No. 13-916

IN THE

Supreme Court of the United States

ALLSTATE INSURANCE COMPANY,
Petitioner,
v.
ROBERT JACOBSEN, and all others similarly situated,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Montana

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 respectfully submits this brief *amicus curiae* in support of the petition for a writ of certiorari.[1]

[1] Counsel of record for all parties received notice at least 10 days prior to the due date of the *amicus curiae's* intention to file this brief. All parties have consented to the filing of this brief. Counsel for *amicus curiae* authored this brief in its entirety. 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 over 250 major U.S. corporations, collectively providing employment to millions of workers. 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.

EEAC's members are employers subject to Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, as amended, as well as other employment laws and regulations. As large employers, they represent likely targets of broad-based employment class action litigation in both state and federal courts. Thus, the nationwide constituency that EEAC represents has a direct and ongoing interest in the issues presented in this case regarding the proper interpretation and uniform application of due process principles to the class action context.

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.

STATEMENT OF THE CASE

In 2001, Robert Jacobsen was involved in a car accident. Pet. App. 2a. Allstate initially settled Jacobsen's claims for $3,500, in exchange for which he executed a release. *Id.* At the time, Jacobsen was not represented by counsel. *Id.* After retaining counsel, Jacobsen persuaded Allstate to reopen his claim; it did so, eventually settling the matter for $200,000 in exchange for a second release. *Id.* at 3a.

Despite having signed the release, Jacobsen hired a new lawyer and sued Allstate for violations of Montana's Unfair Trade Practices Act (UTPA). *Id.* The jury returned a verdict for Jacobsen, awarding him attorney's fees and costs, as well as $350,000 in punitive damages. *Id.* at 3a-4a. Allstate appealed, and the Montana Supreme Court reversed in part and remanded for a new trial, "finding that the jury's award of compensatory damages could not be based solely on Jacobsen's incurred attorney costs and fees and that there could be no punitive damages following this reversal of the compensatory damages award." *Id.* at 5a.

On remand, Jacobsen amended his complaint, contending for the first time that Allstate's claim adjustment guidelines in effect at the time (the "Claim Core Process Redesign" (CCPR) program) were designed to induce unrepresented parties into settling their claims for far less than they were worth, in violation of state statutory and common law. *Id.* at 6a. He moved for class certification on May 7, 2010 on behalf of "'all unrepresented individuals who had either third-party claims or first-party claims against

Allstate whose claims were adjusted by Allstate in Montana using its CCPR program.'" *Id.* at 6a-7a. He is seeking class-wide injunctive and monetary relief, including attorney's fees and punitive damages.

Allstate opposed the motion, arguing that class certification would deprive the company of its due process right to offer proof and to challenge each individual class member's entitlement to relief. The trial court rejected Allstate's arguments, and certified a class for declaratory and injunctive relief pursuant to Rule 23(b)(2) of the Montana Rules of Civil Procedure. *Id.* at 7a. It also certified class-wide punitive damages "available as a matter of law on proof of the certified class claim," that is, that Allstate's application of the CCPR procedures caused indivisible harm to the class as a whole. *Id.* at 76a-77a.

In doing so, the trial court held that the monetary relief is merely incidental to the injunctive relief sought and thus comports with the requirements of Rule 23(b)(2). *Id.* at 54a. It also found that all state and federal due process requirements were satisfied, despite the fact that Jacobsen is not a member of the class, proof of his claim "would not prove the claims of other class members," and his individual claim "is subject to unique defenses not applicable to other class members[.]" *Id.* at 312a. Allstate appealed to the Montana Supreme Court, renewing its due process objections to class certification, including that the certified class violates its due process right "to have an opportunity to present every defense to challenge individual class members' entitlement to the class declaratory and injunctive relief." *Id.* at 352a.

A divided Montana Supreme Court affirmed, approving certification of a mandatory, no-opt-out

Rule 23(b)(2) class for injunctive and declaratory relief. *Id.* at 47a. Acknowledging that Jacobsen's own basis for relief is "not entirely clear," *id.* at 27a, the majority nevertheless found him to be a suitable class representative:

> Jacobsen's claim stems from the same course of conduct, the application of the CCPR to unrepresented claimants, as the proposed class members' claims and both Jacobsen's and the class members' claims are based on the same legal theory, that this application of the CCPR violates the UTPA. The injuries that allegedly resulted among class members, whether economic or emotional, are not sufficiently dissimilar to render Jacobsen's claim atypical of those of the class regarding this core allegation.

Id. at 40a.

The majority further found, citing *Wal-Mart Stores, Inc. v. Dukes*, ___ U.S. ___, 131 S. Ct. 2541 (2011), that to the extent the CCPR constituted a general business practice as applied to the class as a whole, whether the practice violates state law "is just the sort of question that may efficiently drive the resolution of the litigation." *Id.* at 27a. In the majority's view, such a determination "would not turn on the countless discretionary decisions that troubled the *Wal-Mart* majority, and would not be hampered by a variety of unique defenses and circumstances." *Id.*

As to class-wide monetary relief, the majority remanded the case to the trial court for a determination as to whether Allstate "engaged in actual fraud or actual malice in implementing the CCPR. If so, the trier of fact in the later individual cases may determine the amount of individual punitive damages

to be awarded if individual actual damages are also established." *Id.* at 47a. The majority was not persuaded that subsequent individual trials as to each class member's entitlement to monetary damages might pose an obstacle to class certification or impermissibly interfere with Allstate's due process rights.

Three of the seven justices dissented, expressing concern that where, as here, the "requested injunctive or declaratory relief merely attempts to reframe a damages claim," Rule 23(b)(2) certification is improper. *Id.* at 69a. Rather, "[a]ctions for money damages are the province of Rule 23(b)(3), which imposes additional requirements for notice and opt-out rights for the class members and requires findings that a class action would be superior to individual litigation and that common questions predominate over individual ones." *Id.* As Judge McKinnon observed, "The absence of such procedural protections in a class action predominantly for monetary damages violates due process." *Id.* at 93a (citations omitted). After its request for rehearing was denied, Allstate filed a petition for a writ of certiorari with this Court on January 30, 2014.

SUMMARY OF REASONS FOR GRANTING THE WRIT

In its decision below, a fractured majority of the Montana Supreme Court permitted certification of a class rife with constitutional problems. In addition to allowing the sole, named plaintiff to represent a class of which he is not a member, it certified a class for injunctive and declaratory relief under a state rule equivalent to Rule 23(b)(2) of the Federal Rules of Civil Procedure so as to pave the way for subsequent, individual damages trials. In doing so, it disregarded

federal constitutional due process principles governing class certification decisions. Therefore, review and reversal by this Court is necessary.

"[A] considerable majority of American states track Federal Rule 23 … closely and in a good many cases word for word." Thomas D. Rowe, Jr., *State and Foreign Class-Action Rules and Statutes: Differences From – and Lessons for? – Federal Rule 23*, 102 W. St. U. L. Rev. 147 (2007). Even many states whose procedural rules do not closely track the Federal Rules rely on federal case law interpreting class certification requirements under Rule 23. *Id.* at 148 (footnote omitted). To the extent that some courts, like the Montana Supreme Court below, have failed to guarantee that federal principles of fairness and constitutional due process in particular are respected in state class action proceedings, additional guidance from this Court is sorely needed.

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). Those requirements are intended to comport with federal constitutional principles of due process designed, in part, to "effectively limit the class claims to those fairly encompassed by the named plaintiff's claims." *Dukes*, 131 S. Ct. at 2550 (citations and internal quotations omitted).

There is no basis for creating a special exception to *Dukes* for state class certification proceedings especially where, as here, procedural rules identical in all material respects to Federal Rule 23 are involved. Indeed, the court below, in relying on *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d

482 (7th Cir. 2012), a *federal* circuit court ruling purporting to interpret Rule 23's class certification requirements in light of *Dukes*, appears to tacitly have accepted that straightforward proposition – which makes its categorical rejection of *Dukes* that much more puzzling.

The decision below also adds to the disagreement among lower courts over whether actions seeking monetary damages, in addition to equitable and injunctive relief, *ever* are suitable for class certification under Federal Rule 23(b)(2) and equivalent state rules. This Court has indicated that granting class certification status under Rule 23(b)(2) where monetary damages are sought raises constitutional and due process concerns, *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846 (1999), and has strongly suggested that a "serious possibility" exists that certification of such claims is never appropriate. *See Dukes*, 131 S. Ct. at 2557, 2559 (citing *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 121 (1994) (*per curiam*)). This Court should confirm that claims for monetary damages are never suitable for class certification under Rule 23(b)(2), and most certainly not when they are more than merely incidental to the injunctive and declaratory relief sought.

The persistent lack of consistency in the courts regarding Rule 23 class certification requirements creates substantial uncertainty in an area of law that is of great importance to the business community. This inconsistency threatens to undermine the traditional role of the courts as gatekeepers in eliminating meritless cases at the class certification stage and places enormous pressure on defendants to settle even questionable claims.

REASONS FOR GRANTING THE WRIT

I. REVIEW OF THE DECISION BELOW IS NECESSARY TO BRING CLARITY AND CONSISTENCY TO STATE COURT CLASS PROCEEDINGS THAT IMPLICATE FEDERAL DUE PROCESS PRINCIPLES

Though not an employment case, the decision below raises important questions that regularly arise in the employment context, including but not limited to the extent to which state class action procedures may be used as a means of effectuating an end-run around the federal procedural standards articulated by this Court in *Wal-Mart Stores, Inc. v. Dukes*, ___ U.S. ___, 131 S. Ct. 2541 (2011). This Court can, and should, use this case to confirm that class action litigants may not be deprived of their federal constitutional due process rights in state court proceedings especially where, as here, the state procedural rules in question are substantively indistinguishable from Rule 23 of the Federal Rules of Civil Procedure.

To maintain multiple claims as a class action, plaintiffs generally must meet certain procedural requirements. Federal court litigants seeking class certification, for instance, must satisfy all four prerequisites of Federal Rules of Civil Procedure Rule 23(a), as well as the requirements of at least one subsection of Rule 23(b). Fed. R. Civ. P. 23. 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).

Montana Rules of Civil Procedure Rule 23(a) requires that (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. Mont. R. Civ. P. 23(a). Given its functional equivalence to the Federal Rule, the Montana courts "have a long history of relying on federal jurisprudence when interpreting the class certification requirements of Rule 23." Pet. App. 18a (citation and internal quotation omitted). Indeed, as the court below observed, "[b]ecause the Montana version of Rule 23 is identical to the corresponding federal rule, federal authority is instructive …." Pet. App. 15a. Where, as here, a state procedural rule mirrors the Federal Rule 23, litigants should be accorded the same due process protections as are available to them in federal court.

A. The Lower Court Improperly Relied On *McReynolds*, A Seventh Circuit Rule 23(c)(4) Case, Rather Than On *Dukes*, In Evaluating Whether Respondent Satisfied The Requirements Of Rule 23(a)

In *Dukes*, this Court clarified that Rule 23(a) commonality requires that all class members have suffered the same injury – not simply a violation of the same statute. For example, "the mere claim by employees of the same company that they have suffered a Title VII injury, or even a disparate-impact Title VII injury, gives no cause to believe that all their claims can productively be litigated at once." 131 S. Ct. at 2551. Rather, in order for Rule 23(a)'s commonality requirement to be met, the individual

class members' claims must rely on a common assertion, such as that they all were subjected to discrimination by the same biased supervisor. "That common contention, moreover, must be of such a nature that it is capable of classwide resolution …." *Id*.

Rejecting the plaintiffs' claim that Wal-Mart's asserted policy of giving local supervisors discretion to make pay and promotion decisions was sufficient to establish Rule 23(a) commonality, the Court noted not only that such a practice appeared antithetical to the type of uniform policy required to establish commonality under Rule 23(a), but also that it happens to be "a very common and presumptively reasonable way of doing business – one that we have said 'should itself raise no inference of discriminatory conduct.'" 131 S. Ct. at 2554 (citation omitted).

In evaluating the propriety of class certification in the instant case, the Montana Supreme Court considered whether and to what extent *Dukes* should factor into its assessment. It took note of the "Supreme Court's apparent tightening of Federal Rule 23(a)(2)'s requirements," Pet. App. at 18a, and "noted 'a recent divergence between the federal approach and Montana's approach to the commonality requirement,'" *id.* (citation omitted), observing further that "our varying embrace of *Wal-Mart* … perhaps 'introduced confusion into our class certification standards ….'" *Id.* at 19a (citation omitted).

The Montana Supreme Court ultimately declined to fully embrace this Court's reasoning in *Dukes*, however, concluding that because both Allstate and Jacobsen cited the case in support of their respective positions, and

> because we affirm the [d]istrict [c]ourt's class certification …, we need not address whether *Wal-Mart* presents a different standard and if we intend to adopt it.
>
> ***
>
> Instead, … we simply conclude that Jacobsen satisfies the *Wal-Mart* commonality standard because the certified class claims depend upon a common contention concerning a programmatic course of conduct that is 'of such a nature that it is capable of classwide resolution ….'

Pet. App. 37a.

In doing so, the majority relied instead on the Seventh Circuit's decision in *McReynolds v. Merrill Lynch*, *Pierce, Fenner & Smith*, 672 F.3d 482 (7th Cir. 2012), another Title VII employment discrimination case. There, the Seventh Circuit invoked 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," Fed. R. Civ. P. 23(c)(4) – so as to certify a Title VII class, despite acknowledging that (1) favorable resolution of the plaintiffs' class-wide disparate impact claims invariably will result in "hundreds of separate suits" for lost wages and/or compensatory and punitive damages, and (2) "[t]he stakes in each of the plaintiffs' claims are great enough to make individual suits feasible." *McReynolds*, 672 F.3d at 492.

Like the court below, the Seventh Circuit in *McReynolds* considered, but then ultimately declined to apply, this Court's reasoning in *Dukes*, even while expressly acknowledging its "undoubted resemblance" to the case. *Id.* at 489. In particular, rather than

adhering to this Court's admonition in *Dukes* that plaintiffs must present "significant proof" that every Rule 23(a) element has been satisfied, 131 S. Ct. at 2553 – and the district court must resolve any challenge to that evidence – prior to certifying a class, the Seventh Circuit utilized 23(c)(4) as an expedient means of certifying an otherwise plainly deficient class.

In doing so, the Seventh Circuit in *McReynolds* ignored this Court's teachings in *Dukes*, while embracing a controversial approach to class certification on which the federal courts are deeply divided.[2] Its disregard of *Dukes* aside, the Seventh Circuit in *McReynolds* resolved the class certification question on grounds completely irrelevant to the instant case. The lower court's reliance on *McReynolds* therefore is entirely misplaced, and can be viewed only as an overt

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[2] Federal courts strongly disagree on the propriety of utilizing Rule 23(c)(4) to certify the type of "issue" class approved by the Seventh Circuit in *McReynolds* 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 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 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) is "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").

attempt to end-run the robust class certification requirements articulated by this Court in *Dukes*.

For example, in its lengthy discussion of *McReynolds*, the court below describes the Seventh Circuit's analysis as "align[ing] with the *Wal-Mart's* majority's interest in certifying classes that *will drive the resolution of litigation* and it supports affirming the certification of Jacobsen's class to determine the certified declaratory and injunctive relief." Pet. App. 31a (emphasis added). To the extent the lower court seems to suggest that *Dukes* endorses a Rule 23(c)(4) "issues" approach to certification like that taken by the Seventh Circuit in *McReynolds*, *amicus* respectfully suggests that it is mistaken. What this Court did say regarding "driving resolution of litigation" is:

> What matters to class certification … is not the raising of common 'questions' – even in droves – but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers.

Dukes, 131 S. Ct. at 2551 (citation omitted).

The Montana Supreme Court's disregard for Rule 23's stringent commonality requirements, which are designed to protect the due process rights of defendants and plaintiffs alike, thus is evident. Much like the policy at issue in *Dukes*, the mere fact that Allstate maintained claims handling procedures cannot establish the basis for a classwide injury for which a single, indivisible remedy is available. To the contrary, such procedures could well be considered, as was the policy in *Dukes*, "a very common and presumptively reasonable way of doing business …." 131 S. Ct. at 2554.

The court below also erred by looking past Jacobsen's obvious inability to satisfy the typicality requirements of Rule 23(a)(2), raising additional due process concerns. The certified class asserts that Allstate's application of uniform claims adjusting procedures caused indivisible harm to the entire class. Yet any notion that the procedures were applied to each class member in the same way is belied by Jacobsen's own experience. Indeed, to the extent that the court below acknowledges that Jacobsen is not, and cannot become, a member of the class he seeks to represent, it also disregarded the basic Rule 23 requirement that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3); Mont. R. Civ. P. 23(a)(3). As this Court observed nearly seventy-five years ago:

> Such a selection of representatives for purposes of litigation, whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent, does not afford that protection to absent parties which due process requires.

Hansberry v. Lee, 311 U.S. 32, 45 (1940). In allowing a class to be certified where the plaintiff cannot satisfy the categorical requirements of Rule 23(a)(2) regarding typicality, the court below trammeled yet again on the constitutional due process rights of Allstate, as well as the absent class members on whose behalf Jacobsen purports to seek relief. Accordingly, review and reversal by this Court is warranted.

B. *Dukes* Confirms That Certifying A Rule 23(b)(2) Damages Class Violates Due Process, Where Monetary Relief Is More Than Merely Incidental To the Injunctive And Declaratory Relief Sought

Rule 23(b)(2) 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).[3] This Court has indicated that granting class certification status under Rule 23(b)(2) where monetary damages are sought raises constitutional and due process concerns, *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846 (1999), strongly suggesting that a "significant possibility" exists that certification of such claims is never appropriate. *Dukes*, 131 S. Ct. at 2557 (citing *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 121 (1994) (*per curiam*)). In fact, the Court repeatedly has expressed doubt, beginning in *Ticor* and most recently in *Dukes*, that claims for monetary damages can ever be certified as a Rule 23(b)(2) class. *See, e.g., Dukes*, 131 S. Ct. at 2557-58; *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 845-46 (1999).

Indeed, *Dukes* all but resolved the question. There, the Court said, "Our opinion in *Ticor Title Ins. Co. v. Brown* … expressed serious doubt about whether claims for monetary relief may be certified under that provision. We now hold that they may not, at least

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[3] In contrast, 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).

where (as here) the monetary relief is not incidental to the injunctive or declaratory relief." 131 S. Ct. at 2557. The Court observed that "the key to the (b)(2) class is the indivisible nature of the injunctive or declaratory remedy warranted – the notion 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." *Id.* (citation omitted). Said differently:

> Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class. … [I]t does not authorize class certification when each class member would be entitled to an individualized award of monetary damages.

Id.

That is because permitting a monetary class to proceed under 23(b)(2) deprives the parties of important due process protections – including the right of absent class members to notice and an opportunity to opt-out, and the right of defendants to offer proof challenging the basis for each individual class member's claim for relief. As this Court observed in *Dukes*, "In the context of a class action predominantly for money damages … absence of notice and opt-out violates due process." *Id.* at 2558. Thus, "[w]hile we have never held that to be so where the monetary claims do not predominate, the serious possibility that it may be so provides an additional reason not to read Rule 23(b)(2) to include the monetary claims here." *Id.*

The trial court below limited that important aspect of the Court's holding in *Dukes* to the facts of the case:

> The U.S. Supreme Court found that the requested back pay remedy was not susceptible to class-wide determination in a single stroke because the lack

> of Rule 23(a)(2) commonality rendered the requested back pay remedy no more than the sum of individualized, case-specific back pay determinations for each class member.

Pet. App. 235a (citation omitted). It derisively dismissed the "prominent but single line reference in *Wal-Mart* to previously-expressed 'serious doubt,'" Pet. App. 234a n.50, that monetary claims can ever be certified under 23(b)(2), declaring that, in direct conflict with *Dukes*, "the express language of *Ticor* neither expresses nor manifests such sweeping doubt." *Id.* It even went so far as to declare:

> *Ticor* did no more than "dismiss [a] writ of certiorari as improvidently granted" because the case raised an "entirely hypothetical question" regarding the due process implications of monetary relief in a Rule 23(b)(1)/23(b)(2) class action. Without sweeping ominous foreboding either way, even *Ticor's* explanatory *dictum* went no farther than cautiously recognizing the significance of the implicated constitutional concern of whether procedural due process requires notice and member opt-out for any type of class action involving any form of monetary relief. The sweeping reference to "serious doubt" first appears in *Wal-Mart*.

Id. (citations omitted).

Despite the trial court's conclusion to the contrary (which the Montana Supreme Court did not disavow), *Dukes* holds that monetary claims cannot be certified under Rule 23(b)(2) where such relief is not incidental to the injunctive or declaratory remedies sought, and does, in fact, strongly suggest that such claims never

are suitable for class treatment under (b)(2).[4] To the extent that the court below, by certifying a no opt-out class for injunctive and declaratory relief as a predicate for subsequent trials for individual damages, disregarded the important due process considerations expressed in *Dukes*, review by this Court is necessary.

II. INCONSISTENT APPLICATION OF DUE PROCESS PRINCIPLES IN THE CLASS CERTIFICATION CONTEXT, WHETHER BY STATE OR FEDERAL COURTS, PLACES EMPLOYERS AT A SIGNIFICANT 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 Federal Rules 23(a) and (b) – or,

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[4] The advisory committee notes accompanying Rule 23 provide that 23(b)(2) "does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages." Fed. R. Civ. P. 23 advisory committee's note (Note to Subdivision (b)(2)), *reprinted in* 39 F.R.D. 69 (1966). Some courts of appeals have read this statement as suggesting that claims for monetary relief may be certified under certain circumstances, while others categorically reject that position. *Compare Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 415 (5th Cir. 1998) (citing cases); *Reeb v. Ohio Dep't of Rehab. & Corr.*, 435 F.3d 639, 645-50 (6th Cir. 2006); *Cooper v. Southern Co.*, 390 F.3d 695, 720-21 (11th Cir. 2004), *overruled on other grounds by Ash v. Tyson Foods, Inc.*, 546 U.S. 464 (2006) *with Robinson v. Metro-North Commuter R.R.*, 267 F.3d 147, 163-64 (2d Cir. 2001), *abrogated on other grounds by Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011).

as here, their state rule equivalents – 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.

> 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 NYU L. Rev. 97, 99 (2009) (footnote omitted).

While *Dukes*, by clarifying the standards that apply to Rule 23 class certifications, has made it more difficult for plaintiffs to construct "super" class actions as a means of forcing massive class settlements, the substantial costs and business risks associated with class litigation – whether in state or federal court – remain a concern to large employers.

In fact, major U.S. firms continued to cite high-dollar employment class action lawsuits as a persistent problem, even after *Dukes*. In one survey, labor and employment litigation (44%) was ranked among the top three most common types of litigation cited, along with contract cases (44%) and personal injury

claims (27%).[5] In particular, "the percentage of public company respondents reporting class/group actions brought in labor and employment cases continues to rise, from 35% in 2010 to 48% in 2011 to 52% in 2012." Fulbright, *Litigation Trends Survey Report* at 49.

By way of further example, over forty percent of respondents said that they have seen the largest increase in multi-plaintiff disputes in the area of wage and hour litigation. *Id.* at 45. Particularly relevant to this case, over three-quarters of those respondents said that plaintiffs tend to file such actions in state courts, *id*., which are often considered to be more "employee-friendly."

Because of the importance of class certification determinations, the rules must be applied (whether in state or federal court) in a manner that ensures consistency and preserves, rather than undermines, federal constitutional principles of fairness and due process for both plaintiffs and defendants.

CONCLUSION

Accordingly, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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[5] Fulbright & Jaworski, L.L.P., *9th Annual Litigation Trends Survey Report* 10 (2013), *available at* http://www.litigationtrends.com