENT

The district court's class-certification order rests on its fundamental confusion about the method of proof authorized in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977). *Amici* submit this brief in order to untangle that confusion—and to underscore the importance of rigorous adherence to Rule 23's requirements in employment-discrimination cases and others alike.

The analysis in this case should begin from a straightforward proposition: Under any conventional application of Rule 23's commonality, cohesiveness, and predominance requirements, Plaintiffs would not be entitled to litigate the potential disability-discrimination claims of thousands of other employees in tandem with their own. The kaleidoscopic variety among the putative class members' potential claims—involving different medical conditions, jobs, and potential accommodations—would preclude class certification.

This fundamental defect in Plaintiffs' class-certification theory cannot be patched up through the mechanism of an artificial "bifurcation" order. It should go without saying that the mere possibility of bifurcating a case into common and individualized issues does not, in and of itself, justify class certification. If it did, *every* case would be fit for class certification: Any factual or legal issues potentially bearing on multiple class members can simply be resolved in a "first" phase, with a cascade of mini-trials to follow in order to determine both liability and remedies on a case-by-case basis. That is not the method of dispute resolution contemplated by Rule 23. And for good reason: Allowing such pseudo-class actions to proceed threatens extreme prejudice to defendants and absent class members, and it improperly aggrandizes the power of a single district judge by allowing that judge effectively to claim thousands of highly individualized disputes as his or her own.

Here, the district court did not meaningfully dispute that factual variety or its ordinary legal consequences. Instead, the court reasoned that it could grant class certification in the face of the extreme heterogeneity within the class because this is an anti-discrimination case—purportedly allowing the court to invoke the *Teamsters* method of proof, which provides a means for adjudicating "pattern or practice" claims under Title VII of the Civil Rights Act of 1964.

That was a legal error. In reality, the *Teamsters* procedure only permits courts to resolve certain *remedial* questions through individualized hearings, after the court

has already made a classwide determination of *liability* on a genuinely common basis. Here, unlike in *Teamsters*, Plaintiffs and the district court are proposing an unprecedented "bifurcation" of the essential *liability* determination with respect to each and every class member.

That difference in procedural posture flows from critical differences between Title VII and the Americans with Disabilities Act ("ADA"). In a Title VII "pattern or practice" case, the question of whether the defendant has acted unlawfully can be resolved on a classwide basis, because a policy of race discrimination is categorically unlawful. But under the ADA, there is very often nothing unlawful about considering an employee's health condition in making an employment decision—such as when the condition does not qualify as a "disability" under the statute, the person is not qualified for the position at issue, or certain circumstance-specific affirmative defenses apply. As such, no determination that *any* class member has been treated unlawfully can be made until after mini-trials are held on an individualized basis. *Teamsters*, therefore, does not authorize class certification.

ARGUMENT

I. The District Court's Approach To Class Certification Would Eviscerate Rule 23's Protections.

The Court's analysis of this case should begin with a core principle of class-action law: a court cannot bypass Rule 23 merely by bifurcating a case. The district

court's decision rests on the principle that because it is supposedly possible for Union Pacific to present individualized defenses at the "second" phase, a classwide proceeding is permissible at the "first" phase. But even assuming Union Pacific will have a meaningful opportunity to present its individualized defenses—which it will not, *see infra* at 23-24—that reasoning alone could not justify class certification. In virtually *every* putative class action, it is logically possible to extract *some* issue that is common to all class members. In any ADA case, for instance, the question of whether the employer has 15 or more employees—as required to establish liability under the ADA—will typically be common to all class members. *See* 42 U.S.C. § 12111(5)(A). Yet this does not mean that all cases can be transformed into class actions by bifurcating them into a "first" stage, where some preliminary issue is resolved, and then resolving both liability and remedy, on a case-by-case basis, in a "second" phase. This Court should reiterate that such bifurcation does not offer district courts a viable path to circumventing Rule 23's procedural protections for defendants and absent class members.

This Court already said as much when it confronted a very similar case, just three years ago, in *Ebert v. General Mills, Inc.*, 823 F.3d 472, 480 (8th Cir. 2016). There, a class of plaintiffs sued General Mills for alleged environmental contamination affecting their health and property. *See id.* at 475-77. The district court adopted

essentially the same approach as the court below here: It ordered a bifurcated proceeding, with a so-called "liability" phase to determine General Mills' actions with respect to the general geographic area, and a "remedial" phase to determine all matters bearing on specific class members. And, as here, the court justified this approach by invoking Rule 23(b)(2) with respect to the first proceeding and Rule 23(b)(3) with respect to the second. *See id.*

This Court correctly explained that this approach amounted to an end-run around Rule 23's requirements of commonality, cohesiveness, and predominance. Even as to liability, the Court explained, the classwide so-called "liability" proceeding would not yield determinate results: Rather, "[t]o resolve liability there must be a determination as to whether vapor contamination, if any, threatens or exists on each individual property as a result of General Mills' actions, and, if so, whether that contamination is wholly, or actually, attributable to General Mills in each instance." *Id.* at 479. Thus, the district court had not actually bifurcated liability and remedy, but had simply extracted a single supposedly common issue for determination at the first stage, while deferring to the second stage the ultimate question of General Mills' liability to *any* class member.

This Court was unsparing in its criticism of that approach: Through the "*deliberate* limiting of issues by this district court," this Court explained, the court had "essentially *manufactured* a case that would satisfy" Rule 23. *Id.* (emphasis added).

This Court thus made clear that an "artificial" separation of a case into distinct phases—in order to construct one phase allegedly suited for class treatment—is an abuse of discretion. *Id.* at 479. In such a case, "[t]he district court's narrowing and separating of the issues ultimately unravels and undoes any efficiencies gained by the class proceeding because many individual issues will require trial." *Id.*

This case makes clear that *Ebert*'s lesson has not yet been fully learned—and warrants repeating. Pseudo-class actions of the kind at issue there and here threaten extreme prejudice to defendants and absent class members alike. For defendants, they mean that a defendant must litigate potentially thousands of multifarious cases in a single proceeding, before a single jury with limited attention—denying the defendant a fair opportunity to develop in appropriate detail the case-specific arguments and defenses that the law provides. Meanwhile, absent class members are prejudiced as well by the imperative to opt-out or risk losing their claims, when the case at hand in fact shares relatively little with theirs to begin with.

Finally, the district court's approach improperly aggrandizes the power of a single district judge by allowing that judge effectively to claim thousands of highly individualized disputes as his or her own. Rule 23's protections ensure that not *all* claims under the same statute against the same defendant will automatically be heard by a single judge; rather, that result will follow only when the claims of a cohesive class are all actually driven by common issues. Under the district court's approach,

by contrast, a single district judge can effectively appoint himself or herself to supervise all litigation involving a given corporate defendant's practices within a broad field. Of course, the district court's approach contemplates individualized proceedings at the second phase. But the purpose and effect of the district court's approach is to enter a single classwide finding that will dramatically influence the outcome of those second-phase proceedings. That dangerous dynamic compounds the extraordinary pressures toward settlement—irrespective of the merits—that have long been recognized as one of the principal drawbacks of class litigation. *See, e.g.*, *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978) (noting that class litigation "may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense").

Thus, in reversing the district court here, this Court should reaffirm the broader proposition that Rule 23 imposes vital limitations on the powers of district courts—limitations that those courts should not seek to circumvent through artificial "bifurcation" or similar devices.

II. The *Teamsters* Method Of Proof Does Not Permit District Courts To Circumvent Rule 23's Requirements In ADA Cases.

The principle this Court recognized in *Ebert* requires reversal in this case as well. The class-certification order is a paradigmatic example of the sort of artificial "bifurcation" order that violates Rule 23. Contrary to the district court's reasoning,

the Supreme Court's reasoning in *Teamsters* does not permit this end-run around well-settled class certification principles.

The district court's class-certification decision rested on the court's use of the *Teamsters* method of proof. But the *Teamsters* method is appropriate only when the District Court can answer a single question that establishes the defendant's liability to the entire class in one fell swoop. *Teamsters* and its progeny establish that if an employer engages in a pattern or practice of racial discrimination, then the employer has violated Title VII, period. *See infra* at 10-12. As such, the court may enjoin that pattern or practice with respect to *all* class members without the need for individualized inquiries. But that reasoning does not carry over to the ADA, because even assuming that Union Pacific uniformly applied the policy that Plaintiffs allege, that policy's legality depends on each employee's unique situation, turning on numerous individualized factors. The *Teamsters* method thus cannot properly be applied here—and the class lacks the cohesiveness necessary to satisfy Rule 23 as a result.

A. The *Teamsters* Method Presupposes A Classwide Finding of Illegality.

In order to appreciate the logic of the *Teamsters* method of proof and why it has no application here, it is important to understand *Teamsters* itself. There, the plaintiff (the Federal Government) proved "systematic and purposeful employment discrimination" on the basis of race throughout the defendant trucking company. 431 U.S. at 342. Specifically, the company refused to hire African-American or

Spanish-surnamed individuals as drivers. *See id.* at 344. Thus, as the Supreme Court put it, "racial discrimination was the company's standard operating procedure." *Id.* at 361. And under the substantive law of Title VII, the district court's finding of such a "pattern or practice" of race discrimination was sufficient to hold the defendant liable for violating the statute. 42 U.S.C. § 2000e-6(a). As the Supreme Court explained, "[w]ithout any further evidence from the Government, a court's finding of a pattern or practice justifies an award of prospective relief"; most notably, "[s]uch relief might take the form of an injunctive order against continuation of the discriminatory practice." *Teamsters*, 431 U.S. at 361; *see Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 352 n.7 (2011) (similar).

Having already proved the relevant statutory violation, the Government in *Teamsters* also sought "individual relief for the victims of the discriminatory practice." *Teamsters*, 451 U.S. at 361. Consequently, the Court explained, the district court was required to "conduct additional proceedings after the liability phase of the trial to determine the scope of individual relief" (such as retroactive seniority). *Id.* The question in this "second, 'remedial' stage of trial" would not be whether the defendant violated Title VII (a matter already determined at the first stage), but simply what *remedy* each individual member of the affected class (*i.e.*, each particular African-American or Spanish-surnamed employee) was entitled to in light of

the particular *effects* that the company's practice of unlawful discrimination had on him or her. *Id.*

B. The *Teamsters* Method Cannot Be Applied to ADA Cases, Because the Court Cannot Make a Classwide Liability Finding.

The classwide liability finding that underlies the *Teamsters* method of proof—and that renders that method consistent with Rule 23—has no analogue in this case. In *Teamsters*, it was possible to prove (and the Government did in fact prove) that the company violated Title VII because it had a general policy of unlawfully discriminating against African-American and Spanish-surnamed drivers. But that is because Title VII prevents a company from racially discriminating against *any* employee for *any* reason. Title VII does not limit its racial discrimination protections to employees with particular life experiences or job qualifications, and it does not permit employers to justify racial discrimination on the basis of business necessity. As such, a policy that subjects all African-American and Spanish-surnamed drivers to racial discrimination is illegal with respect to *all* of those drivers. For that reason, a class composed of those employees could properly have been certified to seek a classwide finding of liability and appropriate injunctive relief protecting them all—and perhaps additional individual relief, predicated on the classwide liability finding, as well.

"Discrimination" on the basis of a health condition under the ADA, however, is fundamentally different. Adverse treatment based on a health condition is only

unlawful under carefully circumscribed conditions. First, the condition at issue must constitute a "disability" within the meaning of the statute in the first place. *See* 42 U.S.C. § 12102(1)(A), (C) ("[D]isability" means "a physical or mental impairment that substantially limits one or more major life activities of [an] individual," or "being regarded as having such an impairment"); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 490 (1999) ("[A]n employer is free to decide that physical characteristics or medical conditions that do not rise to the level of an impairment … are preferable to others … ."), *superseded by statute on other grounds*, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553. Thus, whereas any employee of any race who suffers racial discrimination may sue under Title VII, only a particular class of employees—those with a "disability"—may invoke the ADA's protections. Second, "[i]n contrast to Title VII, [the ADA] … only protects from discrimination those disabled individuals who are able to perform, with or without reasonable accommodation, the essential functions of the job they hold or desire." *Hohider v. United Parcel Service, Inc.*, 574 F.3d 169, 191 (3d Cir. 2009) (collecting cases). Thus, whereas a victim of racial discrimination need not prove his job qualifications to be protected by Title VII, an ADA plaintiff does bear that burden. Crucially, both of these threshold questions regarding the applicability of the ADA—*i.e.*, whether a person is "disabled," and whether he or she can perform the job—turn on "an individualized inquiry." *Sutton*, 527 U.S. at 483. In addition, the ADA provides

affirmative defenses to liability—such as "business necessity" or a showing that the employee poses a "direct threat"—that call for individualized inquiries as well, and that have no analogue in Title VII. *See* 42 U.S.C. § 12113(a), (b).[2]

Thus, whereas there may be a sense in which "racial discrimination is by definition class discrimination," *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 157 (1982), "the individualized approach of the ADA" is very different. *Sutton*, 527 U.S. at 484. Even a uniform policy of subjecting all employees with health conditions to some form of adverse treatment would not be a uniform policy of *unlawful discrimination*. Rather, the policy would be perfectly legal in many or even most of its applications, either because the affected employee does not have a statutory "disability," or because the employee cannot perform the job's essential functions, or because one of the ADA's affirmative defenses apply. As the Third Circuit explained the same point: "That the existence of the policies alleged by plaintiffs can be adjudicated on a classwide basis … does not mean that these policies, if proven

[2] The EEOC's interpretive regulations repeatedly stress the individualized nature of all of the relevant inquiries under the ADA. *See, e.g.*, 29 C.F.R. § 1630.2(j)(1)(iv) ("The determination of whether an impairment substantially limits a major life activity requires an individualized assessment."); *id.* § 1630.2(r) ("The determination that an individual poses a 'direct threat' shall be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job."); 29 C.F.R. pt. 1630, App. ("[D]isability is determined based on an individualized assessment. There is no 'per se' disability. … Whether a particular form of assistance would be required as a reasonable accommodation must be determined on an individualized, case by case basis …. The capabilities of qualified individuals must be determined on an individualized, case by case basis.").

to exist, would amount to a classwide showing of *unlawful discrimination* under the ADA." *Hohider*, 574 F.3d at 184 (emphasis added).

That gap between a classwide *policy* and a classwide *illegality* has major consequences for the applicability of the *Teamsters* framework and, in turn, for the appropriateness of class certification under Rule 23. The district court certified classes here under both Rule 23(b)(2) and Rule 23(b)(3). But because Plaintiffs cannot prove classwide liability on a common basis—whether at a first, "liability" stage of a bifurcated trial or otherwise—neither the threshold commonality prerequisite of Rule 23(a)(2), nor the respective requirements of Rule 23(b)(2) and 23(b)(3), are satisfied in this case.

1. Rule 23(a)(2) Is Not Satisfied.

First, Rule 23(a)'s bedrock commonality requirement—demanding that there must be "questions of law or fact common to the class"—is not satisfied here. Fed. R. Civ. P. 23(a)(2). As the Supreme Court has explained, "[t]hat language is easy to misread, since any competently crafted class complaint literally raises common 'questions.'" *Wal-Mart*, 564 U.S. at 349 (internal quotation marks and alteration omitted). What commonality actually requires is that "that the class members '*have suffered the same injury*'"—meaning not merely that they have suffered "a violation of the same provision of law," but that their claim rests on "a common contention," such as "the assertion of discriminatory bias on the part of the same supervisor." *Id.*

at 350 (emphasis added). "That common contention, moreover, must be of such a nature that it 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.* In other words, the answer to the purportedly "common" question must be "apt to drive the resolution of the litigation." *Id.* (quotation marks omitted)

In a traditional *Teamsters* case under Title VII, the classwide liability question—whether the defendant has subjected the class to an unlawful policy of race discrimination—plainly "drive[s] the resolution of the litigation." *Id.* (quotation marks omitted). First, that classwide determination suffices to resolve the liability phase of the case and hold the defendant in violation of the law. Second, it suffices to resolve the availability of injunctive relief to reform the defendant's practices as well. And third, even as to *individual* relief, the classwide liability finding justifies a presumption in favor of relief in each ensuing individualized hearing.

Here, by contrast, the matters proposed for resolution on a classwide basis have *none* of these litigation-driving consequences. As Union Pacific's brief explains, Union Pacific imposes work restrictions when its medical professionals conclude that an employee presents an unacceptable high risk of sudden incapacitation, defined as an annual occurrence rate exceeding one percent. Union Pacific Br. 9. If the district court finds that Union Pacific imposes the alleged risk-threshold

policy on a classwide basis, that will not establish Union Pacific's liability under the ADA with respect to *any*, let alone every, class member. Nor will it warrant any classwide injunctive relief. To the contrary, many class members would have no entitlement to an injunction against the application of the challenged risk threshold to them at all—because, for example, they are not covered by the ADA in the first place.

Nor would the classwide determinations that Plaintiffs seek in the "first" phase of their trial plan justify any presumption in favor of class members, with respect to either liability or remedy, in the thousands of contemplated mini-trials at the "second" phase. As the Supreme Court explained in *Teamsters*, the presumption in favor of individual relief rests on two grounds: (1) the diminished equitable entitlements of one in "the position of … a proved wrongdoer," and (2) the simple factual "likelihood that any single decision was a component of the overall pattern" of unlawful conduct. *Teamsters*, 431 U.S. at 359 n.45. Both of those grounds presume that the court finds, at the first phase, that the employer has violated the law with respect to the entire class—which is possible in Title VII pattern-or-practice cases, but impossible in ADA cases. The departures from the *Teamsters* paradigm here thus not only make the *Teamsters* method of proof inappropriate, but also defeat Plaintiffs' claim of commonality under Rule 23(a).

2. Rule 23(b)(2) Is Not Satisfied.

After erroneously finding Rule 23(a)'s commonality requirement satisfied, the district court proceeded to "certify liability and injunctive relief under Rule 23(b)(2) and … certify the back pay and compensatory damages under Rule 23(b)(3)." Add. 17-18. But, even apart from the district court's Rule 23(a) error, neither of these provisions of Rule 23(b) is satisfied in this case either.

Beginning with Rule 23(b)(2), in order to certify a (b)(2) class, a court must find that "the party opposing the class has acted or refused to act on grounds that apply generally to the class, *so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole*." Fed. R. Civ. P. 23(b)(2) (emphasis added). The district court did not even mention this requirement. But as this Court has recognized, it demands that the class be "cohesive." *See Grovatt v. St. Jude Med., Inc.* (*In re St. Jude Med., Inc.*), 425 F.3d 1116, 1121-22 (8th Cir. 2005) ("Although Rule 23(b)(2) contains no predominance or superiority requirements, class claims thereunder still must be cohesive. … At base, the (b)(2) class is distinguished from the (b)(3) class by class cohesiveness." (internal quotation marks omitted)); *see also* Ebert, 823 F.3d at 480 (reversing class certification because "at the outset the cohesiveness necessary to proceed as a class under (b)(2) is lacking").

In particular, because "[i]njuries remedied through (b)(2) actions are really group, as opposed to individual injuries," "[t]he members of a (b)(2) class are generally bound together" either through a legal relationship or through "some significant common trait such as race or gender." 425 F.3d at 1122 (quotation marks and citation omitted). And that critical fact—that the class members are similarly situated with respect to the alleged unlawful policy (as, for instance, a class of African-American employees is with respect to a policy of race discrimination)—is what makes "injunctive relief … appropriate *respecting the class as a whole*." Fed. R. Civ. P. 23(b)(2) (emphasis added). In the Supreme Court's formulation, "[t]he key to the (b)(2) class is … that the conduct is such that it can be enjoined or declared unlawful *only as to all of the class members or as to none of them*." *Wal-Mart*, 564 U.S. at 360 (internal quotation marks omitted; emphasis added). For that reason, this Court has repeatedly found the "cohesiveness" required for a (b)(2) class lacking when the defendant's "conduct cannot be evaluated without reference to the individual circumstances of each plaintiff." *Avritt v. Reliastar Life Ins. Co.*, 615 F.3d 1023, 1036 (8th Cir. 2010); *see Ebert*, 823 F.3d at 481 ("It is the disparate factual circumstances of class members that prevent the class from being cohesive and thus unable to be certified under Rule 23(b)(2).").

Here, the certified (b)(2) class encompasses "[a]ll individuals who have been or will be subject to a fitness-for-duty examination as a result of a reportable health

event at any time from September 18, 2014 until the final resolution of this action." Add. 19. But that class plainly lacks the requisite cohesiveness with respect to Plaintiff's legal theory, because many of the class members would *not* be entitled to an injunction against the use of Union Pacific's challenged policy even if that policy violated the ADA as applied to some individuals. For many class members, the application of Union Pacific's policy would not violate the ADA—for instance, if the class members have no covered disability, or are not qualified for their positions, or if Union Pacific could assert another defense recognized by the ADA. *See supra* at 12-14. And once again, this feature of Plaintiffs' case is in stark contrast to the traditional *Teamsters* model, where a class of employees challenge an alleged policy of systematic racial discrimination that is unlawful in all of its applications and thus "can be enjoined or declared unlawful only as to all of the class members or as to none of them." *Wal-Mart*, 564 U.S. at 360 (quotation marks omitted).

3. Rule 23(b)(3) Is Not Satisfied.

Plaintiffs' bid for class certification fares no better under Rule 23(b)(3). Initially, even the district court did not believe that a Rule 23(b)(3) class could be certified in this case on a standalone basis. Rather, the court proposed a "hybrid" approach in which it would "certify liability and injunctive relief under Rule 23(b)(2)" and "certify the back pay and compensatory damages under Rule 23(b)(3)." Add. 17-18. But there could *be* no back pay or compensatory damages

absent a liability finding—which, under the district court's approach, was to be made at least in part through litigation predicated (albeit improperly) on Rule 23(b)(2). And as noted above, a *Teamsters*-like finding of classwide liability cannot be made at the first stage, because liability—not just remedy—depends on individualized questions. Thus, the impermissibility of the Rule 23(b)(2) class necessitates vacatur of the decision to certify the Rule 23(b)(3) class as well, *see supra* § II.B.2—as, indeed, does the absence of a "common" question at the very first step of the class-certification analysis, *see supra* § II.B.1.

Nonetheless, if this Court reaches the applicability of Rule 23(b)(3), it is clearly unsatisfied here as well. That rule requires the court to find "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." Fed. R. Civ. P. 23(b)(3) (emphasis added). In making these assessments, the court must consider "the likely difficulties in managing a class action." Fed. R. Civ. P. 23(b)(3)(D). As this Court has explained, "[t]he 'predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation,' and 'goes to the efficiency of a class action as an alternative to individual suits.'" *Ebert*, 823 F.3d at 479 (citations omitted).

Here, the district court's extraordinarily cursory discussion of predominance is at odds with the Supreme Court's direction to undertake a "rigorous analysis" before certifying a class. *Behrend*, 569 U.S. at 33. The court simply restated the language of Rule 23(b)(3) in the form of a "find[ing]," followed by the assertion that "[t]he proposed classes are sufficiently cohesive as to the alleged pattern of discriminatory decision making to the class, more so than to the individuals," and that "[t]he same evidence will be used to establish class-wide proof." Add. 13-14. Whatever that means, it reflects no serious weighing of the relative significance of assertedly common questions and plainly individualized questions in this litigation.

Indeed, as the court's trial plan reflects, the court did not dispute that central issues in the case—most notably, whether each particular class member has been subject to any legal wrong at all—will require individualized assessments. *See* Add. 18. Given that much, the court's perfunctory finding that classwide questions "predominate over" these thousands of individualized mini-trials—each of which will address both liability and remedies—is indefensible. As this Court has explained, common questions do not "predominate" when critical issues "will *still* need to be resolved household by household even if a determination can be made class-wide on the fact and extent of [the defendant's] role in the [alleged wrong]," such that the

class-wide findings are "merely preliminary to matters that *necessarily* must be adjudicated to resolve the heart of the matter." *Ebert*, 823 F.3d at 479-80. That is the case here as well.

4. The Class Certification Order Violates the Due Process Clause and the Rules Enabling Act.

Finally, for all practical purposes, there is no way for a district court to manage this class action without improperly stripping Union Pacific of its right to raise individualized defenses, in violation of the Rules Enabling Act and the Due Process Clause. ADA lawsuits brought by individual plaintiffs often present numerous complex issues of both fact and law—the parties might litigate whether the plaintiff has a statutory "disability," whether he can perform the essential functions of his job, and whether the employer can assert one or more of the affirmative defenses that the ADA recognizes. Each of these issues may require fact and expert discovery and trial testimony. Litigating *one* such case in a manner comprehensible to a jury is challenging; litigating *thousands* of such cases in a single class proceeding is impossible. The only possible way to resolve thousands of ADA cases in a single class proceeding is to "streamline" the case by stripping Union Pacific of its right to present individualized defenses. But such a proceeding would not only strip Union Pacific of its due process right to present its defense, but would violate the Rules Enabling Act, which bars courts from using the class-action device in a way that

would "abridge … any substantive right" of any party. 28 U.S.C. § 2072(b); *see Wal-Mart*, 564 U.S. at 364.

* * *

The district court's fundamental mistake was to attempt to extend the *Teamsters* method of proof—built for classwide challenges to genuinely classwide policies of unlawful discrimination—to the fundamentally different statutory scheme of the ADA, where the very same employment policy will often be lawful as applied to numerous individuals even if it may be unlawful as applied to others. That heterogeneity means that *Teamsters*' bifurcated approach cannot be applied consistent with the core procedural requirements of Rule 23.

CONCLUSION

The class-certification decision should be reversed.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5), the type style requirements of Fed. R. App. P. 32(a)(6), and the type-volume limitations of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because it is proportionally spaced, has a typeface of 14 point Times New Roman, and contains 5,688 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This brief complies with Circuit Rule 28A(h) because the files have been scanned for viruses and are virus-free.

/s/ Adam G. Unikowsky

CERTIFICATE OF SERVICE

I, hereby certify that on April 29, 2019, I caused the foregoing brief to be electronically filed with the Clerk of the Court for the United States Court Of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Adam G. Unikowsky