No. 12-113

IN THE

Supreme Court of the United States

MERRILL LYNCH, PIERCE, FENNER & SMITH, INCORPORATED,

Petitioner,

v.

GEORGE MCREYNOLDS, MAROC HOWARD, LARUE GIBSON, JENNIFER MADRID, FRANKIE ROSS, MARVA YORK, LESLIE BROWNE, HENRY WILSON, LEROY BROWN, GLENN CAPEL, CHRISTINA COLEMAN, J. YVES LABORDE, MARSHELL MILLER, CARNELL MOORE, MARK JOHNSON, CATHY BENDER-JACKSON, AND STEPHEN SMARTT, 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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court should review the Seventh Circuit's interlocutory holding that a disparate impact challenge by approximately 700 employees in a single job and business unit to admittedly "objective national policies" satisfies the commonality standard for class certification set forth in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011).

2. Whether this Court should review the Seventh Circuit's interlocutory decision to "carve at the joint" in certifying an issue class for class-wide disparate impact liability and injunctive relief under Federal Rule of Civil Procedure 23(c)(4), where there is no longer any circuit split and the formerly dissenting circuit would have reached the same result.

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STATUTES AND RULES INVOLVED

Federal Rule of Civil Procedure 23:

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

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

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

* * *

(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

(3) the court finds that the questions of law or fact common to class members predominate over any

questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses.

* * *

(4) *Particular Issues.* When appropriate, an action may be brought or maintained as a class action with respect to particular issues.

(5) *Subclasses.* When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.

* * *

INTRODUCTION

This is the rare case in which the employer – here, Merrill Lynch, Pierce, Fenner & Smith Inc. ("Merrill Lynch") – admits that its "objective national policies" disproportionately disadvantage and exclude African American brokers. D 386 at 52 n.24; D 347-1 at 32; D 360-4.[1] As a substantial result of these policies, African American brokers are paid 33% to 42% less than white brokers with the same education, experience, job duties, and office location. D 343-2 at 59-64. Scrupulously following this Court's teachings in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), the Seventh Circuit held that a class of approximately 700 African American brokers should be certified under Federal Rules of Civil Procedure 23(b)(2) and 23(c)(4) for determination of the issues of class-wide disparate impact liability and injunctive relief.

Merrill Lynch urges this Court to review that decision on the ground it contravenes *Dukes.* Quite to the contrary, as the Seventh Circuit recently wrote about its decision in this case: "The [Supreme] Court had said that a single policy spanning all sites could be contested in a company-wide class, 131 S. Ct. at 2553, consistent with Rule 23(a)(2), if all other requirements of Rule 23 also were satisfied; [in *McReynolds*] we took the Justices at their word." *Bolden v. Walsh Constr. Co.,* No. 12-2205, 2012 WL 3194593, *4 (7th Cir. Aug. 8, 2012).

Merrill Lynch also contends, based on dicta in two Fifth Circuit decisions from the 1990s, that this case

1. "D" refers to the docket number assigned in the district court; "__a" refers to Petitioner's Appendix.

"deepens" a circuit split concerning the meaning of Rule 23(c)(4). Pet. 3. But to the extent there ever was a circuit split on the issue, it would not have affected the outcome of this case and, in any event, the Fifth Circuit resolved the circuit split of its own accord by joining the other circuits in its approach to issue classes and subclasses under Rule 23(c).

STATEMENT OF THE CASE

Respondents are a class of approximately 700 African American brokers, or Financial Advisors, who work in a single job in a single Merrill Lynch business unit. D 361-5. They offer the same products to firm clients and are subject to the same company-wide account distribution, teaming, and compensation policies. *See* D 353-19.

Uncontested evidence establishes that Merrill Lynch's African American brokers suffer higher rates of attrition and fare far worse than white brokers in nearly all of the firm's metrics. D 347-1; D 347-7. Merrill Lynch also does not dispute that, under firm-wide policies, it paid its African American brokers 33% to 42% less than white brokers with the same job, education, experience, and office location:

Year	Percentage Compensation Differences Between African American and White Brokers	Standard Deviations	Probability Due to Chance
2001	- 33.57%	6.57	1 in 20 billion
2002	- 36.53%	7.37	1 in 50 trillion
2003	- 33.23%	6.73	1 in 58 billion
2004	- 37.98%	8.03	1 in 100 trillion
2005	- 41.81%	9.05	< 1 in 1 quadrillion
2006	- 42.34%	9.07	< 1 in 1 quadrillion

D 343-2 at 11, 59-64. Plaintiffs' experts and Merrill Lynch's internal reports demonstrate that two specific company-wide policies, account distribution and teaming, are substantially responsible for these racial disparities. 31a-33a; D 343-2 at 13-15; D 364-5 at 47.

A. The Challenged Firm-Wide Policies

A small team of senior executives creates, implements, and monitors the national account distribution and teaming policies that apply to every Merrill Lynch broker and manager. D 353-4; D 356-9 at 5.

1. The National Account Distribution Policy

Every year a committee of Merrill Lynch senior executives reviews, approves, and issues a new written, national account distribution policy that dictates which broker will receive each client account of a departing or retiring broker. D 353-15 to -19. Mandatory for each branch manager and each client account distribution firm-wide, the account distribution policy utilizes a national ranking scheme. *Id.*; D 368-8 at 4-5.

The national account distribution policy largely excludes African American brokers from account distributions, and the accounts they do receive are significantly smaller and less lucrative than those given to white brokers:

- Racial disparities in account distributions begin in the first month of the training program and continue for 26 of the 28 months thereafter, with statistical significance of 5.20 standard deviations.

- Between 2001 and 2006, Merrill Lynch gave African American brokers client accounts with lower asset value and productivity than whites, resulting in standard deviations of 3.84 and 4.76 respectively.

D 364-5 at 47, 50. Merrill Lynch studied its company-wide policy in the same way as Plaintiffs' expert, with the same results. Internal studies confirmed disproportionate account transfers to white brokers, except for the very smallest accounts. D 360-4; D 353-21.

2. The National Teaming Policy

Merrill Lynch has a firm-wide policy allowing brokers in the same office to form broker teams, and then conferring special policy benefits on those teams. 12a; D 356-21 at 6; D 350-2. The teaming policy gives credit to team brokers for their team's client assets and transactions, which boosts team brokers' standings in the national account distribution ranking system. D 353-19 at 8; 32a-33a. In addition, the client accounts of departing brokers are distributed to their teammates under the account distribution policy. *Id.*

Plaintiffs' expert studied Merrill Lynch data and established the causal link between the firm's teaming policies and the racial disparities:

- The exclusion of African Americans from teams begins in the first year of the broker training program and continues throughout the program.

- White brokers are about twice as likely as African Americans to participate in teams, with statistical significance ranging from 4.94 to 5.65.

- Exclusion from teams accounts for about one-third of the higher failure rate for African American trainees and one-half of the greater attrition among African American brokers.

- Racial differences in team membership account for 15% to 28% of the racial disparities in broker compensation.

D 343-2 at 13-15.

Merrill Lynch monitored and reported on the company-wide effects of its teaming policy and confirmed that its "voluntary model for forming teams appears to disadvantage women and minority FAs" and causes African American brokers to remain "under-represented on teams across all regions." D 347-1 at 32; D 357-11 at 2. Merrill Lynch's own studies confirm the expert findings that teams provide substantial benefits to brokers, including higher production, earnings, and rates of retention. *E.g.*, D 350-2.

3. Merrill Lynch's Admissions of Disparate Impact

Merrill Lynch managed and studied its brokerage workforce on a national basis and reached the same conclusions as Plaintiffs' experts in internal reports disseminated to top executives and the Firm's board of directors: African American brokers are under-represented in the top ranks of "performance," receive fewer and less valuable distributed accounts, are excluded from teams, suffer higher rates of attrition, and are paid less under the firm's uniform policies. *E.g.*, D 347-1, 347-7, 347-8, 347-9.

B. The District Court Rulings

Plaintiffs initially moved to certify their disparate impact and pattern-or-practice discrimination claims under Rules 23(b)(2) and/or 23(b)(3). D 257. Plaintiffs asked the district court to consider a number of class certification options, including issue certification to determine liability, injunctive and declaratory relief issues. *Id.* at 4. The district court accepted Plaintiffs' expert and statistical

evidence but denied class certification. 21a-41a; D 485 at 20-21. The district court also denied Plaintiffs' motion to reconsider. 42a-49a.

After this Court issued its *Dukes* decision, Plaintiffs filed a new motion to certify the disparate impact claim alone, based on this Court's reasoning in *Dukes*. D 471. Plaintiffs proposed several options, including issue certification of the disparate impact class for liability and injunctive and declaratory relief only pursuant to Rule 23(c)(4). *Id.* at 4. The district court noted Plaintiffs had identified the challenged policies and presented "sufficient evidence of a disparate impact just by the statistical evidence." D 489 at 3; 56a. With "evident misgivings," the district court denied Plaintiffs' new certification motion. 19a-20a; 52a-56a. Acknowledging its ruling on "difficult" and "challenging" legal issues could be in error, the district court urged the Seventh Circuit to accept an interlocutory appeal under Rule 23(f) or 28 U.S.C. §1292(b). 56a; D 489 at 6-8.

C. The Seventh Circuit's Interlocutory Decision

The Seventh Circuit reversed the denial of certification for the disparate impact class and ordered "limited class action treatment" for the issues of class-wide disparate impact liability and injunctive relief under Rules 23(b)(2) and 23(c)(4). 1a, 11a, 19a-20a. Writing for the unanimous court, Judge Richard Posner began his analysis with a lengthy discussion of this Court's *Dukes* decision, and then applied *Dukes* to this case. 10a-17a.

Examining Plaintiffs' disparate impact challenge to the account distribution and teaming policies, the court of

appeals rejected Merrill Lynch's argument that the facts of this case are "just like" *Dukes* because the challenged policies involve "a measure of discretion" by individual managers. 10a-17a. As the court noted, the discretion Merrill Lynch gives individual managers is confined to the "framework established" by Merrill Lynch's policies. 10a-17a. Moreover, under these policies, account distributions and team participation "can affect a broker's performance evaluation" by enhancing his or her standing in the national ranking system, "which under company policy influences the broker's pay and promotion." 13a.[2]

The Seventh Circuit noted that Merrill Lynch's account distribution policy establishes specific criteria for distributing the accounts of brokers who leave the firm to the remaining brokers. 12a-13a. "The criteria include the competing brokers' records of revenue generated for the company and of the number and investments of clients retained" – records that may be distorted by prior account distributions and teaming opportunities from which African American brokers were disproportionately excluded. 13a, 15a. As a result, Merrill Lynch's policies can create a "vicious cycle" that compounds the disadvantages for African Americans:

> A portion of the team's pre-existing revenues are transferred within a team to a new recruit, who thus starts out with that much "new" revenue credited to him or her—an advantage,

2. The Seventh Circuit used the term "promotion" to refer to advancement in Merrill Lynch's national ranking system. All class members have the same job title, duties, and pay structure. D 361-5.

> over anyone who is not on a team and thus must generate all of his own "new" revenue, that translates into a larger share of account distributions, which in turn helps the broker do well in the next round of such distributions. This spiral effect attributable to company-wide policy and arguably disadvantageous to black brokers presents another question common to the class, along with the question whether, if the team-inflected account distribution system does have this disparate impact, it nevertheless is justified by business necessity.

15a; *see also* 32a-33a.

The Seventh Circuit likened Merrill Lynch's teaming policy to a police department's policy allowing police officers to choose a junior officer as a partner. 14a. If no male officers choose women partners and no white officers choose black partners, "and if a discriminatory effect was proved," then under *Dukes*, the voluntary partnering policy could be challenged under a disparate impact theory as "an employment decision by top management." *Id.*

The Seventh Circuit concluded that this Court's analysis in *Dukes* supports class treatment in this case:

> [I]n a disparate impact case the presence or absence of discriminatory intent is irrelevant; and permitting brokers to form their own teams and prescribing criteria for account distributions that favor the already successful—those who may owe their success to having been invited to join a successful or promising

> team—are practices of Merrill Lynch, rather than practices that local managers can choose or not at their whim. Therefore challenging those policies in a class action is not forbidden by the *Wal-Mart* decision; rather that decision helps (as the district judge sensed) to show on which side of the line that separates a company-wide practice from an exercise of discretion by local managers this case falls.

15a-16a. Accordingly, the Seventh Circuit ordered certification of the issues of class-wide disparate impact liability and injunctive relief, but did not certify individual class members' backpay claims for class treatment. 19a-20a. The court acknowledged that Plaintiffs were not then requesting class certification under Rule 23(b)(3), but left open for the district court on remand the question of whether any common damages issues warranted certification. 1a-2a, 19a-20a. Merrill Lynch petitioned the Seventh Circuit for rehearing *en banc*, but no member of the court of appeals requested a vote on the petition. 58a-59a.

On remand, the district court issued a Class Certification Order finding "that the proposed disparate impact class meets all elements of Fed.R.Civ.P. 23(a), as well as Fed.R.Civ.P. 23(c)(4) and Fed.R.Civ.P. 23(b)(2)." D 534 at 1. The Order certified a class action "limited to determining the issues of: (i) whether Defendant's teaming and/or account distribution policies have or had an unlawful disparate impact on the certified class, and (ii) if so, the appropriateness of any class-wide final injunctive and corresponding declaratory relief." *Id.* at 2.

REASONS FOR DENYING THE PETITION

Merrill Lynch's bid for certiorari assumes that this Court will adopt a simplistic approach to class certification: *Dukes* reversed certification of a class challenging millions of individual employment decisions, so the Seventh Circuit must have disregarded *Dukes* in certifying a disparate impact challenge to two company-wide policies that apply to all 700 members of the class in this case. Merrill Lynch also argues that a court cannot consider Rule 23(c)(4) unless and until every component of the action qualifies for class treatment under Rules 23(a) and 23(b), according to the rigidly sequential procedure Merrill attributes to the Fifth Circuit.

The simplistic approach Merrill Lynch advocates cannot be squared with the record in this case, including Merrill Lynch's own admissions. Nor can Merrill Lynch's arguments be reconciled with governing law, including this Court's decision in *Dukes*. The Seventh Circuit properly interpreted *Dukes* and Rule 23(c)(4), and the decision below is consistent with the application of Rule 23(c) in other circuits, including the Fifth. Thus, certiorari should be denied.[3]

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3. Merrill Lynch argues that "[t]his case would make an ideal companion case" to *Comcast Corp. v. Behrend*, No. 11-864. But this Court already chose *Behrend* as a companion case to *Amgen v. Connecticut Retirement Plans*, No. 11-1085, and they are scheduled for oral argument on November 5, 2012. Both cases involve deep circuit splits over the evidentiary showing required at the class certification stage, whereas there is no longer any circuit split that would apply to the very different issues in this case.

I. The Seventh Circuit Scrupulously Adhered To The Commonality Standard This Court Announced In *Wal-Mart Stores, Inc. v. Dukes.*

Merrill Lynch's certiorari petition embraces the bottom-line outcome but ignores the reasoning and core holdings of *Dukes.* This Court rejected the *Dukes* class for reasons that require the opposite result here. The "fundamental" flaw in *Dukes* was the lack of any specific employment practice, other than a "policy" of delegating discretion for subjective pay and promotion decisions to individual supervisors. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2554-56 (2011). "[A] policy *against having* uniform employment practices," the Court noted, "is just the opposite of a uniform employment practice that would provide the commonality needed for a class action." *Id.* at 2554 (emphasis in original). No uniform practice "touch[ed] and concern[ed] all members of the class," and the Court held "the bare existence of delegated discretion" could not unite the intentional discrimination claims of 1.5 million workers. *Id.* at 2555-57 & n.10. The diversity of the proposed class, including workers in "a multitude of different jobs, at different levels of Wal-Mart's hierarchy, … in 3,400 stores" who were "subject to a variety of regional policies that all differed," also precluded a finding of commonality. *Id.* at 2557.

Measured by the factors this Court regarded as most critical to commonality, this case is the polar opposite of *Dukes.* Each of the certification factors the *Dukes* class lacked is present in this case. Instead of a bare policy of delegating discretion to individual supervisors, Merrill Lynch promulgated two "objective national policies" that apply uniformly to every Merrill Lynch broker

and manager. D 386 at 52 n.24. These policies, and the "compelling" statistical evidence that they disadvantage African Americans, can and do unite the claims of every class member. 32a. A liability trial would determine the truth or falsity of a common contention: whether Merrill Lynch's uniform account distribution or teaming policies disproportionately disadvantage African American brokers – undoubtedly "an issue that is central to the validity" of the claims of every class member. *Dukes*, 131 S. Ct. at 2551. And unlike a proposed class of 1.5 million workers in multiple line and supervisory jobs, and subject to different regional employment policies, the proposed class here consists of African American brokers who all have the same job within a single business unit, are subject to the same personnel policies, and are systematically paid 33% to 42% less than white brokers with the same education, work experience, and office location. A ruling on whether the policies are discriminatory will resolve "in one stroke" an issue central to each African American broker's claim. *Id.* at 2551; 17a-19a.

Merrill Lynch argues that Wal-Mart supervisors exercised their discretion within the confines of an objective framework, just as Merrill Lynch managers do. Pet. 17. But this analogy cannot bear even superficial scrutiny. Local Wal-Mart supervisors exercised their "broad discretion" over pay and promotions "in a largely subjective manner . . . with only limited corporate oversight." *Dukes*, 131 S. Ct. at 2547. Store managers were free "to apply their own subjective criteria" when selecting candidates for promotion, and only those hand-picked candidates were subject to certain baseline qualifications for advancement. *Id.*

Here, in contrast, the formal national account distribution policy establishes "objective criteria that rank each office's FAs in order of eligibility to receive or select accounts." D 386 at 33, 52 n.24. Managers may depart from these rankings only for rare exceptions identified in the policy itself, and must report any such exceptions to senior management. *Id.* at 32. "Merrill Lynch reviews data from all distributions to monitor whether local offices complied with the [account distribution policy]." *Id.*

A more recent Seventh Circuit decision highlights the factual differences between *Dukes* and this case and refutes Merrill Lynch's argument that the decision below "eviscerates *Dukes*." Pet. 21. In *Bolden v. Walsh Construction Co.*, No. 12-2205, 2012 WL 3194593 (7th Cir. Aug. 8, 2012), the Seventh Circuit relied on *Dukes* and its decision in this case to reverse the certification of a class of thousands of workers at hundreds of construction sites. *Id.* at *6. Commonality was lacking in *Bolden*, as in *Dukes*, because the plaintiffs merely challenged the employer's "policy" of giving discretion to local supervisors. *Id.* at *3, 5. In rejecting the *Bolden* plaintiffs' argument that the decision below in *McReynolds* authorized class certification in their case, the Seventh Circuit explained that *McReynolds* simply applied this Court's teachings:

> Plaintiffs contended that this national [teaming] policy had a disparate impact, because some successful teams refused to admit blacks. We held that a national class could be certified to contest this policy, which was adopted by top management and applied to all of Merrill Lynch's offices throughout the nation. This single national policy was the missing

> ingredient in *Wal-Mart*. The Court had said that a single policy spanning all sites could be contested in a company-wide class, 131 S. Ct. at 2553, consistent with Rule 23(a)(2), if all other requirements of Rule 23 also were satisfied; we took the Justices at their word.

Id. at *4.

In a further effort to analogize this case to *Dukes*, Merrill Lynch erroneously claims that both cases involve "aggregate statistical disparities." Pet. 15. The *Dukes* plaintiffs' expert aggregated regional data, but Wal-Mart countered with evidence that "over 90 percent of Wal-Mart's stores showed no statistical difference in the hourly pay rates between men and women associates with similar work-related characteristics." *Dukes*, 603 F.3d 571, 637 (9th Cir. 2010) (Ikuta, J., dissenting). There is nothing "aggregate" about the statistical evidence in this case, however, which shows that African American brokers earned 33% to 42% less than white brokers with the *same* job, education, experience, and office location, by statistically significant margins ranging from 6.57 to 9.07 standard deviations. D 343-2 at 59-64. Unlike Wal-Mart, Merrill Lynch did not and could not dispute that these disparities hold true across the firm.

Indeed, Plaintiffs' expert analyzed the data in exactly the same way that Merrill Lynch did in its own $12 million expert report (D 312-18 to -19; D 485 at 3) and in a legion of internal reports studying the firm-wide racial effects of its national account distribution and teaming policies. In one internal report after another, Merrill Lynch concluded that these policies disproportionately harm African American brokers. *E.g.*, D 360-4; D 353-21; D 347-1.

Merrill Lynch also asserts that plaintiffs in both *Dukes* and this case relied on anecdotal evidence and a report by Dr. William Bielby to support commonality. Pet. 14-16. This evidence is irrelevant to Merrill Lynch's certiorari petition and was never mentioned or relied upon by the Seventh Circuit's decision, the district court's opinion reviewed by the Seventh Circuit, Plaintiffs' renewed class certification motion, or Plaintiffs' merits briefing before the Seventh Circuit. 1a-20a; 52a-56a; D 471; C.A. No. 11-3639, Plaintiffs' Briefs.

Rather than following the reasoning and teachings of *Dukes*, Merrill Lynch looks only at the bottom-line result and concludes that the Seventh Circuit should have reached the same result in this case. The Seventh Circuit properly rejected that argument, and there is no reason for this Court to review that decision.

II. The Circuits Are Now Uniform In Certifying Issue Classes Like This One.

Merrill Lynch urges this Court to resolve a "circuit split" over the interpretation of Rule 23(c)(4) in favor of dicta in two Fifth Circuit panel decisions from the 1990s – a footnote in *Castano v. American Tobacco Co.*, 84 F.3d 734, 745 n.21 (5th Cir. 1996), and a divided opinion in *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 422 (5th Cir. 1998). As Merrill Lynch acknowledges, the Fifth Circuit alone has referred to Rule 23(c)(4) as a mere "housekeeping" measure that district courts may consider only after finding that the cause of action as a whole has met the requirements of Rules 23(a) and (b). Pet. 22-26. All other circuits to consider the question have rejected this approach to issue classes. *See*, *e.g.*,

Smilow v. Southwestern Bell Mobile Sys., Inc., 323 F.3d 32, 41 (1st Cir. 2003); *In re Nassau County Strip Search Cases*, 461 F.3d 219, 226 (2d Cir. 2006); *Gates v. Rohm & Haas Chemicals LLC*, 655 F.3d 255, 272-73 (3d Cir. 2011); *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 439 (4th Cir. 2003); *Mejdrech v. Met-Coil Sys. Corp.*, 319 F.3d 910, 911-12 (7th Cir. 2003); *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996); *Williams v. Mohawk Indus.*, 568 F.3d 1350, 1359-60 (11th Cir. 2009).

Likewise, all the leading scholars agree that a class action may be certified for particular issues that meet the requirements of Rules 23(a) and 23(b), even if other portions of the action would not qualify for class treatment. 6 Conte & Newberg, *Newberg on Class Actions* §24:24 (4th ed. 2002); 7AA Wright & Miller, *Federal Practice & Procedure* § 1790 (3d ed. 2005); Federal Judicial Center, *Manual for Complex Litigation* §30.17 (3d ed. 1995); *see also* Kamens, *Experts Say Recent Seventh Circuit Ruling May Not Make 'Issue Certification' Trendy*, Class Action Litigation Report (Mar. 9, 2012), *available at* Bloomberg BNA 13 Class 284 (quoting Professor John C. Coffee, Jr.'s statement that the ruling below in *McReynolds* is "an encouraging decision by Judge Posner" demonstrating the judicious use of issue certification).[4]

4. Only a smattering of commentators disagree with the consensus interpretation of Rule 23(c)(4), and many of those dissenters are advocates on behalf of defendants resisting class certification. For example, Laura Hines represented Philip Morris in *Castano*, and Daniel Piar represented employers in several class actions. Hines, *The Dangerous Allure of the Issue Class Action*, 79 Ind. L.J. 567 (2004); Piar, Bio, Charlotte School of Law website, *available at* http://charlottelaw.org/facultyandstaff/homepage.aspx?ID=329&pageTypeID=1.

Rule 23(c)(4) provides that, "When appropriate, an action may be brought or maintained as a class action with respect to particular issues." The Advisory Committee Note to the 1966 Amendment of subdivision (c)(4) explains that issue class actions are appropriate, for example, for determining liability in actions where the need for individualized damages determinations would otherwise defeat predominance:

> This provision recognizes that an action may be maintained as a class action as to particular issues only. For example, in a fraud or similar case the action may retain its "class" character only through the adjudication of liability to the class; the members of the class may thereafter be required to come in individually and prove the amounts of their respective claims.

Mischaracterizing a failed 1995 amendment to Rule 23,[5] Merrill Lynch argues that the "rulemaking history"

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5. Contrary to Merrill Lynch's contention, the 1995 proposed amendment was designed not to relax the requirements for issue classes but to comprehensively revamp Rule 23 "to accommodate the demands of mass tort litigation" by, among other things, "collaps[ing] the categorical distinctions . . . between subdivision (b)(1), (b)(2), and (b)(3) classes." Report of the Advisory Comm. on Civil Rules, May 17, 1996, 167 F.R.D. 523, 536 (1996). The major change affecting issue classes was an added reference to them in subdivision (a), because its placement in subdivision (c) "ha[d] tended to obscure the potential benefit of resolving certain claims and defenses on a class basis…." Cooper, *Rule 23: Challenges to the Rulemaking Process*, 71 N.Y.U. L. Rev. 13, 58 (1996). The proposed amendment would not have excused issue classes from the requirements of subdivisions (b)(2) and (b)(3), as Merrill Lynch contends; instead, those requirements would have become part of

supports its argument that Rule 23(c)(4) is merely a "housekeeping" measure that cannot apply until the cause of action as a whole satisfies the requirements of Rules 23(a) and (b). Pet. 26-27. In fact, the opposite is true. Prior to 2007, Rule 23(c)(4) covered both issue classes and subclasses. The Rule specified that the other requirements of Rule 23 should then be applied to the particular issue class or subclass, not to the cause of action as a whole:

> When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall *then* be construed and applied accordingly.

Report of the Civil Rules Advisory Comm. on Fed. R. Civ. P. (July 20, 2006) (letter from Judge Lee H. Rosenthal, Chair) (emphasis added); *see also Gunnells*, 348 F.3d at 439. Indeed, requiring that the class as a whole rather than the subclass must meet Rules 23(a) and (b) makes no sense: Subclasses are created because the class as a whole includes members with divergent interests and thus could rarely, if ever, satisfy the requirements of typicality and adequacy of representation except through the use of subclasses. *See Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 864 (1999); *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 626-27 (1997). Rule 23(c)'s authorization of issue classes and subclasses would be superfluous, if

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the superiority analysis required for all class actions. *Id.* at 64-65. And the amendment was rejected not to preserve a limited role for Rule 23(c)(4), as Merrill Lynch suggests, but rather because "there seems to be little collective sense of any need for significant change [to Rule 23], apart from the area of mass torts." *Id.* at 52.

not meaningless, if limited to cases that qualify for class treatment as a whole. *Gunnells*, 348 F.3d at 439-40.

In 2007, as part of the Style Project to clarify and simplify the Federal Rules of Civil Procedure, the issue class and subclass provisions were split into consecutive subdivisions:

> (4) *Particular Issues.* When appropriate, an action may be brought or maintained as a class action with respect to particular issues.
>
> (5) *Subclasses.* When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.

Fed. R. Civ. P. 23(c). At the same time, the concluding phrase of the former Rule 23(c)(4) – "and the provisions of this rule shall then be construed and applied accordingly" – was deleted. *Id.* As the Committee Notes to the 2007 Amendment explain, however, this amendment effected no substantive change in the rule:

> These changes are intended to be stylistic only. . . . As part of the general restyling, intensifiers that provide emphasis but add no meaning are consistently deleted.

Accordingly, Rule 23(c) continues to authorize certification of class actions for both particular issues and subclasses that meet the requirements of Rules 23(a) and 23(b), even though the action as a whole might not do so.

In keeping with the plain language of the rule, the Seventh Circuit certified a class action under Rules 23(b)(2)

and 23(c)(4) to determine whether Merrill Lynch's account distribution and teaming policies have a disparate impact on African Americans, and if so, whether the policies are justified by business necessity. 14a-17a. As the Seventh Circuit held, these "are issues common to the entire class and therefore appropriate for class-wide determination" under Rule 23(c)(4). 14a. Far from being "fragmentary" or "discrete sub-issues," as Merrill Lynch maintains (Pet. i, 25), these common questions are central to the validity of the disparate impact claims of each class member. 17a-18a. The answers to these questions will resolve the heart of each class member's claim "in one stroke." *Dukes*, 131 S. Ct. at 2551. There is no need for 700 separate trials "to determine whether the challenged practices were unlawful." 17a. The Seventh Circuit also certified the question of class-wide injunctive relief, but did not order class treatment of individual backpay awards, reserving them instead for subsequent proceedings. 17a, 19a.

A. Issue Certification Is Appropriate Here, Even Under Merrill Lynch's Erroneous Reading Of Rule 23(c)(4).

Even if Merrill Lynch's rigidly sequential approach to Rule 23(c)(4) were correct, the decision below demonstrates that the disparate impact claim as a whole meets the requirements of cohesiveness under Rule 23(b)(2) and predominance under Rule 23(b)(3). *Dukes* held that non-incidental backpay claims may not be certified under Rule 23(b)(2), 131 S. Ct. at 2557, and the Seventh Circuit decision honors that holding by certifying a class to determine whether the two policies have an unlawful disparate impact and, if so, to determine class-wide

injunctive relief, but not to award backpay to individual class members.

Instead of analyzing the disparate impact claim as a whole, Merrill Lynch insists that each portion of the claim must independently satisfy Rule 23(b)(2) before Rule 23(c)(4) can be considered. Pet. 23. Because the backpay portion of the claim could not be certified under Rule 23(b)(2), the argument goes, the same must be true of the disparate impact claim as a whole, and issue certification would be improper. *Id.* Nothing in either *Dukes* or *Castano* justifies such contorted reasoning.

Quoting *Dukes*, Merrill Lynch also contends that Rule 23(b)(2) does not apply to this case because "each individual class member would be entitled to a *different* injunction." Pet. 33. That was true in *Dukes*, where the plaintiffs proposed to challenge not a corporate policy but millions of individual decisions by local managers. It is not true here, however, where 700 African American brokers challenge the same two firm-wide policies. Contrary to Merrill Lynch's argument, the fact that some African American brokers achieved some success despite the racial impact of the account distribution and teaming policies does not mean they are better off under the existing policies. And even if they were, that is no reason to deny injunctive relief to eliminate the disparate impact of the policies. A height requirement of 5'4" would disproportionately exclude Asian Americans and (if not job-related) would warrant injunctive relief, even though (a) the status quo might benefit some taller Asian Americans who would not have to compete with otherwise qualified candidates, and (b) an injunction might also benefit shorter white candidates. The disparate impact class certified by the Seventh Circuit has

"the most traditional [of] justifications for [Rule 23(b)(2)] class treatment . . . that the relief sought must perforce affect the entire class at once." *Dukes*, 131 S. Ct. at 2558.

Title VII claims are such a natural fit with Rule 23(b)(2) that, when the Rule was enacted, the advisory committee felt it necessary to caution practitioners that "Subdivision (b)(2) is not limited to civil-rights cases." Fed. R. Civ. P. 23(b)(2) advisory committee note (1966). That remains true today, because disparate impact claims challenge firm-wide policies rather than individual acts of discrimination, do not require proof of intent or jury trials, and do not permit recovery of compensatory or punitive damages. *See* 27a-28a; 30a-32a. Yet Merrill Lynch would read this Court's *Dukes* decision as prohibiting class certification of any disparate impact issue – a result irreconcilable with the intent of the framers of Rule 23(b)(2).

The Seventh Circuit's decision also makes clear that common issues predominate over individual ones, thus satisfying the predominance requirement of Rule 23(b)(3). The "most significant contested issue[s]" in each class member's case, whether litigated individually or as a class action, are whether Merrill Lynch's account distribution and teaming policies have a disparate impact on African American brokers, and if so, whether the policies are justified by business necessity. *Castano*, 84 F.3d at 745 n.18; 4a, 17a-19a. Only if the class prevails on both of these key issues would the court need to address the individual backpay claims of the 700 class members. 19a. Unlike a class of millions, as in *Castano* and *Dukes*, common issues of disparate impact liability predominate over individual issues for this class of 700. *See Castano*, 84 F.3d at 744-45 & n.18 (holding that common issues did not predominate

where class of millions asserted novel legal theory, but predominance was met in a different case for class of 893 asserting settled claim because one common issue was "the most significant contested issue in each case").

Merrill Lynch takes it as a foregone conclusion that Plaintiffs' disparate impact claim as a whole could not meet the predominance requirement of Rule 23(b)(3) because of the need to determine backpay awards for the 700 class members individually. Pet. 23. As a result, Merrill Lynch argues, the Seventh Circuit decision would eliminate the predominance requirement altogether if allowed to stand. *Id.* at 25. Merrill Lynch's arguments are incorrect. The 1966 Advisory Committee Note to Rule 23(b)(3) specifically states that common issues may predominate "despite the need . . . for separate determinations of the damages suffered by individuals within the class." As this Court held:

> When a class seeks an indivisible injunction benefitting all its members at once, ... [p]redominance and superiority are self-evident.

Dukes, 131 S. Ct. at 2558.

In any event, this case presents an inappropriate vehicle for this Court to review the predominance issue. The district court's initial finding of a lack of predominance was based entirely on a legally incorrect analysis of commonality (39a), which the Seventh Circuit reversed. 20a. The Seventh Circuit did not reach the issue of predominance under Rule 23(b)(3) except to say that on remand "there may be" common issues regarding the

class members' backpay claims. 1a-2a, 19a. There is no reason to believe the district court, guided by *Dukes* and the Seventh Circuit decision, will ignore or misconstrue the predominance requirement on remand. Predominance and superiority are questions to be addressed by the district court in the future. As such, these issues are not ripe for review in this Court.

B. The Purported Circuit Split Has No Impact On The Fact-Bound Determination Of Whether An Issue Class Is Appropriate.

Misreading dicta in *Castano* and *Allison*, Merrill Lynch argues that this Court should take this case and hold that no issue class can be certified unless the entire action warrants certification. The "circuit split" between the Fifth Circuit and all others has always been more semantic than real, however, having little or no practical effect on the outcome of decided cases, including this one. *See* Evans & Crone, *Much Ado About Nothing? The Quarrel Over Predominance in Issue Certification*, *in* ABA Section of Litigation, Class Actions Today 26 (2008). The result in each case, whether in the Fifth Circuit or in the remaining, "consensus" jurisdictions, depends on the factual circumstances of the proposed issue class, not the particular gloss the court puts on Rule 23(c)(4). Thus, the Fifth Circuit has approved issue classes despite the presence of significant issues requiring individualized determination – like causation, comparative fault, and damages – while circuit courts in the "consensus" jurisdictions have rejected issue classes in a variety of other circumstances. *Compare Mullen v. Treasure Chest Casino, L.L.C.*, 186 F.3d 620, 626-29 (5th Cir. 1999) (certifying certain common liability issues under

federal law despite the need for follow-on jury trials to decide causation, damages, and comparative negligence), *with McLaughlin v. Am. Tobacco*, 522 F.3d 215, 221-34 (2d Cir. 2008) (reversing issue class certification because of individualized issues of reliance, injury, damages, and statute of limitations).

The unique facts of *Castano* undoubtedly dictated the outcome in that case. "In what may [have been] the largest class action ever attempted in federal court," the district court in *Castano* had certified a "Frankenstein's monster" class of all Americans addicted to nicotine (and their heirs) during the prior half-century. 84 F.3d at 737, 745 n.19. The court conditionally certified for class jury trials the issues of "core liability" resulting from the tobacco industry's conduct and punitive damages, but did not certify the issues of injury-in-fact, proximate cause, reliance, comparative negligence, affirmative defenses, and compensatory damages. *Id.* at 738-39. The plaintiffs asserted nine different causes of action based on a "novel and wholly untested theory" of liability that would be governed by the law of all 50 states. *Id.* at 737. The Fifth Circuit held that the district court abused its discretion in finding that the requirements of predominance and superiority were met, particularly given that the court would be required to guess how 50 states' laws would apply to the plaintiffs' novel legal theory. *Id.* at 737, 741-44. In a footnote, the Fifth Circuit commented that "[s]evering the defendants' conduct from reliance under rule 23(c)(4) does not save the class action," because "[a] district court cannot manufacture predominance through the nimble use of subdivision (c)(4)." *Id.* at 745 n.21.

1. Despite Dicta From The Fifth Circuit, The Fifth And Seventh Circuits Apply The Same "Carve At The Joint" Standard To Issue Classes.

Although Merrill Lynch castigates the Seventh Circuit for being "at the forefront of efforts to use (c)(4) to certify Rule 23(b) 'issue classes'" (Pet. 28), both *Castano* and the Seventh Circuit in this case followed the analysis of an earlier Seventh Circuit decision reversing issue certification, *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293 (7th Cir. 1995). *Castano*, 84 F.3d at 741, 746-47 & nn.22-23, 748, 750-51; 18a; *see also* Taber, *The Reexamination Clause: Exploring Bifurcation in Mass Tort Litigation*, 73 Def. Couns. J. 63, 66 (2006) (noting that *Castano* followed Judge Posner's approach in *Rhone-Poulenc*). *Rhone-Poulenc* was a mass tort action brought on behalf of thousands of hemophiliacs who had contracted AIDS through blood transfusions. 51 F.3d at 1294. Like *Castano*, *Rhone-Poulenc* involved a huge putative class asserting a novel theory of liability, governed by the law of 50 states, which threatened the defendants with potentially catastrophic liability exposure. *Id.* at 1294-98. Only thirteen cases had been tried under the plaintiffs' theory, and the defendants had won twelve of them. *Id.* at 1296. The district court had certified the issue of defendants' negligence for a single class jury trial, but class members would then have to file separate actions to litigate the overlapping issue of comparative negligence before separate juries around the country. *Id.* at 1297. The Seventh Circuit held that the district court erred in trying to separate the issue of the defendants' negligence from the plaintiffs' comparative negligence, because issues certified under Rule 23(c)(4) must be "carve[d] at the joint"

of the elements of the claim so that "the same issue is [not] reexamined by different juries." *Id.* at 1302-03.

The *Castano* court quoted and adopted *Rhone-Poulenc*'s "carve at the joint" standard for issue certification. 84 F.3d at 750-51. "Carving at the joints" of a substantive claim, as the Seventh Circuit did in this case (17a-18a), prevents Rule 23(c)(4) from being used to manufacture predominance by peeling off individual issues until only common sub-issues remain. Accordingly, the decision below does not conflict with *Castano*.[6]

The same is true for *Allison*, in which a divided panel of the Fifth Circuit relied on both *Rhone-Poulenc* and *Castano* in affirming a district court's decision to utilize consolidation under Rule 42 rather than class certification under Rule 23 in an employment discrimination action. 151 F.3d at 420, 425-26. The *Allison* plaintiffs sought compensatory and punitive damages on behalf of more than 1,000 employees "working in seven different departments, and alleging discrimination over a period of nearly twenty years." *Id.* at 419-20. The plaintiffs had asked the court to certify their disparate impact claim, while holding in abeyance their request to certify the pattern-or-practice claim and the compensatory and punitive damages claims, pending the outcome of the disparate impact class trial.

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6. Merrill Lynch incorrectly cites a Third Circuit case in support of a purported three-way circuit split on whether the requirements of Rule 23(b) should be analyzed before or after the court identifies particular issues for class certification. Pet. 22 (citing *Gates*). In fact, *Gates* rejected the rigidly sequential approach enunciated in the *Castano* footnote and endorsed the same "carve at the joints" standard for forming issue classes as the Fifth and Seventh Circuits. 655 F.3d at 273.

Id. at 420-21. The *Allison* majority disapproved of this piecemeal approach to class certification, and noted that the entire disparate impact claim could not be certified because, like the pattern-or-practice claim, it would require a finding that each class member was harmed by the challenged employment practices. *Id.* at 424. Because the pattern-or-practice claim would be tried to a jury, it could not be held in abeyance while the class proceeded to judgment on the disparate impact claim. *Id.*

The *Allison* majority issued a statement qualifying its decision in response to a request for rehearing:

> The trial court utilized consolidation under rule 42 rather than class certification under rule 23 to manage this case. We review that decision for abuse of discretion and we find no abuse in this case. We are not called upon to decide whether the district court would have abused its discretion if it had elected to bifurcate liability issues that are common to the class and to certify for class determination those discreet [sic] liability issues.

Id. at 434. This statement casts doubt on the status of the panel majority's opinion regarding issue certification. At a minimum, the majority's statement renders *Allison* dicta with respect to a case like this one, where the court did "bifurcate liability issues that are common to the class" and "certify for class determination" the discrete issues of class-wide disparate impact liability and injunctive relief.

2. The Seventh Circuit Decision Does Not Impair Any Constitutional Rights Of Merrill Lynch Or Absent Class Members.

Merrill Lynch contends hypothetically that the Seventh Circuit's issue certification would "violate the Seventh Amendment" because, "to the extent the remaining issues are legal, Merrill Lynch and absent class members have the right to litigate them before a jury." Pet. 31. But the only "remaining" issue Merrill Lynch identifies is backpay (*id.* at n.4), undeniably an equitable issue decided by the bench and not a jury. *See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 416-17, 421 n.13 (1975) (characterizing Title VII backpay as equitable and noting that Senate rejected an amendment to require jury trials for backpay claims). When Title VII was amended in 1991 to authorize compensatory and punitive damages, Congress left intact the equitable nature of backpay, explicitly excluding it from the definition of compensatory damages. 42 U.S.C. §1981a(b)(2). Merrill Lynch has no right to a jury trial on backpay.

Moreover, as the hypothetical cast of Petitioner's argument suggests, the decision below presents no Seventh Amendment issue. The Seventh Circuit did not decide how any follow-on trials should be adjudicated, leaving that issue for the district court on remand. 1a-2a, 19a. Given the interlocutory nature of its ruling, the Seventh Circuit took no position on who should adjudicate these trials – a jury, a judge, or a special master. *See* 42 U.S.C. §2000e-5(f)(5). Merrill Lynch remains free to ask for a jury trial in any follow-on trials.

Moreover, if Merrill Lynch anticipates that its Seventh Amendment rights might be infringed by the class liability trial on the disparate impact claim, Merrill Lynch is free to request that the district court impanel a jury to resolve factual issues common to any jury and non-jury claims. *See, e.g.*, *Biondo v. City of Chicago*, 382 F.3d 680, 683 (7th Cir. 2004). Merrill Lynch has made no such request, nor has the district court ruled on it, but nothing in the decision below forecloses it.

Because Merrill Lynch has not even asked the district court for a jury trial on any follow-on proceedings for backpay or the class-wide determination of disparate impact liability, much less obtained a ruling from the district court on such a request, the Seventh Amendment concerns Petitioner outlines are premature. A petition for certiorari is not an appropriate vehicle for addressing hypothetical Seventh Amendment issues that may never materialize.

C. The "Circuit Split" Has All But Disappeared.

Castano and *Allison* demonstrate that the Fifth Circuit would approve the issue class that the Seventh Circuit certified in this case. Subsequent decisions by the Fifth Circuit merely confirm that conclusion. More recent decisions show that the weak "circuit split" occasioned by *Castano* and *Allison* has all but vanished, and the Fifth Circuit now interprets Rule 23(c) in accord with the consensus view of the other circuits, as well as the language and history of the rule. *See*, *e.g.*, *Mullen*, 186 F.3d at 626-29 (certifying certain common liability issues under federal law despite the need for follow-on jury trials to decide causation, damages, and comparative negligence);

Robertson v. Monsanto Co., 287 Fed. Appx. 354, 362-63 (5th Cir. 2008) (*per curiam*, unpublished opinion describing liability issue class followed by individual proceedings on causation and damages as "the 'usual' class action method of resolving mass-tort claims").

Indeed, shortly after the Seventh Circuit's decision in this case, the Fifth Circuit held that a putative class lacking Rule 23(a)(2) commonality and Rule 23(b)(2) cohesiveness could nevertheless be certified through subclasses under Rule 23(c)(5), the companion provision to Rule 23(c)(4), as long as the claims of each subclass (not the action as a whole) met the requirements of Rules 23(a) and (b). *See M.D. v. Perry*, 675 F.3d 832, 848-49 (5th Cir. 2012). The *M.D.* court vacated an order certifying a class of all children who are or will later be in Texas's foster care system, because the plaintiffs had failed to establish commonality of issues and class cohesiveness. *Id.* at 841-43, 846. Although the "'amorphous' super-claim" as a whole did not qualify for class treatment, the Fifth Circuit held that the district court on remand could consider certification of subclasses. *Id.* at 848. Whether subclasses are appropriate, the Fifth Circuit held, should be analyzed by the claims of individual subclasses rather than the action as a whole. *Id.* at 848-49.

As discussed above, issue classes and subclasses are governed by parallel, consecutive provisions of Rule 23(c) that once were joined in Rule 23(c)(4), but later divided in a stylistic, non-substantive revision of the rules. As such, there is no principled reason to differentiate between issue classes and subclasses in their relationship to the requirements of Rules 23(a) and 23(b). Accordingly, *M.D.* confirms that the Fifth Circuit has joined the consensus jurisdictions in its approach to Rule 23(c).

The circuits are now unanimous in holding that Rule 23(c)(4) authorizes certification of an issue class like the one certified here, where the common, certified issues are pivotal to the entire claim and "carved at the joint" rather than enmeshed with individual issues. *See Mullen*, 186 F.3d at 626-29 (holding that issue class met predominance and superiority where certified issues were "not only significant but also pivotal" despite individualized issues of causation, comparative negligence, and damages). Here the Seventh Circuit correctly held that whether Merrill Lynch's company-wide account distribution and teaming policies have a disparate impact on African American brokers, thus warranting class-wide injunctive relief, are "genuinely common issues, issues identical across all the claimants, issues moreover the accuracy of the resolution of which is unlikely to be enhanced by repeated proceedings." 17a-18a (quoting *Mejdrech*, 319 F.3d at 911).

Given the national consensus on the proper use of issue classes under Rule 23(c)(4), it is not surprising that this Court has declined numerous opportunities to review decisions involving issue classes under Rule 23(c)(4). *See, e.g.*, *Gunnells*, 348 F.3d 417 (affirming issue class to determine whether administrator mismanaged health plan and contributed to its collapse, while reserving damages issues for individual trials), *cert. denied*, 542 U.S. 915 (2004); *Mullen*, 186 F.3d 620 (affirming certification of common liability issues of federal claims triable by jury, to be followed by individual jury trials on causation, damages, and comparative negligence), *cert. denied*, 528 U.S. 1159 (2000); *Rhone-Poulenc*, 51 F.3d at 1302-03 (reversing class certification of negligence issue in immature tort theory, where district court failed to "carve at the joint" in severing common issues from overlapping

issues to be tried individually), *cert. denied*, 516 U.S. 867 (1995); *see also Carnegie v. Household Int'l*, 376 F.3d 656, 661 (7th Cir. 2004) (holding that individualized relief hearings "need not defeat class treatment of the question whether the defendants violated RICO"), *cert. denied*, 543 U.S. 1051 (2005). Indeed, just last year – after granting certiorari in *Dukes* – this Court denied a petition for certiorari seeking review of a class action certified for certain consumer liability issues under Rule 23(b)(3), where the issues of causation, damages, and statute of limitations were left to individual proceedings. *Pella Corp. v. Saltzman*, 606 F.3d 391 (7th Cir. 2010), *cert. denied*, 131 S. Ct. 998 (2011). Merrill Lynch's petition should be denied as well.

CONCLUSION

For all of the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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