No. 14-1146

IN THE
Supreme Court of the United States

TYSON FOODS, INC.,

Petitioner,

v.

PEG BOUAPHAKEO, ET AL., individually and on behalf of all others similarly situated,

Respondents.

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

BRIEF FOR DRI—THE VOICE OF THE DEFENSE BAR AS *AMICUS CURIAE* SUPPORTING PETITIONER

JOHN PARKER SWEENEY
President of DRI—The Voice of the Defense Bar
BRADLEY ARANT BOULT CUMMINGS LLP
1615 L Street, N.W., Suite 1350
Washington, DC 20036

WILLIAM M. JAY
Counsel of Record
GOODWIN PROCTER LLP
901 New York Ave., N.W.
Washington, DC 20001
wjay@goodwinprocter.com
(202) 346-4000

JOSHUA M. DANIELS
GOODWIN PROCTER LLP
Exchange Place
Boston, MA 02109

Counsel for Amicus Curiae

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INTEREST OF THE *AMICUS CURIAE*[1]

Amicus curiae DRI—The Voice of the Defense Bar is an international organization of more than 22,000 attorneys involved in the defense of civil litigation. DRI is committed to enhancing the skills, effectiveness, and professionalism of defense attorneys. Because of this commitment, DRI seeks to promote the role of defense attorneys, to address issues germane to defense attorneys and their clients, and to improve the civil justice system. DRI has long participated in the ongoing effort to make the civil justice system fairer, more consistent, and more efficient.

To promote these objectives, DRI participates as *amicus curiae* in cases that raise issues important to its membership, their clients, and the judicial system, including a number of cases raising important issues concerning class-action practice. *See, e.g.*, *Comcast Corp.* v. *Behrend*, 133 S. Ct. 1426 (2013);

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[1] The parties' blanket consents to the filing of *amicus curiae* briefs are on file with the Clerk. No counsel for a party authored any part of this brief; no party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief; and no person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the brief's preparation or submission. DRI notified respondents' counsel of its intent to file this brief on April 17, 2015, less than the prescribed period; respondents had already graciously provided blanket consent to *amicus* filings, received notice from other *amici*, and sought an extension for their own brief.

Wal-Mart Stores, Inc. v. *Dukes*, 131 S. Ct. 2541 (2011). DRI's members regularly must defend their clients against proposed class actions in a wide variety of contexts, including the type of wage-and-hour litigation that this case exemplifies.

Too often, those proposed classes fail to satisfy the generally applicable requirements of Fed. R. Civ. P. 23, or the more specific requirements of statutes like the federal Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 *et seq.*, for adjudicating the claims of many different persons at once.[2] And once a class is certified, the stakes change dramatically, as defendants' potential exposure increases in direct proportion to the large number of claims to be adjudicated. Erroneous appellate decisions approving class certification have lasting effects on class-action defendants and their counsel, including DRI members: they increase not just the *number* of erroneous certifications, but also the *threat* of erroneous certification, and the attendant cost and settlement pressure. As cost and settlement pressure increase, there are fewer and fewer opportunities to correct those errors in class-certification law. DRI has a strong interest in

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[2] Damages class actions under Rule 23(b)(3) and collective actions under FLSA § 216(b) "are fundamentally different" in some respects, including that persons do not become parties to collective actions unless and until they opt in by "filing written consent with the court." *Genesis Healthcare Corp.* v. *Symczyk*, 133 S. Ct. 1523, 1529-30 (2013). Because the FLSA collective action here is a subset of the putative Rule 23(b)(3) class, the focus of this brief is on the Rule 23 class issues—though the ability to provide simultaneous guidance on the FLSA collective-action issue as well makes this case even more suitable for review.

ensuring that the Court does not pass up the opportunity that this case represents.

SUMMARY OF ARGUMENT

The court of appeals held that this case could properly proceed to trial and judgment for the plaintiffs based on evidence about how much uncompensated overtime pay the "average" worker at a particular food-processing facility is owed. But that fictional everyman is not in the caption of this case or the certified class. Thousands of real workers are. And the record evidence shows that some of them worked no unpaid overtime, but were paid all that they are due under the law. Yet the judgment in this case allows those plaintiffs to recover money for their non-injury from an employer who did not harm them. The Eighth Circuit upheld that judgment, relying on the power of averaging to dissolve these critical differences among the class members. In the process, the court of appeals' decision deprived petitioner of its right to assert every defense it has to each of its workers' claims for unpaid overtime. Unless corrected, the Eighth Circuit's decision threatens to create great mischief in class-action practice.

The Eighth Circuit's decision here is part of a troubling line of cases emerging from the courts of appeals that the Court must abate if its teachings in *Wal-Mart* and *Comcast* are to retain meaning. Among other things, *Wal-Mart* held that a defendant's right to challenge every claim leveled against it cannot be circumvented simply by having the district court's liability determination rest on "Trial by Formula," whereby the defendant's liability would be proved by reference to "[a] sample set of the class

members [that] would be selected," and "[t]he percentage of [the sampled members'] claims determined to be valid would then be applied to the entire remaining class … without further individualized proceedings." 131 S. Ct. at 2561. Just two years later, in its *Comcast* decision, the Court added that if damages are to be adjudicated on a classwide basis, then they must also rest on classwide, common proof, and cannot be established using an "arbitrary" measure that fails to line up with the theory of liability on which the plaintiffs' case depends. 133 S. Ct. at 1433. The Eighth Circuit's decision abides by neither instruction.

This case purportedly combines, for both liability and damages purposes, an FLSA collective action comprising approximately 400 workers who supposedly are "similarly situated," 29 U.S.C. § 216(b), with a state-law damages action that seeks to combine the claims of more than 3,000 workers under Rule 23(b)(3). *See* Pet. 7. The central contention is that the petitioner failed to pay the class members all the overtime pay they allegedly earned due to time spent donning and doffing protective clothing and walking back and forth between their lockers and the production floor. Pet. App. 2a. Any individual employee wishing to recover damages on that theory must prove "that he performed work for which he was not properly compensated." *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946).

Introducing evidence about how much time each of the 3,000 class members spent donning, doffing and walking (and what if any difference that made to the amount of overtime each worked) would be unworkable. That should have been enough to show that the

workers' claims cannot "productively be litigated at once," *Wal-Mart*, 131 S. Ct. at 2551. But it did not stop the courts below. Instead, the Eighth Circuit held that a judgment in favor of the class may rest on proof only of what the "average" amount of unpaid overtime among the class members is, not of what amounts are due to the individual class members respectively. The Eighth Circuit's decision thus approves the very sort of "Trial by Formula" that this Court disallowed in *Wal-Mart*, and allows a class-wide damages award to rest on an "arbitrary" measure untethered from the theory of liability that was actually tried, contrary to *Comcast*. What is an average if not a formula?

And, when the money is paid out, the fictitious average worker steps aside and the real plaintiffs return. Every one of those plaintiffs gets a share of the money judgment—despite undisputed evidence that many of the workers (hundreds of them, at least) were not owed any overtime pay at all. Storm Lake may not be too far from Lake Wobegon—but here, every plaintiff is deemed precisely average.

Unfortunately, the Eighth Circuit's is not the first decision to allow "average" evidence of this sort to trump a defendant's right to raise every available defense to every class member's individual claims. This Court should make it the last, however, by granting review.

ARGUMENT

I. The Court Should Grant Review To Stop Courts From Averaging Away The Differences Between Class Members' Claims

Formulas are tempting in a class action. Using them can make many knotty problems disappear easily. But as this Court has recognized, federal courts are not free to flatten the obstacles to class certification: those obstacles are there to protect the due process rights of litigants. With increasing frequency, however, some lower courts are disregarding this Court's teaching and once again embracing the promise of easy adjudication by formula. The result is a conflict, and an important one. This Court should step in to resolve it.

In *Wal-Mart*, this Court instructed that the class-certification inquiry should focus on whether there is sufficient commonality—not just in terms of the legal claims involved, but also in terms of how they will be adjudicated—"to believe that all [the class members'] claims can productively be litigated at once." 131 S. Ct. at 2551. Central to that examination, the Court also said, is whether there are "[d]issimilarities within the proposed class [that] … have the potential to impede the generation of common answers," the whole point of the class-action procedure. *Id.* (citation omitted).

That was the case in *Wal-Mart*: each of the class members there alleged that her supervisor exhibited a pattern or practice of discriminating against her on the basis of sex in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* 131 S. Ct. at 2547, 2552. But one form of class relief sought

was backpay, a necessarily individualized remedy, which the employer has the right to contest by showing that, regardless of its alleged pattern or practice, "the individual applicant was denied an employment opportunity for lawful reasons" in her individual case. *Id.* at 2561. Confronted with a plan to "replace such proceedings with Trial by Formula," *i.e.*, extrapolating the defendant's classwide backpay liability from the results of a sample set of claims that would be tried by a master, the Court flatly rejected that "novel project" as inconsistent with the Rules Enabling Act, 28 U.S.C. § 2072(b), because it would deny the defendant its right "to litigate its … defenses to individual claims." 131 S. Ct. at 2561.

Wal-Mart thus disapproved efforts to gloss over "[d]issimilarities" between class members on liability issues by using statistical extrapolations or averages to hide them. Soon after, in *Comcast*, the Court applied the same principle to damages issues, holding that where damages are tried on a classwide basis, the measure of damages must track the class's theory of liability; the damages awarded to the class may not be "arbitrar[ily]" based on a statistical model that fails to measure only those losses that are fairly attributable to the allegedly wrongful conduct underpinning the class's claims. 133 S. Ct. at 1433-35. If the class plaintiffs' theory of liability would result in different answers on the damages question for each class member, then their damages are not susceptible of classwide proof and thus cannot be certified for classwide adjudication. Statistical models at best obscure that reality; they cannot change it.

That has not stopped the class-action plaintiffs' bar from trying, however. Despite the Court's teachings

in *Wal-Mart* and *Comcast*, class plaintiffs' lawyers have indeed resorted to an increasingly common tactic: using statistical generalities to disguise significant "[d]issimilarities within the proposed class"—such as differences among class members as to the existence or extent of their respective injuries. *Wal-Mart*, 131 S. Ct. at 2551 (citation omitted); *see, e.g.*, William C. Martucci & Ashley N. Harrison, *Using Statistics Effectively in Wage and Hour Litigation: An Employer's Offensive and Defensive Tactics*, THE METROPOLITAN CORPORATE COUNSEL, January 2015,[3] at 14 ("[C]lass litigation and the use of statistics within class litigation have grown increasingly over the last decades…."); Saby Ghoshray, *Hijacked by Statistics, Rescued by* Wal-Mart v. Dukes*: Probing Commonality and Due Process Concerns in Modern Class Action Litigation*, 44 LOY. U. CHI. L.J. 467, 468 (2012) (Ghoshray) (noting that "the contemporary class action's certification process … relies heavily on statistical sampling").

The decision below is one of several recent decisions that encourage that trend—but that are wholly inconsistent about just when sampling may be used. The mirror-image results from two recent appellate decisions illustrate the problem. In another overtime-liability case, the Ninth Circuit upheld the certification of a Rule 23(b)(3) liability class where the plaintiffs proposed to prove liability by relying on "statistical sampling." *Jimenez* v. *Allstate Ins. Co.*, 765 F.3d 1161, 1167 (9th Cir. 2014). The Ninth Circuit's reason for doing so was not based on any case-

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[3] *Available at*: http://www.metrocorpcounsel.com/pdf/2015/January/14.pdf.

specific evaluation of whether that procedure would ensure the defendant's right to challenge its liability to any one of the putative class members. It plainly would not have in that case, because the fundamental liability question—whether a particular worker performed any uncompensated overtime work—is highly individualized, just as it is here. Instead, the court justified its ruling by invoking a per se rule "that statistical sampling and representative testimony are acceptable ways to determine liability." *Id.* (citing *Leyva* v. *Medline Indus., Inc.*, 716 F.3d 510, 513-14 (9th Cir. 2013)). The one limitation that the Ninth Circuit recognized was that "the use of these techniques [may] not [be] expanded into the realm of damages." *Id.* Contrast the Ninth Circuit's holding with the Tenth Circuit's recent adoption of a similar, *but diametrically opposed* per se rule. *See In re Urethane Antitrust Litig.*, 768 F.3d 1245, 1256-57 (10th Cir. 2014). Citing the *same case* as the Ninth Circuit in *Jimenez*, the Tenth Circuit held that the use of extrapolation techniques is acceptable to decide class-wide *damages, but not liability*—exactly the converse of the Ninth Circuit's holding.[4]

The only thing these per se rules have in common is that they represent failures to carry out the judicial responsibility set out in this Court's recent class-certification cases. This Court required careful consideration *not only* of whether "all [the class members'] claims can productively be litigated at once," but *also* of whether the means proposed for doing so

[4] Defendants in both *Jimenez* and *In re Urethane* have petitioned for certiorari, *see Allstate Ins. Co.* v. *Jimenez,* No. 14-910; *Dow Chem. Co.* v. *Indus. Polymers, Inc.*, No. 14-1091, and DRI has filed briefs supporting certiorari in both.

fairly preserves the defendant's right to assert every defense it has to each class member's individual claims. *Wal-Mart*, 131 S. Ct. at 2551, 2561. Formulas may do a fine job of achieving the first goal, but they fail even to honor the second, much less to achieve it. No per se rule, such as "sampling is always okay for purposes of establishing liability," exhibits the kind of "rigorous analysis" of both efficiency and fairness considerations that this Court demands. *Id.* at 2551.

Ultimately, the sort of extrapolation that these decisions endorse is no substitute for what this Court has demanded: truly "common" evidence that, when presented, "will resolve [the common] issue that is central to the validity of each one of the [class members'] claims in one stroke." *Wal-Mart*, 131 S. Ct. at 2551. The "Trial by Formula" that *Wal-Mart* disapproved is a predictable result of allowing statistical extrapolation from a sample of class members to be the measure of a defendant's liability in cases, like this one, where the requisite "commonality" of claims is absent. Where significant "[d]issimilarities" divide the class—for example, where some class members are grievously injured while others have suffered little or no harm, or where some class members' claims are subject to good affirmative defenses while others' are not—there is no easy, practicable way of trying every single class member's claim in a single proceeding. In those circumstances, for there to be any hope of efficiently conducting a classwide proceeding, the issues presented to the jury must be simplified for trial purposes, in essence by ignoring certain nuances and being content with "close enough." *See In re Fibreboard Corp.*, 893 F.2d 706, 712 (5th Cir. 1990) ("To create the requisite commonality for trial,

the discrete components of the class members' claims and the [defendants'] defenses must be submerged."). And as the Eighth, Ninth, and Tenth Circuits' decisions demonstrate, relying on averages or sampling is a common means of achieving simplicity, at the cost of obscuring significant variations that may exist between each class member's individual circumstances, and thus also at the expense of the defendant's right to present every available defense to every claim asserted against it.

That approach conflicts not only with this Court's teachings, but with the holdings of other circuits that have correctly recognized that an "aggregate determination" may "not accurately reflect the number of plaintiffs actually injured by defendants and [may] bear[ ] little or no relationship to the amount of economic harm actually caused by defendants," so that relying on that "aggregate determination" would "offend[ ] the Rules Enabling Act." *McLaughlin* v. *Am. Tobacco Co.*, 522 F.3d 215, 231 (2d Cir. 2008); *accord Broussard* v. *Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 343 (4th Cir. 1998) (holding that damages could not be resolved on a classwide basis by computing lost profits based "on abstract analysis of 'averages'" calculated for a "fictional 'typical franchisee operation'"). The rule employed in cases like this one would be reversible error in those other circuits.

As a result, decisions like this one conflict not only with this Court's precedents, but with the interpretation of Rule 23 in other federal circuits. The Court should grant review now to ensure that *all* federal courts instead perform the "rigorous analysis" that Rule 23 and this Court's precedents mandate.

II. The Court Should Grant Review To Make Clear That Class Actions Cannot Include Those Who Have No Damages

The Eighth Circuit's decision errs in a different respect, one that follows directly from its willingness to allow the tyranny of averages to override the dissimilarities between the class members' individual claims for unpaid overtime. For not only did class members differ in the amount of uncompensated overtime that they performed, but some members concededly had performed none at all, and thus had no legally cognizable injury under the wage-and-hour laws pursuant to which this case was brought. Examination of time records, for example, reveals that, even using the "average" times for donning, doffing and walking that the plaintiffs' experts relied on, many class members—more than 200 at least—would still not have worked enough hours in the week to be entitled to any overtime pay. *See* Pet. 11.

Nevertheless, as Judge Beam noted in his dissents below, these uninjured workers presumably will receive a share of the money judgment awarded to the class. Pet. App. 22a-24a, 122a-125a. It is difficult to imagine a result that more plainly contravenes both the Rules Enabling Act and this Court's precedents than one that allows persons who are not entitled to any damages award at all to share in the spoils of a multimillion-dollar judgment, simply because they happen to fall within the district court's class definition. *See* 28 U.S.C. § 2072(b) (Federal Rules of Civil Procedure "shall not … enlarge or modify any substantive right"); *Wal-Mart*, 131 S. Ct. at 2561; *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 613

(1997) ("Rule 23's requirements must be interpreted in keeping with Article III constraints….").

Unfortunately, the Eighth Circuit's decision is not alone in that regard either. Several other circuits similarly have approved class certification even when the class concededly contains a number of members who have suffered no legally cognizable injury at all. *See, e.g.*, *Butler* v. *Sears, Roebuck & Co.*, 727 F.3d 796, 799 (7th Cir. 2013), *cert. denied*, 134 S. Ct. 1277 (2014) (granting class certification despite potential that "most members of the plaintiff class had not experienced" the complained-of product defect); *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d 838, 857 (6th Cir. 2013), *cert. denied sub nom. Whirlpool Corp.* v. *Glazer*, 134 S. Ct. 1277 (2014) (same).

Just months ago, for instance, a divided panel of the First Circuit upheld certification of a class of brand-name drug purchasers suing over the absence of a cheaper generic drug from the market—even though everyone agreed that the class included some purchasers who would never have bought the generic anyway (*e.g.*, out of brand loyalty). *See In re Nexium Antitrust Litig.*, 777 F.3d 9, 20 (1st Cir. 2015). The panel majority recognized that there must be some means of separating, prior to judgment, these uninjured goats from the putative class of injured sheep, but that none had been proposed. *Id.* at 19. Even so, it dismissed that problem because, in its view, "a certified class may include a de minimis number of potentially uninjured parties." *Id.* at 25. As the dissent noted, however, "de minimis" depends on the denominator. In *Nexium,* it meant that as many as 24,000 people, whose identities were unknown and perhaps

unknowable, had suffered no injury but would be included in the class nonetheless. *Id.* at 35 (Kayatta, J., dissenting).

To be sure, the nonexistence of some class members' injuries is a pesky impediment to adjudicating *all* class members' claims in a single proceeding using common evidence. But that does not mean that such impediments may be "submerged" for the sake of an efficient proceeding. *Fibreboard*, 893 F.2d at 712. Those impediments are more generally known as defenses—individualized defenses showing that particular class members are not entitled to any relief. *See* Ghoshray, *supra*, at 498-99 ("[W]ithin the context of sampling, extrapolation allows a nonplaintiff [class member] to enjoy the fruits of adjudication by relying on a representative plaintiff's testimony and construction of causation," but "does not … allow the defendant a reciprocal opportunity to defend against each absent class member").

This Court has long said that "[d]ue process requires that there be an opportunity to present every available defense." *Lindsey* v. *Normet*, 405 U.S. 56, 66 (1972) (quoting *Am. Sur. Co.* v. *Baldwin*, 287 U.S. 156, 168 (1932)). Rule 23, and the Federal Rules of Civil Procedure as a whole, does not privilege the efficiency of the proceeding above all other values, including respect for the defendant's due-process right. *See Amchem*, 521 U.S. at 615 (observing that Rule 23(b)(3)'s predominance and superiority requirements are intended to ensure that certification will "achieve economies of time, effort, and expense," "*without* sacrificing procedural fairness" (citation omitted and emphasis added)); Fed. R. Civ. P. 1 (Federal Rules of Civil Procedure "should be con-

strued and administered to secure the just, speedy, and inexpensive determination of every action and proceeding").[5]

Overlooking the presence of uninjured class members, as many courts have been willing to do, is unfair to defendants in yet another respect. It effectively relieves class plaintiffs of their burden to "affirmatively demonstrate [their] compliance with" Rule 23 by "prov[ing] that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc." *Wal-Mart*, 131 S. Ct. at 2551. All too many recent class-certification decisions ignore that allocation of the burden of proof to the party seeking class certification. The Eighth Circuit here appeared not even to consider it. Pet. App. 8a-10a. Even worse, some court of appeals decisions appear to demand that *the defendant* prove that there is no method of separating out uninjured claimants before the court will vacate the certification order. *See Nexium*, 777 F.3d at 32 ("We also conclude that *defendants have not established* that more than a de minimis number of uninjured consumers are included in the certified class." (emphasis added)). That approach shirks the "rigorous analysis" which this Court has required to decide the fundamental question that Rule 23 poses: whether "all [class members'] claims can productively be litigated at once." *Wal-Mart*, 131 S. Ct. at 2551.

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[5] The unfairness of certifying a class with dissimilarly situated members of course may also harm Rule 23(b)(3) class members, if they fail to exclude themselves, because the class proceeding will "not allow absent class members to stake claims for injury dissimilar to the representative plaintiff's claimed injuries." Ghoshray, *supra*, at 499.

The Court should take this opportunity to put an end to it.

III. The Class-Certification Issues Presented Here Are Important And Recurring, Yet Also Tend To Evade This Court's Review

Besides the critical importance of the questions presented here for federal-court class-certification practice, there is yet another feature of this case that militates in favor of this Court's review: the comparative rarity of class-certification decisions by federal courts of appeals. Courts are reluctant to take interlocutory appeals, and once a class is certified, litigants are reluctant to litigate to final judgment and appeal rather than settle. The paucity of such decisions sharply reduces the number of cases that can serve as a vehicle for addressing a particular class-certification issue, while also increasing the amount of mischief created when erroneous class-certification decisions by the courts of appeals are allowed to stand.

This Court's general practice has been to allow issues to "percolate" to some degree in the courts of appeals before taking them up. But percolation has its limits. Even for issues that can theoretically recur in every circuit, or in every state and federal appellate court, this Court has never insisted that percolation run through every crevice of the judiciary before granting certiorari. *See, e.g.*, *Filarsky* v. *Delia*, 132 S. Ct. 1657, 1661 (2012) (resolving 1-1 circuit conflict).

Extended, unnecessary percolation is particularly inadvisable for class-certification issues. Courts of appeals decide class-certification cases far less fre-

quently than they decide other types of cases. So when a reasoned appellate decision presents a *legal* issue for this Court's review, one that could clarify class-certification practice, this Court should be less inclined to wait for the next case than in some other areas on the docket. *Cf. Harper* v. *Maverick Recording Co.*, 131 S. Ct. 590, 591 (2010) (Alito, J., dissenting from denial of certiorari) (noting that "I would grant review in this case because not many cases presenting this issue are likely to reach the Courts of Appeals"). Appellate percolation of class-certification issues is slow and difficult, for multiple reasons.

This case is exceptional because it involves an appeal from a class action finally tried to judgment. Class certification is often the critical stage in the life cycle of a class action: "a grant of class status can put considerable pressure on the defendant to settle, even when the plaintiff's probability of success on the merits is slight." *Blair* v. *Equifax Check Servs., Inc.*, 181 F.3d 832, 834 (7th Cir. 1999); *accord AT&T Mobility LLC* v. *Concepcion*, 131 S. Ct. 1740, 1752 (2011) (noting "the risk of 'in terrorem' settlements that class actions entail"). And when defendants succumb to that "pressure," as they often do,[6] it may

[6] Indeed, more than one recent study has found that the majority of class actions that are certified for litigation settle thereafter. *See, e.g.*, THOMAS E. WILLGING & SHANNON R. WHEATMAN, AN EMPIRICAL EXAMINATION OF ATTORNEYS' CHOICE OF FORUM IN CLASS ACTION LITIGATION 50 (Federal Judicial Center 2005) ("Certified cases concluded with a court-approved, class-wide settlement 89% of the time…."); Thomas E. Willging & Emery G. Lee III, *Class Certification and Class Settlement: Findings from Federal Question Cases, 2003-2007*, 80 U. CIN. L. REV. 315, 341-42 & tbl. 2 (2011) (reporting that

well "prevent judicial resolution of [disputed] issues," *Amgen Inc.* v. *Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1200 (2013), including "class certification—the ruling that [may] have forced them to settle" in the first place. *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995).

It was for these very reasons that Rule 23 was amended to allow discretionary interlocutory review of class-certification orders. *See* Fed. R. Civ. P. 23(f) advisory committee's note (1998). Rule 23(f) appeals, however, have certainly not filled appellate dockets. Most federal courts of appeals in practice are loath to grant review under that Rule. A recent study of all Rule 23(f) petitions filed between October 31, 2006 and December 31, 2013, confirms this. *See* John H. Beisner, Jessica D. Miller & Geoffrey M. Wyatt, *Study Reveals US Courts of Appeal Are Less Receptive to Reviewing Class Certification Rulings* (Apr. 29, 2014) (Beisner *et al.*).[7] It found that "[l]ess than one-quarter of petitions for interlocutory review filed in the last seven years have been granted," a marked decrease from what a 2008 study previously found. *Id.* at 1; *see also* Barry Sullivan & Amy Kobelski Trueblood, *Rule 23(f): A Note on Law and Discretion in the Courts of Appeals*, 246 F.R.D. 277, 283-84 (2008) (finding that courts of appeals granted only

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certification of litigation class resulted in settlement in 58% of all federal-question cases and 75% of all diversity cases).

[7] *Available at*: http://skadden.com/insights/study-reveals-us-courts-appeal-are-less-receptive-reviewing-class-certification-rulings.

36% of all Rule 23(f) petitions filed before October 30, 2006).[8]

The various courts of appeals also differ considerably, both in the number of Rule 23(f) petitions that they receive, and in the rates at which they accept them. Just three circuits—the Second, Seventh, and Ninth—accounted for nearly 60% of all Rule 23(f) petitions filed during the study period. *See* Beisner *et al.*, *supra*, App. A. Each of those circuits accepted less than 30% of the petitions they received. *See id.* In the circuits where the grant rate is higher, the raw numbers are lower. Circuits accepting petitions at a higher rate such as the Third, Fourth, and Fifth received far fewer petitions: combined, the petitions filed in those three circuits made up only about 12% of the total. *See id.* Even the Fourth Circuit's relative receptivity, for example, translated into only four petitions granted over seven years. Then there are the circuits (including the Eighth Circuit) that receive fewer *and* deny more: the First Circuit, for example, granted only two Rule 23(f) petitions over the entire study period, and the D.C. Circuit only *one*. *Id.* For its part, the Eighth Circuit saw fewer than sixty petitions over the entire seven-year study period; it granted only eight. *Id.*

These metrics demonstrate that the Court should not wait for the class-certification issues this case presents to percolate further before deciding to re-

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[8] The bulk of the decline is driven by a decrease in the number of *defendants'* petitions being accepted: "defendants' petitions were granted far less frequently than during the prior period," but "the grant rate for plaintiffs' petitions dipped only slightly in recent years." Beisner *et al.*, *supra*, at 1.

solve them. Quite simply, the Court may have to wait longer than usual before a different court of appeals decides to tackle these same issues again in a decision suitable for plenary review. And while the Court waits, class-action defendants will be left to deal with the consequences of erroneous class-certification decisions. The worse the circuit precedent, the heavier the settlement pressure on defendants in that circuit, and the fewer the opportunities to correct the circuit's misapplications of FLSA and Rule 23. This Court should not pass up the opportunity this case affords.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

JOHN PARKER SWEENEY
President of DRI—The Voice of the Defense Bar
BRADLEY ARANT BOULT CUMMINGS LLP
1615 L Street, N.W., Suite 1350
Washington, DC 20036

WILLIAM M. JAY
Counsel of Record
GOODWIN PROCTER LLP
901 New York Ave., N.W.
Washington, DC 20001
wjay@goodwinprocter.com
(202) 346-4000

JOSHUA M. DANIELS
GOODWIN PROCTER LLP
Exchange Place
Boston, MA 02109

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