No. 10-17360

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOAQUAN HARVEY and RON MOWDY,
Plaintiffs – Appellees,

v.

KAG WEST, LLC, f/k/a Beneto Bulk Transport, and
KENAN ADVANTAGE GROUP, INC.,
Defendants – Appellants.

Appeal from an Order of the United States District Court
for the Northern District of California, No. 3:06-CV-05682 MHP

BRIEF FOR THE AMERICAN TRUCKING ASSOCIATIONS, INC., CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AND DRI—THE VOICE OF THE DEFENSE BAR AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, counsel for the American Trucking Associations, Inc. ("ATA"), Chamber of Commerce of the United States of America ("Chamber"), and DRI—The Voice of the Defense Bar ("DRI") certifies that none of them has a parent corporation, and that none of them (nor any affiliate) has issued shares or debt securities to the public.

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INTEREST OF THE AMICI CURIAE

The American Trucking Associations, Inc. ("ATA"), the Chamber of Commerce of the United States of America ("Chamber"), and DRI—The Voice of the Defense Bar ("DRI") represent the interests of their members before the legislative, executive, and judicial branches of government, and in other public policy forums. As part of that representation, each organization files *amicus curiae* briefs in cases involving issues of concern to its members, and each has appeared many times in this Court.[1]

The ATA is the national trade association of the trucking industry. It has approximately 2,000 direct motor carrier members and, in cooperation with state trucking associations and affiliated national trucking conferences, represents tens of thousands of motor carriers nationwide.

The Chamber is the world's largest federation of businesses, representing 300,000 direct members and an underlying membership of over 3,000,000 businesses and professional organizations. Chamber members operate in every sector of the economy and transact business worldwide.

DRI is an international organization of more than 22,000 attorneys involved in the defense of civil litigation. DRI is committed to enhancing the skills,

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[1] Both parties have consented to the filing of this brief. Fed. R. App. P. 29(a). No counsel for either party authored this brief in whole or in part, and no party, party's counsel, or person other than the *amici* and their counsel contributed money that was intended to fund preparing or submitting this brief. *Id.* 29(c)(5).

effectiveness, and professionalism of defense attorneys and to making the civil justice system fairer, more efficient, and—when national issues are involved—more consistent.

The *amici* have a strong interest in this case because it raises important and recurring questions concerning class certification and the Fair Labor Standards Act. A substantial number of ATA and Chamber members, and many clients of DRI members, have large workforces, creating jobs for millions of Americans. These businesses have made attractive targets for plaintiffs' lawyers who wish to leverage the certification of employment-related claims as class actions into settlements, regardless of the merit of the underlying claims. Affirming the decision below would exacerbate that trend by eliminating or weakening several key safeguards against unwarranted class certification. Because that, in turn, likely would induce vexatious filing of individualized grievances against businesses as class actions, the *amici* have a powerful interest in the outcome of this appeal.

INTRODUCTION AND SUMMARY OF ARGUMENT

A class action may be certified only if its proponents satisfy all four requirements of Federal Rule of Civil Procedure 23(a)—numerosity, commonality, typicality, and adequacy. In addition, "parties seeking class certification must show that the action is maintainable under" a subdivision of Rule 23(b). *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997). Of those subdivisions, Rule

23(b)(1) principally addresses claims for the disposition of a limited common fund; Rule 23(b)(2) concerns claims for common injunctive or declaratory relief; and Rule 23(b)(3) permits certification of a claim if common questions predominate and class treatment provides the superior means of adjudication.

The class certification in this wage-and-hour lawsuit by truck drivers hinges primarily on the district court's assertion of authority under Rule 23(c)(4)—which states that "when appropriate, an action may be maintained as a class action with respect to particular issues only"—to certify a class to resolve subcomponents of a claim that does not satisfy any subdivision of Rule 23(b).

Sound jurisprudence and policy weigh against that expansion of the class certification device. The danger of indiscriminately aggregating claims against a business into a class action is that a plaintiff can so raise the stakes and expense of a case as to coerce a settlement irrespective of the merits. One survey of large companies revealed that, in 2009 alone, 30 percent of U.S. companies and 39 percent of California companies were targeted by at least one class action. Robert Fischer Jr., *California Tops Litigation Wave*, L.A. DAILY J., Dec. 2, 2009. If this Court were to adopt the district court's erroneous view that Rule 23(c)(4) provides a basis to certify a class that does not satisfy Rule 23(b), abusive class actions would more easily progress to certification—and legally unwarranted settlement. And the enhanced promise of a pay-off would trigger the filing of many more

lawsuits. Similar results would follow if this Court approved the district court's misapplication of Rule 23(b)(3)'s predominance analysis, or its holding that the restrictions on collective actions under the Fair Labor Standards Act ("FLSA") can be disregarded whenever plaintiffs invoke a state statute that provides a piggyback remedy for an alleged FLSA violation.

First, although the district court recognized that common questions did not predominate over individualized ones for any claim—so that the class would be improper under Rule 23(b)(3)—the court certified the common questions for resolution on behalf of a so-called "issue" class under Rule 23(c)(4). Yet the Supreme Court has made clear that a class must satisfy all of the subsections of Rule 23(a) and at least one subsection of Rule 23(b). Rule 23(c)(4) does not provide an independent basis for class certification. Moreover, because of the ease of posing a common question, however abstract, the district court's approach would permit certification of an issue class in far more cases than can be properly certified under Rule 23(b).

Second, the district court made a fundamental—and pernicious—error in determining that plaintiffs presented common questions in their claims relating to overtime pay, meal and rest breaks, and off-the-clock work. Rather than considering the employers' actual practices, which varied dramatically from driver to driver, the court looked instead solely at whether the defendants had policies

regarding compensation and breaks. Yet almost any employment lawsuit is likely to involve ***some*** company policy. The district court's approach arguably would justify class certification in most employment cases, whether or not the alleged policies are consistently (or ever) applied in a way that would permit their lawfulness to be evaluated on a class basis.

Third, at the same time that the court certified an FLSA opt-out collective action, the court also certified an opt-out class action under Rule 23 of the exact same claim under California's Unfair Competition Law ("UCL"), CAL. BUS. & PROF. CODE §§ 17200 *et seq*. Congress mandated that FLSA claims be brought solely on an opt-in basis in order to protect employers and employees alike from abusive representational litigation. Allowing the certification of an FLSA claim on an opt-out basis whenever a state-law borrowing statute like the UCL is available would frustrate Congress's intent in forbidding opt-out FLSA class actions.

ARGUMENT

I. RULE 23(c)(4) DOES NOT AUTHORIZE THE CERTIFICATION OF CLAIMS THAT FAIL TO SATISFY RULE 23(b).

As appellants have demonstrated, Rule 23(c)(4) does not permit certification of subcomponents of a damages claim as an issue class action when the claim as a whole does not satisfy Rule 23(b). Aplt. Br. 15-27. This Court surely is not bound by its suggestion in dicta that Rule 23(c)(4) might authorize certification of an issue class "[e]ven if the common questions do not predominate over the individual

questions." *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996). The sole support for that dictum was itself dictum in an earlier decision expressing doubt that slicing off nonpredominant issues for class treatment would be appropriate: "The few issues that might be tried on a class basis in this case, balanced against issues that must be tried individually, indicate that the time saved by a class action may be relatively insignificant." *In re N. Dist. of Cal. Dalkon Shield IUD Prods. Liab. Litig.*, 693 F.2d 847, 856 (9th Cir. 1982). Moreover, in ***deciding*** *Valentino* the Court reversed the class certification precisely because the district court had ignored Rule 23(b)(3)'s requirements. 97 F.3d at 1235. As a consequence, the present case is the first in this Court that squarely raises for decision the scope of issue-certification authority under Rule 23(c)(4).

No approach that would permit a district court to certify for class treatment any isolated common issue could be squared with the plain language of Rule 23(c)(4). The rule provides that "an action may be maintained as a class action with respect to particular issues" only "***[w]hen appropriate***." FED. R. CIV. P. 23(c)(4) (emphasis added).

Most important, the outer limits of the "appropriate" use of Rule 23(c)(4) have become clear since *Valentino* was decided. A year after *Valentino*, the Supreme Court held unequivocally that ***no*** class may be certified unless it satisfies both Rule 23(a) and Rule 23(b): "In addition to satisfying Rule 23(a)'s

prerequisites, parties seeking class certification ***must*** show that the action is maintainable under Rule 23(b)(1), (2), or (3)." *Amchem*, 521 U.S. at 614 (emphasis added). Moreover, the structural placement and rulemaking history of Rule 23(c)(4) confirm that it is merely a housekeeping provision that authorizes bifurcation of the common and individual issues in a class action that has been properly certified under Rule 23(b)(3). Laura J. Hines, *Challenging the Issue Class Action End-Run*, 52 EMORY L.J. 709, 752-63 (2003). *See, e.g.*, *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 745 n.21 (5th Cir. 1996).

We write to explain the adverse practical effects of untethering issue class actions from the requirements of Rule 23(b)(3). Under that approach, individualized damages claims could be routinely certified as issue class actions. Because the resulting torrent of inappropriate class actions would have far-reaching adverse consequences, the decision below should be reversed.

A. Construing Rule 23(c)(4) To Permit Class Certification Irrespective Of Rule 23(b) Would Allow Certification Of An Issue Class In Almost Any Putative Class Action.

One consequence of the district court's rulings is clear: Plaintiffs could obtain class certification (at least in part) for most damages claims.

Normally, such a request could be granted only if the putative class representative could demonstrate that, among other things, "the questions of law or fact common to class members predominate over any questions affecting only

individual members." FED. R. CIV. P. 23 (b)(3). The Supreme Court has described predominance as a "demanding" requirement. *Amchem*, 521 U.S. at 623 (1997).[2] Indeed, one treatise writer advises that the predominance requirement "usually is the greatest obstacle to [Rule 23](b)(3) certification" of dubious class actions. 1 JOSEPH M. MCLAUGHLIN, MCLAUGHLIN ON CLASS ACTIONS § 5:23 (6th ed. Supp. 2010).

That obstacle recedes, however, if—as the district court held—any common subcomponent of a claim may be certified for an "issue" class under Rule 23(c)(4). Identifying a common issue is a requirement that is "easily met in most cases." 1 WILLIAM B. RUBENSTEIN ET AL., NEWBERG ON CLASS ACTIONS § 3:10 (4th ed. Supp. 2010). If a damages claim can be certified under Rule 23(c)(4) by cherry-picking one or more common questions—even though individual questions predominate for the claim as a whole—then certification could become nearly automatic: A court could "sever issues until the remaining common issue predominates over the remaining individual issues," thus "eviscerat[ing] the predominance requirement." *Castano*, 84 F.3d at 745 n.21; *see also* 2

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[2] This Court closely scrutinizes would-be class representatives' assertions that the predominance requirement is satisfied. *See, e.g.*, *Williams v. Veolia Transp. Servs., Inc.*, 379 F. App'x 548, 549 (9th Cir. 2010) (affirming denial of class certification because plaintiff had failed to show predominance); *Koike v. Starbucks Corp.*, 378 F. App'x 659, 661-62 (9th Cir. 2010) (same); *In re Wells Fargo Home Mortgage Overtime Pay Litig.*, 571 F.3d 953, 958-59 (9th Cir. 2009) (reversing class certification for failure to satisfy predominance requirement).

RUBENSTEIN., *supra*, § 4:23 (recognizing this possibility); *also* 7A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1778 (3d ed. Supp. 2010) (same).

In addition, if the suitability of a class may be evaluated issue by issue—rather than as an "action" that must satisfy Rule 23(b)—plaintiffs could sidestep other important safeguards against improper class certification. For example, if confined to discrete common issues, the inquiry into the representative's adequacy and typicality would not pose meaningful restrictions to class certification. Thorny conflicts of interest between the representative and absent class members or between groups of class members could be brushed aside as irrelevant to resolution of the common issue in isolation. And particularized defenses to the class representative's claims (as might arise from the details of his employment duties)—which otherwise could defeat typicality as well as predominance—could be assumed away.

Moreover, because the court below proposed to try only a few common issues, it failed to consider how certain-to-follow disputes in each of 1,300 individual cases—such as whether particular class members had reasonable expectations of driving interstate or actually were deprived of rest or meal breaks—would be resolved. Certification of isolated issues simply kicks the question of manageability down the road.

The district court did not indicate whether it intended to conduct all of the follow-on proceedings itself, or whether it envisioned issuing a partial class "judgment" for class members to enforce in separate litigation. The first option is the height of inefficiency. It also raises the question whether the only possible class-wide disposition would be a judgment ***precluding*** recovery for all class members, as the resolution of the certified issue otherwise would not resolve any "claim" of any party. FED. R. CIV. P. 54(b).

But the second option raises additional difficult questions, such as how the issue "judgment" could be immediately appealable without a new exception to the final-judgment rule. Deferring the appeal until after the conclusion of individual proceedings, however, would raise another question—how to prevent disagreements among the hundreds or thousands of courts reviewing the issue "judgment" (or intermixed follow-on questions) from destroying the uniformity that the issue class was intended to create.

Regardless of where the individual trials take place, there is a serious risk of violating the defendants' Seventh Amendment right not to have the findings of one jury "reexamined by a second, or third, or *n*th jury." *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1303 (7th Cir. 1995). The individualized issues for follow-on trials are hopelessly intertwined with the issues that the district court has proposed to try on a class-wide basis. For example, if the issue-class jury were to render a

verdict against the defendants based on alleged policies of withholding breaks or pay, the follow-on juries will inevitably revisit that jury's findings in weighing individualized evidence against the evidence of those policies.

The logical consequence of certifying issue class actions regardless of Rule 23(b) is a risk of automatic class certification whenever class counsel can identify even a single common issue—even in the face of substantial practical and constitutional objections to certification.

B. Permitting Certification Of Nonpredominant-Issue Classes Would Invite A Flood Of Class-Action Litigation Brought Irrespective Of Merit Or Amenability To Resolution By Common Proof.

To construe Rule 23(c)(4) to permit the certification of issue classes that do not also satisfy Rule 23(b) would invite a significant upswing in the opportunistic filing of abusive class actions. That outcome would have devastating consequences for businesses; their owners, employees, and customers; and the judicial system.

1. The defendants in class actions already face tremendous pressure to capitulate to what Judge Friendly termed "blackmail settlements." HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 120 (1973). Indeed, the Rule authorizing this appeal exists in part because "[a]n order granting 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." FED. R.

CIV. P. 23(f), 1998 advisory committee's note. As the Supreme Court has observed, once certified as a class action, "even a complaint which by objective standards may have very little chance of success at trial has a settlement value to the plaintiff out of any proportion to its prospect of success at trial[.]" *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 740 (1975); *see also*, *e.g.*, *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1465 n.3 (2010) (Ginsburg, J., dissenting) ("A court's decision to certify a class * * * places pressure on the defendant to settle even unmeritorious claims."). The threat of inevitably costly and disruptive class-wide discovery adds an additional "*in terrorem* increment" to the settlement value of the claim. *Blue Chip Stamps*, 421 U.S. at 741.

The easy availability of issue-class certification would exacerbate the problem of coercive settlements. Every lawsuit against a business potentially could be converted into a class action whenever the would-be class counsel could point to numerous potential plaintiffs sharing even a single common issue. And because class members would not be able to establish liability as a consequence of the proceeding, they would have inadequate incentives to monitor the litigation. Commentators have long warned of the risk for abuse when class members exercise insufficient oversight of class counsel. Indeed, "the single most salient characteristic of class and derivative litigation is the existence of 'entrepreneurial'

plaintiffs' attorneys [who, because they] are not subject to monitoring by their putative clients * * * operate largely according to their own self-interest[.]" Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation*, 58 U. CHI. L. REV. 1, 7-8 (1991).[3] For these reasons, Congress recently found that "there have been abuses of the class action device," leading to situations where "counsel are awarded large fees" while "[c]lass members often receive little or no benefit from class actions, and are sometimes harmed." Class Action Fairness Act of 2005, PUB. L. NO. 109-2, §§ 2(a)(2)-(3), 119 STAT. 4, 4 (Feb. 18, 2005). If favorable resolution of isolated issues certified for class treatment would not bring individual class members even halfway to a recovery, the separation between their interests and those of their lawyers would widen.

In addition, certifying an issue class despite the predominance of individualized issues in the claim as a whole may violate the defendant's due process rights. If the issue class were to prevail, the defendant would face

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[3] *See also, e.g.*, Martin H. Redish, *Class Actions and the Democratic Difficulty*, 2003 U. CHI. LEGAL F. 71, 77-83 (often "what purports to be a class action, brought primarily to enforce private individuals' substantive rights to compensatory relief, in reality amounts to little more than private attorneys acting as bounty hunters"); *cf.* Neil Weinberg, *Shakedown Street*, Forbes.com, Feb. 11, 2008, at http://www.forbes.com/2008/02/11/lerach-milberg-weiss-biz-cz_nw_0211lerach.html (noting that former securities class action attorney William Lerach once boasted, "I have the greatest practice of law in the world. I have no clients").

potentially enormous liability to the class in subsequent proceedings. But if the defendant were to win on the certified issues—or even reach a class settlement—the defendant would have no assurance of finality because of the possibility of collateral attacks on the judgment.

The absent members of an issue class also could argue that certification violated their due process rights. As the Supreme Court has explained, as "part of our deep-rooted historic tradition that everyone should have his own day in court," a "judgment or decree among parties to a lawsuit * * * does not conclude the rights of strangers to those proceedings." *Martin v. Wilks*, 490 U.S. 755, 762 (1989) (internal quotation marks omitted). Accordingly, class actions "implicate the due process 'principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party.'" *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846 (1999) (quoting *Hansberry v. Lee*, 311 U.S. 32, 40 (1940)). The certification of an issue class action, however, would permit representative litigation without regard to one of the fundamental safeguards of absent class members' due process rights: the predominance requirement.

The absent class members of an issue class action would have good reason to insist upon a showing of predominance. In *Amchem*, the Supreme Court explained that the "mission" of the predominance requirement—which winnows

out classes in which the members' claims are riddled with idiosyncrasies—is to "assure the class cohesion that legitimizes representative action in the first place." 521 U.S. at 623. Only when the interests of the class and its representative are aligned as a matter of evidentiary presentation as well as ultimate interest can "the named plaintiff at all times adequately represent the interests of the absent class members," as due process requires. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985). An issue class circumvents the predominance requirement, however, because all individualized issues have been severed. Because the predominance test was short-circuited, there is a risk that subsequent courts may sustain collateral challenges to any issue "judgment" on the ground that class certification violated the due process rights of absent class members—particularly if, as is often the case, the class member can hypothesize some flaw in the class notice. *See, e.g., Wolfert ex rel. Estate of Wolfert v. Transamerica Home First, Inc.*, 439 F.3d 165 (2d Cir. 2006) (entertaining collateral attack by absent class member who failed to opt out of settlement); *Moody v. Sears, Roebuck & Co.*, 2007 WL 2582193, at *5 (N.C. Super. Ct. May 7, 2007) (sustaining such an attack), *rev'd*, 664 S.E.2d 569 (N.C. Ct. App. 2008). Class members who succeeded with such challenged might be free to litigate anew—thus placing the defendant in a no-win situation.

When some applications of a rule might exceed constitutional limits, it should be construed to avoid constitutional doubt. *See Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). The Supreme Court has endorsed "the alternative of using the Federal Rules instead of the Constitution as the means of" avoiding the violation of a "constitutional due process right." *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 121 (1994). The due-process implications of an expansive construction of Rule 23(c)(4) weigh heavily in favor of a construction that does ***not*** place the Rule or its application in constitutional doubt.

2. If issue classes are certified under Rule 23(c)(4) irrespective of Rule 23(b), the businesses targeted by abusive issue class actions will not be the only victims. As noted above, the ease of obtaining class certification—and thus coercive settlements—will encourage the filing of many more class actions to pursue claims that are predominantly and inevitably individualized. This avalanche of complex lawsuits will clog court dockets, adding to the workload of an already overburdened judiciary.

Moreover, the ripple effects of these lawsuits will be felt throughout the economy. Defending and settling these lawsuits—not to mention potential litigation over collateral attacks on the judgments—will require businesses to expend enormous resources. But these costs will not simply be absorbed by the

owners of the targeted businesses, but rather will affect economic behavior across the board. For example, the imposition of these costs will adversely affect customers and employees through higher prices, more limited product and service offerings, lower wages and benefits, and disincentives to hire additional employees. *See generally* Michael Moore & Kip Viscusi, *Product Liability, Research and Development, and Innovation*, 101 J. POLITICAL ECON. 161, 174-75 (1993).

II. THE DISTRICT COURT'S PREDOMINANCE ANALYSIS IS LEGALLY FLAWED.

Aside from the decision to certify an improper issue class, the district court's certification analysis suffers from other defects. Here, we focus on two errors that—if not corrected—could have broad and detrimental effects on class-action litigation generally. First, in deciding whether common questions predominated over individualized ones, the court below focused on the defendants' alleged policies to the exclusion of their actual practices. Second, in considering the applicability of the Motor Carrier Act exemption to state and FLSA overtime rules, the court truncated the predominance analysis by granting conditional certification that might be defeated depending on how particular issues were resolved on a class-wide basis—assuming that the hydraulic pressure to settle permits those issues to be resolved at all.

A. Questions Regarding An Employer's Abstract Policies Do Not Predominate Over Questions Regarding Its Actual Practices.

The district court determined that common questions as to defendants' policies regarding overtime pay, unpaid work, and rest and meal breaks predominate over individualized questions as to whether particular class members actually were deprived of pay or breaks. ER 24-27. The court repeatedly concluded that the gravamen of plaintiffs' claims is whether defendants' "*policy* facially violated state law," with the question whether, for example, "individual drivers actually took meal breaks" going solely "to damages, not liability." *Id.* at 24; *see also id*. *at* 25, 27.

That analysis is erroneous for at least two reasons. First, in focusing solely on the defendants' alleged policies while ignoring their practices, the court overlooked the fact that only actual deprivations of pay or breaks violate the law. Although a policy may be relevant to liability, proving that a policy exists on paper is only one step toward proving liability; at least as important is evidence that the policy is applied unlawfully, particularly if the legality of the policy on its face is ambiguous. (For example, in this case the "common issue" of the existence of a policy against paying overtime is undisputed, yet whether that policy was lawfully applied to any given driver is likely to depend on driver-specific factual inquiries.) If the mere existence of a company policy were automatically to establish predominance, Rule 23(b)(3) would not serve its purpose of separating cases where

a class trial would save resources from those that instead would devolve into a multitude of mini-trials. For this reason, this Court recently reminded the same district court that scrutiny of an employer's policies "to the near exclusion of other factors relevant to the predominance inquiry" cannot justify class certification. *In re Wells Fargo Home Mortgage Overtime Pay Litig.*, 571 F.3d 953, 959 (9th Cir. 2009). *See also Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935, 947 (9th Cir. 2009).

Second, by deferring to some other proceeding any consideration of whether particular employees actually were deprived of pay or breaks—issues of causation and injury that the district court mistakenly characterized as addressing "damages" alone (ER 24, 27)—the district court guaranteed the violation of the defendants' Seventh Amendment rights. When district courts sever issues for trial before separate juries, the factual findings of the first jury cannot be subject to reexamination by the second jury. In *Gasoline Products Co. v. Champlin Refining Co.*, 283 U.S. 494 (1931), the Supreme Court held that a partial retrial limited to particular issues "may not properly be resorted to unless it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice." *Id.* at 500. In rejecting a limited retrial on counterclaim damages, the Court explained that "the question of damages on the counterclaim is so interwoven with that of liability that the former cannot be

submitted to the jury independently of the latter without confusion and uncertainty, which would amount to a denial of a fair trial." *Id.*

Since *Gasoline Products*, the courts of appeals—including this Court—have made clear that district courts must "carve at the joint" when deciding which issues may be certified for class-wide or consolidated trial and which would be resolved by subsequent juries, in order to avoid re-examination of the first jury's findings. *Castano*, 84 F.3d at 751 (quoting *Rhone-Poulenc*, 51 F.3d at 1302); *see also*, *e.g.*, *United Air Lines, Inc. v. Wiener*, 286 F.2d 302, 305 (9th Cir. 1961) (reversing order consolidating the liability phases of airline crash victims' trials because the separate trials on damages would decide questions "interwoven with that of liability").

Even if the district court were correct that whether employees actually were deprived of pay or breaks went solely to "damages" (ER 24, 27), these "damages" issues are so "interwoven with that of liability" that they cannot be tried separately without "a denial of a fair trial." *Gasoline Prods.*, 283 U.S. at 500. Overlapping factual and legal issues regarding the content and application of the policies and the actual treatment of individual class members may confuse the subsequent juries and lead to inconsistent verdicts.

The district court's piecemeal approach would have negative repercussions for businesses nationwide. It is easy for plaintiffs in many class-action contexts to

point to some evidence of a common policy, however vague. For example, employers have employee handbooks, retailers have posted return policies and sales scripts, and manufacturers often include brochures with their products. Yet under the district court's approach, the possible existence of any policy and whether it "facially violate[s] state law" might justify class certification (ER 24, 27)—even if actual practices can be determined only through an individual inquiry. That approach would grease the skids towards class certification—while increasing the ability of class counsel to coerce unwarranted settlements from the businesses they target.

B. A Plaintiff May Not Obtain A Conditional Class Certification In Order To Avoid Having To Satisfy Predominance.

The district court also erred in assessing predominance by conditionally certifying issues regarding the applicability of the Motor Carrier Act exemption to the FLSA and California's overtime regulations.

Those rules do not apply to employees whose hours of service are regulated by the Secretary of Transportation under the Motor Carrier Act, 49 U.S.C. § 31502. *See* 29 U.S.C. § 213; CAL. CODE REGS. tit. 8, § 11090(1)(A)(1). That Act applies if both the employer carrier and the driver are subject to the Secretary's jurisdiction. *See* 46 FED. REG. 37,902 (July 23, 1981). The Secretary has jurisdiction over motor carriers unless they "engage[] in wholly intrastate commerce" and have not sought to "'solicit'" any "'interstate business'" within "'a

reasonable period of time prior to the time at which jurisdiction is in question.'" *Reich v. Am. Driver Serv., Inc.*, 33 F.3d 1153, 1155-56 & n.2 (9th Cir. 1994) (quoting 46 FED. REG. 37,902). And the Secretary has jurisdiction over a particular driver if, during the past four months, he or she was involved in interstate commerce or "'could reasonably have been expected to make one of the carrier's interstate runs,'" upon review of "'statements from [the] driver[] and [the] carrier[], and any employment agreement[].'" *Id.* at 1156 (quoting 46 FED. REG. 37,902).

The district court concluded that the question whether the defendants were subject to the Secretary's jurisdiction was amenable to common proof because the only disputed issues were whether, as a few district courts have concluded, there is an exception for carriers whose interstate activities are "de minimis," and whether defendants fell under that exception. ER 16-17, 22. The first question that the court deemed common—whether a de minimis exception exists—should be resolved in the certification inquiry, not deferred in order to justify certification. It is impossible to determine whether a class trial would be efficient—which is why common questions are weighed against individualized ones—if the court postpones determining the elements of a claim and any defenses (and thus what evidence would need to be considered at trial) until after the class is certified.

And the district court should have rejected the de minimis doctrine here. The handful of trial courts that have applied it to carriers mistakenly rely on an interpretation of the Motor Carrier Act by the Secretary of ***Labor*** rather than the Secretary of ***Transportation***, who enforces that Act. The Secretary of Transportation, speaking through the Federal Highway Administration, chose not to adopt the Labor Secretary's "de minimis" exception. *Compare* 46 Fed. Reg. at 37,903 *with* 29 C.F.R. § 782.2. This Court has properly deferred to the Transportation Secretary's interpretation. *See Reich*, 33 F.3d at 1155-56; *accord, e.g.*, *Friedrich v. U.S. Computer Servs.*, 974 F.2d 409, 417 (3d Cir. 1992). When two agencies disagree on the meaning of a statute, this Court "give[s] deference" to the construction of the agency "charged with administering" the statute—not that of the agency "interpret[ing] statutes outside [its] administrative ken." *Parola v. Weinberger*, 848 F.2d 956, 959-60 (9th Cir. 1988); *see also United States v. Eurodif S.A.*, 129 S. Ct. 878, 887 (2009).

The district court thus erroneously believed that the de minimis exception raised a common question as to whether the ***carriers*** were within the Secretary's jurisdiction. But the court correctly recognized that whether individual ***drivers*** are subject to the Secretary's jurisdiction is so rife with individualized inquiries as to "overwhelm common issues." ER 20. For example, although the court deemed defendants' method of assigning routes to drivers to be susceptible to common

proof, the court recognized that weighing the individualized evidence as to drivers' expectations of traveling interstate would require "fact-intensive, detailed inquiries." *Id.* Thus, the court concluded that it could not definitively resolve the applicability of the Motor Carrier Act exemption in a class-wide trial.

Rather than resolving whether common questions as to the applicability of the Motor Carrier Act exemption predominate, the district court simply delayed decision. The court thus certified the first element—whether the defendants fall within the Secretary's jurisdiction—and noted that it would decertify the class "[i]f on summary judgment or at trial, it is determined that defendants" do indeed qualify. ER 21-23.

This conditional certification, however, was improper because "the 2003 amendments to [] Rule 23 eliminated so-called 'conditional certifications" that were "formerly available under Rule 23(c)(1)(C)." *Wachtel ex rel. Jesse v. Guardian Life Ins. Co.*, 453 F.3d 179, 186 n.8 (3d Cir. 2006). As the Standing Committee on Rules and Practice explained in proposing the amendment, "[t]he provision for conditional class certification is deleted to avoid the unintended suggestion, which some courts have adopted, that class certification may be granted on a tentative basis, even if it is unclear that the rule requirements are satisfied." *Report of the Judicial Conference Comm. on Rules of Practice and Procedure to the Chief Justice of the United States and Members of the Judicial*

Conference of the United States 12 (2002). Accordingly, "a trial court may not certify only a limited list of class claims or issues while explicitly delaying decision on other claims." *Wachtel*, 453 F.3d at 186 n.8; *see also Castano*, 84 F.3d at 741 (rejecting notion that conditional certification may be used so the court may "'avoid deciding whether, at that time, the requirements of the Rule have been substantially met'") (quoting *In re Hotel Tel. Charges*, 500 F.2d 86, 90 (9th Cir. 1974)).

The district court's certify-now, ask-questions-later approach is profoundly unfair to defendants. To begin with, the availability of conditional class certifications vastly expands the exposure of businesses to unwarranted class-action litigation. For example, under the district court's approach, plaintiffs arguably could obtain certification of almost any consumer fraud claim. Such claims often are not susceptible to class-wide adjudication because reliance typically cannot be resolved by class-wide proof. But if the plaintiff can advance a legal theory by which reliance may be presumed—no matter how dubious—that obstacle to class-wide treatment can be swept under the rug. To be sure, the class could be decertified once the business refutes the plaintiff's theory. But the increased expense of litigating a class action and the magnified risk of an adverse result may allow the plaintiff to extract a settlement.

In addition, conditional certifications present the defendant with a lose-lose scenario. If the defendant fails to satisfy the condition for decertification, the defendant is subject to potential class-wide liability. But if the defendant does make the required showing, the resulting decertification of the class means that absent class members are not bound by the judgment and thus are free to re-litigate the conditional certification until the defendant eventually loses or capitulates. *Cf.* Brainerd Currie, *Mutuality of Collateral Estoppel: The Limits of the* Bernhard *Doctrine*, 9 STAN. L. REV. 281, 281-89 (1957).

III. CERTIFYING AN OPT-OUT CLASS ACTION TO PURSUE A UCL CLAIM PREMISED ON A VIOLATION OF THE FLSA WOULD UNDERMINE CONGRESS'S INTENT TO REDRESS FLSA VIOLATIONS THROUGH OPT-IN COLLECTIVE ACTIONS.

As defendants explained, the Federal Rules do not authorize certification of an opt-out class action to pursue a California UCL claim that rests entirely on alleged violations of the FLSA. Aplt. Br. 46-58. When a UCL claim is premised on the violation of another law, the UCL claim "borrows" all "substantive portion[s]" of that law—including any procedural requirements that are such "fundamental parts" of the borrowed law as to be substantive in effect. *Blanks v. Seyfarth Shaw LLP*, 171 Cal. App. 4th 336, 364 (2009). Congress's mandate that FLSA claims be pursued only on an opt-in basis (29 U.S.C. § 216(b)) is both substantive and fundamental. As the Supreme Court has explained, Congress enacted that provision "for the purpose of limiting private FLSA plaintiffs to

employees who asserted claims in their own right and freeing employers of the burden of representative actions." *Hoffmann-La Roche, Inc. v. Sperling*, 493 U.S. 165, 173 (1989). Plaintiffs' UCL claim therefore borrows the FLSA's opt-in provision. By certifying the claim on an opt-out basis, the district court "enlarge[d]" the plaintiff's rights and "abridge[d]" the rights of the class members and the defendants in violation of the Rules Enabling Act, 28 U.S.C. § 2072(b).

In addition, in certifying the UCL claim on an opt-out basis, the district court failed to consider Rule 23(b)(3)'s superiority requirement. Because Congress has commanded that FLSA violations be litigated on an opt-in basis, a Rule 23 opt-out class necessarily is not "superior" to an opt-in FLSA collective action. *See*, *e.g.*, *Khadera v. ABM Indus. Inc.*, 701 F. Supp. 2d 1190, 1196 (W.D. Wash. 2010). It might be a closer question if the Rule 23 class asserted the violation of a parallel state substantive law. But California's UCL here serves as a means to pursue an FLSA claim; an FLSA violation ***is*** the "unlawful * * * business * * * practice" that violates the UCL. CAL. BUS. & PROF. CODE § 17200.

If plaintiffs' pleading gambit were to succeed, the FLSA collective action would cease to exist in any state with a pliant borrowing statute. No plaintiff's lawyer would bother pleading an FLSA claim, with its enhanced protections for employers and absent employees, when he can simply recast the same claim under the UCL and obtain certification as an opt-out class under Rule 23(b)(3). That

would avoid the irony—present here—that large numbers of employees who ***refused*** authority to litigate their FLSA claims in the collective action are nevertheless swept up into a Rule 23 class that litigates the ***same*** FLSA claim in the guise of a UCL claim.[4]

Eliminating the FLSA's protections for employers and employees would have a deleterious effects on employment incentives and the economy. It would vastly—and unfairly—magnify the leverage of plaintiffs' lawyers to extract unjustified settlements from any business amenable to suit in California. Aggregating claims on an opt-out basis—which causes the class to balloon in size by encompassing the claims even of people who threw the class notice away—allows the class counsel to extract unjustified settlements. *See* pages 11-12, *supra*.

Moreover, employees would lose their right under the FLSA not to be bound by FLSA litigation that they do not affirmatively consent to join. Their claims would then be extinguished by the inevitable settlement reached by the plaintiff's lawyer suing in their name. But class members typically receive little benefit from

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[4] *See Leuthold v. Destination Am., Inc.*, 224 F.R.D. 462, 470 (N.D. Cal. 2004) ("Should only a few plaintiffs opt in to the FLSA class after the court were to certify a Rule 23 state law class, the court might be faced with the somewhat peculiar situation of a large number of plaintiffs in the state law class who have chosen not to prosecute their federal claims.").

these settlements—often pennies on the dollar, if that—with the lion's share reverting to class counsel in the form of attorneys' fees.[5]

It was these very defects with opt-out class actions that led Congress to enact 29 U.S.C. § 216(b), which requires FLSA collective actions to proceed on an opt-in basis:

> [I]t is certainly unwholesome to allow an individual to come into court alleging that he is suing on behalf of 10,000 persons and actually not have a solitary person behind him, and then later on have 10,000 men join in the suit, which was not brought in good faith, was not brought by a party in interest, and was not brought with the actual consent or agency of the individuals for whom an ostensible plaintiff filed the suit.

93 CONG. REC. 2177, 2182 (1947) (statement of Sen. Donnell). Yet through the device of an opt-out UCL class action piggybacking on an alleged FLSA violation, an "ostensible plaintiff" can circumvent Congress's safeguard against the vexatious assertion of collective rights in FLSA litigation.

In the last decade, employment class actions and FLSA collective actions already have grown from less than one quarter to almost half of the federal class action docket. Emery G. Lee III & Thomas E. Willging, *The Impact of the Class Action Fairness Act of 2005 on the Federal Courts: Fourth Interim Report to the*

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[5] *See, e.g.*, Christopher R. Leslie, *The Significance of Silence: Collective Action Problems and Class Action Settlements*, 59 FLA. L. REV. 71 (2007); John Bronsteen, *Class Action Settlements: An Opt-In Proposal*, 2005 U. ILL. L. REV. 903, 910-18; Susan P. Koniak & George M. Cohen, *Under Cloak of Settlement*, 82 VA. L. REV. 1051 (1996).

Judicial Conference Advisory Committee on Civil Rules 4 (Fed. Jud. Ctr. Apr. 2008), at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Fourth%20Interim%20Report%20Class%20Action.pdf. If adopted by this Court, the district court's rationale would accelerate that trend by providing a type of class action that Congress did its level best to preclude. The Court should prevent that anomalous result.

CONCLUSION

The class certification order of the district court should be reversed.

Respectfully submitted,

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February 16, 2011

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