No. 12-113

IN THE

Supreme Court of the United States

MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED,
Petitioner,

v.

GEORGE MCREYNOLDS, *et al.*
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

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BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

The Equal Employment Advisory Council (EEAC) respectfully submits this brief *amicus curiae* with the consent of the parties. The brief supports the petition for a writ of certiorari.[1]

[1] Counsel of record for all parties received notice of the *amicus curiae's* intention to file this brief at least 10 days prior to its due date. Both parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

INTEREST OF THE *AMICUS CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its membership includes nearly 300 major U.S. corporations. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

Comprising potential defendants to large-scale employment class action litigation, the nationwide constituency that EEAC represents has a direct and ongoing interest in the issues presented in this case regarding the circumstances under which district courts may certify "issue" classes under Rule 23(c)(4) of the Federal Rules of Civil Procedure. The Seventh Circuit below certified a class solely for the purpose of deciding whether the employer was liable for disparate impact discrimination, even while acknowledging that there would have to be "hundreds" of individual hearings to determine whether, and to what extent, each member of the class was actually harmed by one or both of the policies being challenged. The ruling exacerbates a longstanding conflict among the courts regarding Rule 23(c)(4)'s proper role in determining the propriety of class certification.

EEAC seeks to assist the Court by highlighting the impact the decision below may have beyond the

immediate concerns of the parties to the case. Accordingly, this brief brings to the Court's attention relevant matters that the parties have not raised. Because of its experience in these matters, EEAC is well-situated to brief the Court on the concerns of the business community and the significance of this case to employers.

SUMMARY OF REASONS FOR GRANTING THE PETITION

While conceding the "undoubted resemblance" of this case to *Wal-Mart Stores, Inc. v. Dukes*, __ U.S. __, 131 S. Ct. 2541 (2011), the Seventh Circuit nevertheless declined to adhere to this Court's counsel regarding the proper role of the federal class action device in certifying a nationwide injunction class comprised of approximately 700 current and former employees challenging two purported employment policies of Merrill Lynch, the application of which the plaintiffs contend amounts to unlawful disparate impact discrimination under Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq*. Instead, it applied an erroneous interpretation of Rule 23(c)(4) of the Federal Rules of Civil Procedure – which provides that "when appropriate, an action may be maintained as a class action with respect to particular issues" – so as to allow the plaintiffs to proceed as a class, despite acknowledging that (1) favorable resolution of their class-wide disparate impact claims invariably will result in "hundreds of separate suits" for lost wages and/or compensatory and punitive damages, and (2) "the stakes in each of the plaintiffs' claims are great enough to make individual suits feasible." Pet. App. 19a.

Federal appeals courts strongly disagree on the propriety of utilizing Rule 23(c)(4) to certify the type of "issue" class approved by the Seventh Circuit below where other required elements of Rule 23 have not been satisfied. The Fifth Circuit holds that using Rule 23(c)(4) as a means of narrowing down a proposed class until the plaintiffs are able to establish common issues of fact or law is improper. *Castano v. Am. Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996).

In contrast, the Second Circuit, like the Seventh Circuit below, takes the position that Rule 23(c)(4) may be utilized "to certify a class on a designated issue regardless of whether the claim as a whole satisfies the predominance test." *In re Nassau County Strip Search Cases*, 461 F.3d 219, 230 (2d Cir. 2006); *see also, e.g., In re Panacryl Sutures Prods. Liab. Cases*, 263 F.R.D. 312, 325 (E.D.N.C. 2009) (Rule 23(c)(4) should be applied liberally "[i]n order to promote the use of the class device and to reduce the range of the issues …") (citation and internal quotation omitted); *In re Baycol Prods. Litig.*, 218 F.R.D. 197, 209 (D. Minn. 2003) (Rule 23(c)(4) "intended to advance judicial economy by permitting adjudication of any issues common to the class even though the entire litigation may not satisfy the requirements of Rule 23").

This inconsistency in the courts regarding whether, and to what extent, Rule 23(c)(4) can be used to certify a class where other required Rule 23 elements are lacking has resulted in the application of vastly different standards from jurisdiction to jurisdiction, which has a particularly negative impact on large employers with operations throughout the nation. Either (c)(4) may be used where required Rule 23 requirements cannot be met, or it may not. Without

a definitive answer to the question from this Court, lower courts will continue to vacillate between these two diametrically opposed theories, to the significant disadvantage of the Nation's largest employers.

REASONS FOR GRANTING THE PETITION

REVIEW OF THE DECISION BELOW IS NECESSARY IN ORDER TO PROVIDE MUCH NEEDED CLARITY ON AN ISSUE OF SUBSTANTIAL IMPORTANCE TO THE BUSINESS COMMUNITY

To maintain a class action in federal court, plaintiffs generally must satisfy all four requirements of Rule 23(a), and at least one of the requirements of Rule 23(b), of the Federal Rules of Civil Procedure.[2] Rule 23 contains a subpart (c)(4), which provides, "[w]hen appropriate, an action may be maintained as a class action with respect to particular issues." Fed. R. Civ. P. 23(c)(4). The provision is intended to allow for class certification of particular issues, even if

[2] Rule 23(a) permits class certification only when "(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." Fed. R. Civ. P. 23(a). Rule 23(b)(2), in turn, allows certification only when the defendant "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). Rule 23(b)(3) permits certification where "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).

individual hearings might have to be conducted later on in order to determine damages owed to individual class members. A "court's decision to exercise its discretion under Rule 23(c)(4), like any other certification determination under Rule 23, must be supported by rigorous analysis." *Hohider v. UPS*, 574 F.3d 169, 201 (3d Cir. 2009).

Whether plaintiffs seeking class certification under Rule 23(c)(4) still must satisfy all of the other requirements of Rule 23(a) and (b) is a question on which this Court has not spoken, and which the lower courts are debating with increasing frequency. Because "[t]he interaction between the requirements for class certification under Rule 23(a) and (b) and the authorization of issue classes under Rule 23(c)(4) is a difficult matter that has generated divergent interpretations among the courts," *Gates v. Rohm & Haas Co.*, 655 F.3d 255 (3d Cir. 2011) (citation omitted), clarity from this Court is desperately needed.

A. The Decision Below Magnifies A Conflict Among Lower Courts Regarding Whether, And To What Extent, Rule 23(c)(4) Can Be Utilized To Confer Class Action Status Where Required Elements Of Rule 23 Have Not Been Satisfied

There are two predominant schools of thought on the use of 23(c)(4) in making class certification determinations. At one end, the Fifth Circuit consistently has held that while Rule 23(c)(4) allows a district court to sever common issues for a class trial, it does not give a court license simply to ignore the parts of the case that would defeat class certification under Rule 23. *Castano v. Am. Tobacco Co.*, 84 F.3d

734 (5th Cir. 1996); *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir. 1998).

According to the Fifth Circuit, district courts should not "manufacture predominance through the nimble use of subdivision (c)(4)," *Castano*, 84 F.3d at 745 n.21, but rather must determine that the case as a whole satisfies all of Rule 23(a)'s requirements and one of Rule 23(b)'s subsections before severing any part of the case. Otherwise:

> [R]eading rule 23(c)(4) as allowing a court to sever issues until the remaining common issue predominates over the remaining individual issues would eviscerate the predominance requirement of rule 23(b)(3); the result would be automatic certification in every case where there is a common issue, a result that could not have been intended.

Id.; see also Fisher v. Ciba Specialty Chems. Corp, 238 F.R.D. 273, 316 (D. Ala. 2006) ("[C]ourts have emphatically rejected attempts to use the Fed. R. Civ. P. 23(c)(4) process for certifying individual issues as a means for achieving an end run around the [Fed. R. Civ. P. 23](b)(3) predominance requirement"); *but see In re FedEx Ground Package Sys., Inc. Emp't Prac. Litig.*, 2010 U.S. Dist. LEXIS 39736 (N.D. Ind. Apr. 21, 2010) ("In recent years though, 'some sister courts have held that in cases where class certification of issues is sought pursuant to Rule 23(c)(4)(A), the requirement of predominance is to be evaluated in a different, less demanding manner than in cases where claims are sought to be certified for class treatment'") (citations omitted).

At the other end, the Second Circuit takes the position that district courts may – indeed, should –

"employ subsection (c)(4) to certify a class as to liability regardless of whether the claim as a whole satisfies Rule 23(b)(3)'s requirement." *In re Nassau County Strip Search Cases*, 461 F.3d 219, 227 (2d Cir. 2006); *see also Robinson v. Metro-North Commuter R.R.*, 267 F.3d 147, 167 (2d Cir. 2001) ("courts should take full advantage of this provision to certify separate issues in order … to reduce the range of disputed issues in complex litigation and achieve judicial efficiencies") (quotations and internal citations omitted). The Third Circuit has articulated yet another, more complex standard. *See Gates v. Rohm & Haas*, 655 F.3d 255 (3d Cir. 2011).

B. Without Clear Guidance From This Court, The Lower Courts Will Continue To Apply Rule 23(c)(4) In A Manner That Is Inconsistent With This Court's Jurisprudence In *Dukes*

In *Wal-Mart Stores, Inc. v. Dukes*, this Court made clear that plaintiffs must present "'significant proof'" that every Rule 23 element has been satisfied, and the district court must resolve any challenge to that evidence, prior to certifying a class. ___U.S.___, 131 S. Ct. 2541, 2553 (2011). The inconsistency with which Rule 23(c)(4) has been applied by the lower courts creates a dangerous opportunity for plaintiffs to bypass that important legal principle. As one commenter observed, even prior to *Dukes*:

> Until fairly recently, this provision received little attention and even less explanation, perhaps due to its low profile within Rule 23 or its somewhat enigmatic language. Some would say (c)(4)(A) deserves its fairly obscure status because is it merely a 'housekeeping tool,' not a mechanism to circumvent other Rule 23 requirements. But the

> proponents of an expansive reading of (c)(4)(A) contend that the provision can play a more powerful and ambitious role, authorizing class treatment of claims that otherwise would be denied Rule 23 certification.

Laura J. Hines, *Challenging the Issue Class Action End-Run*, 52 Emory L.J. 709, 710-11 (2003) (footnotes omitted).

This is of even greater concern since *Dukes* was decided. While *Dukes* placed necessary, common sense limitations on the scope of Rule 23, it has been characterized by many cynics as having erected an unreasonable barrier to Rule 23 class certification. Plaintiffs, fearful of their ability otherwise to qualify for class treatment in the wake of *Dukes*, thus increasingly are seeking issue certification under Rule 23(c)(4) as an end-run around the more stringent requirements of Rule 23(a) and (b).

The fourth amended complaint brought by the original *Dukes* plaintiffs, for instance, contains three counts. *Dukes v. Wal-Mart* ("*Dukes II*"), No. 01-cv-02252 (N.D. Cal.) (Dkt. # 767). The First count asserts class-based, Title VII pattern-or-practice and disparate impact claims, and the Second and Third counts assert various individual claims on behalf of some of the named plaintiffs. Among other things, the *Dukes II* plaintiffs now contend that class certification is proper under Rule 23(c)(4) because class-wide liability and punitive damages liability "present only common issues, the resolution of which would advance the interests of the parties in an efficient manner." *Id.* at ¶ 23; *see also Odle v. Wal-Mart Stores, Inc.*, No. 11-cv-2954 (N.D. Tex.). Similarly, in *Easterling v. State Dep't of Correction*, the district court declined to decertify a 23(b)(2) Title VII class

that was certified prior to *Dukes*, taking, in the words of the Second Circuit, "full advantage of [Rule 23(c)(4)] to certify separate issues in order to reduce the range of disputed issues in complex litigation and achieve judicial efficiencies." 278 F.R.D. 41, 45 (D. Conn. 2011) (citation omitted). Plaintiffs and courts that have begun to utilize Rule 23(c)(4) as a successful means of bypassing *Dukes* will only continue to do so unless this Court steps in.

C. Inconsistent Application Of Rule 23 Places Employers At A Significant Legal And Strategic Disadvantage, Increasing The Pressure To Settle Questionable Claims

"The class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" *Dukes*, 131 S. Ct. at 2550 (citation omitted). Allowing plaintiffs to aggregate the claims of hundreds, thousands, or even millions of claims without having to satisfy all the required elements of Rule 23(a) and (b) invariably will lead to the class action device being used not in the limited manner in which it was intended, but rather as a strategic and opportunistic means of extracting settlements from employers wishing to avoid the financial and commercial risk associated with class-wide litigation.

A district court's decision on a Rule 23 motion for class certification "is often the defining moment in class actions (for it may sound the 'death knell' of the litigation on the part of plaintiffs, or create unwarranted pressure to settle nonmeritorious claims on the part of defendants)." *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 310 (3d Cir. 2008)

(citation omitted). Indeed, class certification "'may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability.'" *Id.* (quoting Fed. R. Civ. P. 23 advisory committee's note, 1998 Amendments). As one scholar has observed:

> With vanishingly rare exception, class certification sets the litigation on a path toward resolution by way of settlement, not full-fledged testing of the plaintiffs' case by trial. In terms of their real-world impact, class settlements can be quite significant, potentially involving dollar sums in the hundreds of millions or requiring substantial restructuring of the defendant's operations.

Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 99 (2009) (footnote omitted).

This is especially true in the Title VII context, in which successful plaintiffs are entitled to recover substantial monetary relief, including statutory compensatory and punitive damages, as well as attorney's fees. Indeed, the current availability of up to $300,000 per plaintiff in compensatory and punitive damages under Title VII creates enormous pressure on defendants to settle that is unwarranted. As the Eleventh Circuit has remarked:

> Once one understands that the issues involved in the instant case are predominantly case-specific in nature, it becomes clear that there is nothing to be gained by certifying this case as a class action; nothing, that is, except the *blackmail value* of a class certification that can aid the plaintiffs in coercing the defendant into a settlement.

Rutstein v. Avis Rent-A-Car Sys., Inc., 211 F.3d 1228, 1241 n.21 (11th Cir. 2000) (emphasis added); *see also Castano*, 84 F.3d at 746 ("The risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low. These settlements have been referred to as judicial blackmail.") (citation and footnote omitted).

While aggregating Title VII claims can force a defendant to consider settling based on the risk of liability alone, when coupled with the prospect of potentially staggering defense costs, as well as the possible lasting damage to a firm's brand, settlement often becomes the only reasonable option. It has become commonplace, for example, for plaintiff's attorneys to create internet web pages with the sole aim of excoriating employers who have been accused (usually by them) of class-wide wrongdoing.[3] Even the EEOC has gotten into the business of using the internet not only to look for potential class members, but also to (presumably) publicly shame targeted employers into settlement well before the first witness is called to the stand. Listed on the agency's home page,[4] for example, are three press releases describing company wide systemic discrimination by three companies – two with nationwide operations – asking anyone with information to contact the EEOC. *See, e.g.*, Press Release, EEOC, *Mavis Discount Tire*

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[3] *See, e.g.*, Wal-Mart Class Website, *available at* http://www.walmartclass.com/public_home.html (last visited Aug. 24, 2012); Allstate Agents Litigation Website, *available at* http://www.allstatecase.com (last visited Aug. 24, 2012); WalMart Sucks.org, *available at* http://www.walmartsucksorg.blogspot.com/p/find-lawyer-to-sue-walmart.html (last visited Aug. 24, 2012).

[4] Equal Employment Opportunity Comm'n Home Page, http://www.eeoc.gov (last visited Aug. 24, 2012).

Sued by EEOC for Sex Discrimination in Hiring (Jan. 31, 2012)[5]; Press Release, EEOC, *Texas Roadhouse Refused to Hire Older Workers Nationwide, EEOC Alleges in Lawsuit* (Oct. 3, 2011)[6]; Press Release, EEOC, *Bass Pro Failed to Hire Blacks and Hispanics at its Stores Nationwide, EEOC Says in Suit* (Sept. 21, 2011).[7] The lasting damage of such tactics to a company's public reputation, competitive edge, and ability to successfully defend the claims in court cannot be overstated.

CONCLUSION

Accordingly, the *amicus curiae* Equal Employment Advisory Council respectfully requests the Court grant the petition for a writ of certiorari.

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[5] *Available at* http://www.eeoc.gov/eeoc/newsroom/release/1-31-11.cfm (last visited Aug. 24, 2012).

[6] *Available at* http://www.eeoc.gov/eeoc/newsroom/release/10-3-11.cfm (last visited Aug. 24, 2012).

[7] *Available at* http://www.eeoc.gov/eeoc/newsroom/release/9-21-11.cfm (last visited Aug. 24, 2012).