No. 17-395

IN THE
Supreme Court of the United States

TAYLOR FARMS PACIFIC, INC. D/B/A TAYLOR FARMS,
Petitioner,
v.
MARIA DEL CARMEN PENA, CONSUELO HERNANDEZ, LETICIA SUAREZ, ROSEMARY DAIL, and WENDELL T. MORRIS, on behalf of themselves and on behalf of all other similarly situated individuals,
Respondents.

On Petition For A Writ of Certiorari To The United States Court of Appeals For The Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF *AMICUS CURIAE* DRI—THE VOICE OF THE DEFENSE BAR IN SUPPORT OF PETITIONER

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MOTION OF *AMICUS CURIAE* DRI—THE VOICE OF THE DEFENSE BAR FOR LEAVE TO FILE BRIEF IN SUPPORT OF PETITIONER

Amicus curiae DRI—The Voice of the Defense Bar respectfully moves under Supreme Court Rule 37.2(b) for leave to file the accompanying brief. Counsel for petitioner has consented to the filing of this brief, and written consent has been filed with the Clerk of the Court. Counsel for respondent has withheld consent.

DRI—The Voice of the Defense Bar (www.dri.org) is an international membership organization composed of more than 22,000 attorneys who defend the interests of businesses and individuals in civil litigation. DRI's mission includes enhancing the skills, effectiveness, and professionalism of defense lawyers, promoting appreciation of the role of defense lawyers in the civil justice system, anticipating and addressing substantive and procedural issues germane to defense lawyers and their clients, improving the civil justice system, and preserving the civil jury. To help foster these objectives, DRI participates as amicus curiae at both the certiorari and merits stages in carefully selected Supreme Court appeals presenting questions that are exceptionally important to civil defense attorneys, their corporate or individual clients, and the conduct of civil litigation.

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INTEREST OF THE *AMICUS CURIAE*[1]

DRI—The Voice of the Defense Bar (www.dri.org) is an international membership organization composed of more than 22,000 attorneys who defend the interests of businesses and individuals in civil litigation. DRI's mission includes enhancing the skills, effectiveness, and professionalism of defense lawyers, promoting appreciation of the role of defense lawyers in the civil justice system, anticipating and addressing substantive and procedural issues germane to defense lawyers and their clients, improving the civil justice system, and preserving the civil jury. To help foster these objectives, DRI participates as *amicus curiae* at both the certiorari and merits stages in carefully selected Supreme Court appeals presenting questions that are exceptionally important to civil defense attorneys, their corporate or individual clients, and the conduct of civil litigation.

DRI has long held a special interest in issues surrounding class action fairness. DRI has authored numerous briefs as *amicus curiae* before this Court on the topic, has testified before Congress on proposed rule changes, and provides class action resources to its

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1. In accordance with Supreme Court Rule 37.6, *amicus curiae* DRI—The Voice of the Defense Bar certifies that no counsel for a party authored this brief in whole or part, and that no party or counsel other than DRI, its members, and its counsel, made a monetary contribution intended to fund preparation or submission of this brief. Counsel of record for all parties received notice at least ten days prior to the due date of the intention to file this brief, and counsel for the petitioner has consented to the filing of this *amicus curiae* brief. Counsel for the respondents has been unresponsive to the notice.

many members. Based on this experience, DRI's perspective will help the Court understand the policy implications in this case.

This class action case presents an issue critical to DRI's interests. DRI's members frequently face class certification motions, which, if granted, have the power to force settlements, despite the merits of the claims involved. Because the stakes of class certification are so high, DRI strives to ensure the integrity of the class certification process. The decision below threatens that integrity by allowing class certification based on unreliable, unauthenticated, inadmissible proof.

SUMMARY OF THE ARGUMENT

This case provides an opportunity for this Court to decide a question on which it granted certiorari, but which the Court was procedurally foreclosed from reaching, in *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013). May a district court certify a class action based on information that cannot satisfy the Federal Rules of Evidence? Unlike in *Comcast*, Taylor Farms objected to the plaintiffs' proffered proof under the Rules of Evidence in both the district court and the Ninth Circuit. The long-festering issue is now perfected for this Court's review.

This Court's intervention is necessary to police Rule 23's prerequisites. The district court allowed an unauthenticated, self-serving document drafted solely by plaintiffs' counsel to serve as the evidentiary basis for class certification. The district court justified that decision by stating, unequivocally, that "evidence presented in support of class certification need not be

admissible at trial." Pet. App. 10a. The Ninth Circuit sanctioned that decision. *Id.* at 3a. Collectively, the decisions below resurrect the long-abandoned practice of certifying class actions based on plaintiffs' bare allegations. Yet that is no longer the standard; this Court's cases demand a "rigorous analysis" of "evidentiary proof." *Wal–Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351 (2011); *Comcast*, 569 U.S. at 33. This Court's holdings in those cases deserve more than lip service.

ARGUMENT

The decision below cuts against the clear text of the Federal Rules of Evidence. The Rules apply by their own terms to "proceedings in United States courts," and specifically to "civil cases and proceedings" in "United States district courts." Fed. R. Evid. 101(a), 1101(a), (b). Class certification is a civil proceeding in the federal district courts and thus fits within the explicit textual scope of the Rules. The Rules' coverage has only two sets of exceptions, and neither touches class certification. Rule 1101(d) excludes preliminary admissibility questions, grand-jury proceedings, and certain "miscellaneous proceedings" of a criminal nature (such as sentencing or search warrants) from the Rules; it says nothing about class certification. Rule 1101(e) allows a federal statute or rule to "provide for admitting or excluding evidence independently from" the Rules of Evidence. No statute or rule renders the Rules of Evidence inapplicable to class certification.

Thus, the Federal Rules of Evidence apply with full force to class certification proceedings. Just as Federal Rule of Civil Procedure 23 "*automatically*

applies" to all civil proceedings in the district courts, *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 400 (2010) (citing Fed. R. Civ. P. 1), the Rules of Evidence also *automatically* apply to all civil proceedings in the district courts, *see* Fed. R. Evid. 101(a), 1101(a), (b).

The text of Rule 23 supports this position. For example, to certify a class under Rule 23(b)(3), a district court must "find" that the class satisfies the conditions of predominance and superiority. Fed. R. Civ. P. 23(b)(3); *see id.* advisory committee notes (1966 Amendment, Subdivision (b)(3)) (noting that "[t]he court is required to find" the conditions defined in Rule 23(b)(3)). "Find" connotes a *factual* finding, derived through *proof*, guided by the Rules of Evidence. *See Irving v. United States*, 49 F.3d 830, 835 (1st Cir. 1995) (explaining that Fed. R. Civ. P. 52 "clearly presumes that a [court's] sustainable *finding* will be based upon properly admitted evidence" (emphasis added)); *cf. Black's Law Dictionary* 749 (10th ed. 2014) (defining "find" as "[t]o determine a fact in dispute by verdict or decision"). Along the same lines, many courts of appeals require district courts to make explicit written *findings* to support class action certifications. 7AA Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1785, at 384 & n.42 (3d ed. 2005 & Supp. 2009).

The 2003 amendment to Rule 23 reinforces the presumption that the Rules of Evidence should guide district courts' class certification analysis. The amendment modified Rule 23 to allow district courts to defer the certification decision to "an early

practicable time." *See* Fed. R. Civ. P. 23 advisory committee notes (2003 Amendment, Subdivision (c), Paragraph (1)). This additional time may be necessary to "gather information," sometimes through discovery, and to accumulate the proof necessary to satisfy Rule 23's constraints. *Id.* The 2003 amendment also eliminated conditional certifications. *Id.* The drafters noted: "A court that is not satisfied that the requirements of Rule 23 have been met should refuse certification until they have been met." *Id.* Both changes reflect Rule 23's demand for factual "proof" to overcome the Rule's hurdles to certification. *See* Fed. R. Civ. P. 23(b), (c) (the district court must "determine" that Rule 23 is "satisfied"); *id.* advisory committee notes (2003 Amendment, Subdivisions (c) and (g)) (requiring "proof" and "scrutiny"). Factual proof is necessarily constrained by the Rules of Evidence.

The decision below ignores not only the broad scope of the Federal Rules of Evidence and Rule 23's text and intent, but also this Court's precedent. By failing to scrutinize the plaintiffs' proffered "proof" under the Rules of Evidence, the Ninth Circuit's decision contravenes this Court's rule against reliance on pleading alone, as well as this Court's requirement of *evidentiary* proof, to satisfy Rule 23.

I. Reliance on an unauthenticated, attorney-drafted spreadsheet to certify a class is tantamount to certification based on pleading alone.

For over three decades, this Court has required district courts to look beyond the complaint when deciding whether to certify a class action. *See Gen.*

Tel. Co. of the Sw. v. Falcon, 457 U.S. 147, 160–61 (1982); *Wal–Mart*, 564 U.S. at 350. The Ninth Circuit disregarded this decades-old tenet by adopting the district court's analysis in this case. The district court applied a mere pleading standard by relying on plaintiffs' counsel's unauthenticated representations about Taylor Farms' alleged meal-break violations to find predominance and superiority.

The 9,011-page "Exhibit 17" used to support class certification is not "evidence." Plaintiffs' counsel introduced the document as "our summary of . . . meal period violations drawn from the sample [timesheet] data produced by" Taylor Farms. C.A. E.R. 1735. The spreadsheet is merely a list of highlighted "violations" compiled by an attorney. *See id.* at 1868–10878. There is no description of the raw data underlying these assumed violations or the methodology used to derive the list. Instead the "exhibit" is akin to a plaintiff's allegation in its complaint that commonality and predominance are satisfied. Despite these inadequacies, the district court concluded that predominance *was* satisfied because the document "show[ed] several thousand instances in which employees' punches-out and punches-in were separated by fewer than thirty minutes for meal breaks." Pet. App. 41a.

By refusing to consider the merits of Taylor Farms' evidentiary objections, the district court deprived Taylor Farms of any opportunity to meaningfully challenge the document's authenticity and reliability. Without any assurance that the summary accurately reflects anything, much less admissible data, Exhibit 17 is no more reliable than

an attorney's unsupported representation in a complaint that a proposed class action satisfies Rule 23(b)(3). The exhibit is pleading offered in the guise of proof.

Under this Court's precedent, allegations in a pleading that a lawsuit comports with Rule 23 are not enough. The idea that evidence is unnecessary to support a district court's class certification decision is outdated. The idea lingers from a time when the common understanding of Rule 23 dictated that courts avoid any examination of evidence at the certification stage. *See* 1 John M. McLaughlin, *McLaughlin on Class Actions* § 3:12 (10th ed. 2013) (explaining how lower courts' confusion about whether *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), allows any inquiry into the merits of a case during class certification has evolved into a consensus that courts must look beyond the pleadings when analyzing Rule 23's prerequisites). This Court has since corrected that misconception, explaining in *Wal–Mart* that "Rule 23 does not set forth a *mere pleading standard*. A party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc." 564 U.S. at 350 (emphasis added).

District courts may no longer assume that a party's allegations are true during class certification. Yet that is effectively what the Ninth Circuit condoned here when it adopted the district court's reasoning. *See* Pet. App. 3a. This Court should intervene to correct the Ninth Circuit's error.

II. Disregard for the Federal Rules of Evidence during class certification cannot be squared with *Comcast*'s requirement of evidentiary proof to satisfy Rule 23.

Rule 23 not only requires district courts to move beyond the complaint during class certification, but also demands that plaintiffs "satisfy through *evidentiary* proof at least one of the provisions of Rule 23(b)." *Comcast Corp.*, 569 U.S. at 33 (emphasis added). By holding that the Rules of Evidence do not govern class certification procedure, the Ninth Circuit has read "evidentiary" out of this Court's opinion in *Comcast*.

Moreover, twice recently, this Court has defined what a district court may consider when making the certification determination by referencing principles from the Rules of Evidence. In *Halliburton Co. v. Erica P. John Fund, Inc.*, this Court held that there is no reason to limit a defendant's ability to rebut an evidentiary presumption at the class certification stage when the presumption has a bearing on Rule 23(b)(3)'s predominance requirement. 134 S. Ct. 2398, 2417 (2014). In *Tyson Foods, Inc. v. Bouaphakeo*, this Court rejected an across-the-board ban on plaintiffs' use of representative evidence to prove Rule 23's prerequisites. 136 S. Ct. 1036, 1049 (2016). In both cases, the Court reasoned that the proof involved in lower courts' "rigorous" class certification analysis should be governed by general standards of relevance and reliability. *See Tyson Foods*, 136 S. Ct. at 1046, 1048 (explaining that the "permissibility" of representative evidence turns "on the degree to which the evidence is reliable in proving

or disproving" the relevant inquiry before the court, and that "[r]epresentative evidence that is statistically inadequate or based on implausible assumptions" is inappropriate); *Halliburton*, 134 S. Ct. at 2417 ("[D]efendants must be afforded an opportunity before class certification to defeat [a] presumption through evidence . . . ."). The Rules of Evidence embody these fundamental principles. By logical inference, then, the Rules govern class certification.[2]

"Insistence on admissible evidence . . . is appropriate and consonant with [this] recent Supreme Court guidance." McLaughlin, *supra*, § 3:12, at 491. The decision below strays even further from this Court's dictates than did the Third Circuit's opinion in *Comcast*. The Third Circuit erroneously explained that expert proof at the class certification stage must at least be capable of *evolving* into admissible evidence. *Behrend v. Comcast Corp.*, 655 F.3d 182, 204 n.13 (3d Cir. 2011). However, as the dissent described, "[a] court should be hard pressed to conclude that the elements of a claim are capable of proof through evidence common to a class if the only evidence proffered would not be admissible as proof of anything." *Id.* at 215 n.18 (Jordan, J., dissenting in part).

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[2] Furthermore, the Court has frequently indicated without expressly holding that the Rules of Evidence govern class certification. For example, in *Wal–Mart*, in response to the district court's conclusion "that *Daubert* did not apply to expert testimony at the certification stage," the Court responded, "We doubt that is so." 564 U.S. at 354.

The Ninth Circuit's holding does not even require those indicia of reliability. The decision below ignores whether proof can even evolve into admissible evidence and instead excludes *all* consideration of the limitations imposed by the Rules of Evidence. This Court should step in to correct the Ninth Circuit's error.

III. The Ninth Circuit's decision will encourage a surge in class actions without sufficient safeguards at the pivotal certification stage.

The Ninth Circuit's decision, if left uncorrected, is sure to impact parties defending against class action litigation. The courts of the Ninth Circuit already house more class action settlements than their share of all civil lawsuits within the federal courts. Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical Legal Stud. 811, 821 (2010). Post-*Wal–mart* and *Comcast* decisions in the Northern, Southern, Central, and now Eastern, Districts of California have sanctioned the idea that evidence need not be admissible to support class certification. *See Shaia v. Harvest Mgmt. Sub LLC*, 306 F.R.D. 268, 275 (N.D. Cal. 2015); *Blair v. CBE Grp., Inc.*, 309 F.R.D. 621, 627 (S.D. Cal. 2015); *In re SFPP Right-of-Way Claims*, No. SACV 15-00718 JVS, 2017 WL 2378363, at *3–4 (C.D. Cal. May 23, 2017); Pet. App. 10a. The Ninth Circuit effectively abdicated appellate review over these decisions by affirming and, indeed, *adopting* the district court's reasoning. The court of appeals' inaction in the face of literally complete disregard of the Rules of Evidence gives the plaintiffs'

bar more incentive to flock to these California district courts to file putative class actions.

Unconstrained by the need for admissible evidence to support Rule 23's conditions, these district courts will be free to certify class actions without the rigorous analysis required by this Court's precedent. In most cases, class certification will be determinative of the outcome. "A district court's ruling on the certification issue is often the most significant decision rendered in . . . class-action proceedings." *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980). "[A]lmost all class actions settle, and the class obtains substantial settlement leverage from a favorable certification decision." Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 Duke L.J. 1251, 1292 (2002); *see also Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978) ("Certification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense."); Linda S. Mullenix, *Putting Proponents to Their Proof: Evidentiary Rules at Class Certification*, 82 Geo. Wash. L. Rev. 606, 631 (2014) ("[T]he class certification process is *the* major, significant litigation event in class litigation, with serious, outcome-determinative effects for everyone."). In turn, that leverage both "increases the prospects for frivolous class action suits," Bone & Evans, *supra*, at 1301, and increases the chances that plaintiffs will recover for meritless claims. The declaration that the Rules of Evidence do not apply therefore has the capacity to substantially undermine the integrity of the class action process.

As a matter of fundamental fairness, class action defendants should receive the protections built into Rule 23 and the Federal Rules of Evidence before becoming subject to the threat of massive liability that accompanies an unfavorable class certification decision. This case presents an opportunity for this Court to preserve that fairness.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted.

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