No. 12-165

IN THE

Supreme Court of the United States

RBS CITIZENS N.A. D/B/A CHARTER ONE, ET AL.,

Petitioners,

v.

SYNTHIA ROSS, ET AL.,

Respondents.

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

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

In this case for violations of Illinois wage and hour law, two classes of Illinois employees allege that their employer denied them overtime pay to which they were entitled. The first class of employees alleges that the wage and hour violations arose because the employer had a policy of requiring or permitting employees to work off the clock. The second class alleges a companywide policy of misclassifying them as exempt from overtime pay requirements.

Was the Seventh Circuit correct to affirm the district court's finding of commonality as to each class?

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INTRODUCTION

Two classes of employees at Petitioners' Illinois bank branches claim that Petitioners have a policy of denying them overtime pay in violation of Illinois wage and hour law by requiring hourly employees to work off the clock and misclassifying "assistant branch managers" as exempt from overtime pay requirements. Applying this Court's decision in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), the Seventh Circuit held that each class meets the commonality requirement of Rule 23(a).

The rule of law applied by the Seventh Circuit is unremarkable and is drawn directly from *Dukes*: the existence of a common policy resulting in the same injury to a group of plaintiffs can establish commonality. Petitioners do not contest this basic rule. Instead, they ask this Court to review the fact-bound judgment of the district court, and the Seventh Circuit's application of law to fact.

Petitioners' attempts to invest the decision below with broader implications are unpersuasive. As Petitioners admit, the alleged split with the Ninth Circuit requires a comparison of apples to oranges: the Ninth Circuit cases cited by Petitioners addressed the predominance inquiry under Rule 23(b)(3), rather than the Rule 23(a)(2) commonality inquiry at issue in this case and in *Dukes*. Petitioners cannot raise the issue of predominance now because it was not within the scope of the appeal below. The Fifth Circuit case cited by Petitioners as evidence of a circuit split is easily distinguishable. Finally, Petitioners' argument that the Seventh Circuit has wiped out class action defendants' ability to assert

defenses is based on a strained reading of dicta in a footnote and is no basis for certiorari.

For these reasons, the Court should deny the Petition.

STATEMENT OF THE CASE

The Respondents (plaintiffs in the district court) are employees at Petitioners' Illinois bank branches (doing business as Charter One). Pet. App. 2a. The plaintiffs asserted (among other claims not at issue here) that they were denied pay to which they were entitled under the Illinois Minimum Wage Law (IMWL). *Id.* The plaintiffs sought certification of two classes. *Id.*

One class of employees comprises tellers and other hourly employees performing routine tasks at Illinois Charter One branches. *Id.* at 3a. This group of hourly employees, who are "non-exempt" under the IMWL and therefore eligible to receive overtime pay, claims that Petitioners have a policy of denying overtime pay using four common methods: (1) instructing employees not to record all overtime hours worked; (2) modifying timesheets to reduce or eliminate overtime hours worked; (3) giving illegal "comp time" (*i.e.,* time off in following weeks) instead of paying overtime wages; and (4) requiring employees to perform work during unpaid breaks. *Id.*

The second class comprises assistant branch managers (ABMs) at Illinois Charter One branches who claim Petitioners misclassified them as exempt in order to avoid paying overtime. *Id.*

At certification, plaintiffs presented to the district court ample evidence supporting the existence of common policies under which both proposed classes

were denied overtime pay. 7th Cir. App. 643-704. It is uncontroverted that Petitioners have a policy denying all the Illinois ABMs overtime pay. To demonstrate the uniformity among the ABM class, plaintiffs presented evidence of their job descriptions and, more importantly, Petitioners' performance expectation policies detailing the work activities expected from every ABM each day. Pet. App. 37a, 7th Cir. Supp. App. 1-5. Twenty-four assistant branch managers submitted declarations attesting that the overwhelming majority of their time is spent performing non-exempt job functions. Pet. App. 24a. This testimony was consistent with the job duties detailed in Petitioners' performance expectation policies, as well as the declarants' personal observations regarding other assistant branch managers working for Petitioners throughout Illinois. 7th Cir. App. 16-36, 538-78.

The hourly class of plaintiffs presented 96 declarations from employees who worked at 83% of Petitioners' Illinois branches. Pet. App. 34a. One hundred percent of these employees testified that they were required to work "off the clock," and that they personally observed other employees forced to do the same. 7th Cir. App. 46-128, 135, 410-522, 533. Seventy-eight percent of these declarants testified that their branch managers informed them that Petitioners' policy required "off-the-clock" work. *See id.* Also, a branch manager and assistant branch managers provided declarations confirming the existence of Petitioners' policy requiring "off the clock" work in Illinois. *Id.* at 16-36, 38-45. Finally, Petitioners' Illinois timekeeping data revealed that 93% of all Illinois hourly class members had their reported time reduced by management. *Id.* at 406-07.

This data comports with the hourly workers' declarations, 88% of which verified that management modified the time they entered to remove overtime. *Id*. at 135-37, 533-37.

Petitioners' discussion of the record is misleading or inaccurate in several respects. First, Petitioners suggest that the ABMs' testimony contradicts the ABM job description. *See* Pet. 7. However, Petitioners fail to point to any particular testimony that directly contradicts the description. Indeed, the ABM testimony comports with the more detailed performance expectation policies describing ABMs' daily job duties. Petitioners also suggest that each ABM's job duties are unique, such that an individualized inquiry is necessary to determine whether commonality exists. *See, e.g., id.* at 9. This contention is belied by Petitioners' company-wide, uniform job descriptions and detailed policies spelling out exactly what each ABM is to do at work each day. Petitioners' claim that the ABMs "attested to spending between 50% and 95% of their time on non-exempt tasks," *id.* at 7, is misleading. Only one ABM stated that 50% of time was spent on such tasks; the average time spent on teller and banker non-exempt tasks among the ABM declarants was 80%. 7th Cir. App. 15-36, 538-78. Petitioners' claim that their declarants described their tasks as "primarily exempt," Pet. 7, is unwarranted because of the lack of specificity in those declarations. Finally, Petitioners' claim that several plaintiffs "admitted that they were in fact paid for all overtime work," *id.* at 8, is simply incorrect. None of the declarants testified that he or she was paid for all overtime worked. 7th Cir. App. 643-704.

Based on the substantial body of evidence submitted, the district court found commonality (as well as the other requirements of Rule 23) satisfied. Pet. App. 26a. As the district court correctly stated, "A policy applicable to a class of employees is enough to establish a common question of fact or law." *Id.*

The Seventh Circuit permitted an appeal under Rule 23(f) limited to the question of "whether the district court complied with Rule 23(c)(1)(B)" in defining the class, class claims, issues, and defenses. Order Granting Appeal (7th Cir. Nov. 30, 2010); *see also* Pet. App. 5a n.2 (rejecting invitation in Petitioners' appellate briefs to expand the scope of review). After this Court decided *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), the Seventh Circuit ordered additional briefing regarding "whether the two certified classes satisfied the Rule 23(a)(2) commonality element" in light of *Dukes*. Order For Supplemental Briefing (7th Cir. Sept. 14, 2011).

The Seventh Circuit affirmed the district court regarding both class definition and commonality. Pet. App. 2a. Regarding commonality — the only aspect of the decision below that Petitioners ask this Court to review — the Seventh Circuit held that the district court's decision comported with *Dukes*. Unlike *Dukes*, in which the vesting of a significant amount of discretion in individual store managers defeated commonality as to the plaintiffs' claims of sex discrimination, here "both classes maintain a common claim that Charter One broadly enforced an unlawful policy denying employees earned-overtime compensation. This unofficial policy is the common answer that potentially drives the resolution of this litigation." *Id.* at 17a-18a. Additionally, the size of

the classes, nature of the claims, and proof offered here put the Charter One employees on significantly stronger footing than the *Dukes* plaintiffs: whereas *Dukes* involved "1.5 million nationwide claimants [who] were required to prove that thousands of store managers had the same discriminatory intent in preferring men over women," each of the classes in the instant case involves fewer than 1200 individuals, all based in one state, with over 100 declarations submitted in support of the class allegations. *Id.* at 17a. Based on "the common question of whether an unlawful overtime policy prevented employees from collecting lawfully earned overtime compensation," the Seventh Circuit held that commonality was satisfied. *Id.* at 18a-19a.

The Seventh Circuit denied rehearing en banc. *Id.* at 40a-41.

REASONS FOR DENYING THE WRIT

I. The Petition Second-Guesses The District Court's Application Of Settled Law To The Evidence At Certification.

The rule of law the district court and the Seventh Circuit applied is uncontroversial and consonant with *Dukes*.

In *Dukes*, this Court held that a class action on behalf of 1.5 million employees working at 3400 different Wal-Mart stores throughout the nation should not have been certified because the class members' claims did not satisfy the commonality requirement of Rule 23(a)(2). 131 S. Ct. at 2553-57. As the Court explained, commonality means that class members' "claims must depend upon a common contention" whose "truth or falsity will resolve an

issue that is central to the validity of each one of the claims in one stroke." *Id.* at 2551.

The only companywide policy the *Dukes* plaintiffs established was that of "*allowing discretion* by local supervisors over employment matters," which the Court explained was "just the opposite of a uniform employment practice that would provide the commonality needed for a class action; it is a policy *against having* uniform employment practices." *Id.* at 2554. Therefore, the suit could not generate common answers to common questions: "demonstrating the invalidity of one manager's use of discretion will do nothing to demonstrate the invalidity of another's." *Id.* In so holding, the Court contrasted the plaintiffs' weak case for commonality with a well-established method of satisfying commonality: showing that an employer "operated under a general policy" that led to plaintiffs' injuries. *Id.* at 2553 (citation and internal quotation marks omitted).

The Seventh Circuit's affirmance of class certification in this case is a straightforward application of these principles. As the district court found based on the evidence at certification, what linked the respective claims of the hourly and ABM classes together were substantiated allegations that Petitioners had two policies that resulted in violations of state wage and hour law. For the hourly class, the common allegation was Petitioners' policy of requiring them to work off the clock. For the ABMs, the common allegation was that Petitioners misclassified their position as exempt from overtime pay requirements under state wage and hour law. Each policy is a "uniform employment practice . . . provid[ing] the commonality needed for a class

certification." *Id.* at 2554. Each class also shares a common injury: lost overtime pay.

The existence of Petitioners' policies is a "common contention" whose "truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.* at 2251. And the *Dukes* Court specifically reaffirmed that commonality may be satisfied by a showing that an employer "operated under a general policy" resulting in plaintiffs' injuries. *Id.* at 2553 (citation and internal quotation marks omitted). Therefore, the Seventh Circuit's finding of commonality was consistent with *Dukes*.

The Petitioners' ultimate quarrel with the decision below is factual. Petitioners contend that the Seventh Circuit erred in affirming the district court's finding that the evidence supported the existence of such policies with respect to both classes. *See, e.g.*, Pet. 1 (characterizing plaintiffs as having "tried to prove" the existence of a policy); *id.* at 8 (complaining that the district court insufficiently focused on certain aspects of the record); *id.* at 10 (characterizing the Seventh Circuit as inappropriately dismissive of certain aspects of the record); *id.* at 17-18 (criticizing district court's analysis of the record); *id.* at 19-20 (criticizing Seventh Circuit's analysis of the record); *id.* at 20 (arguing that the Seventh Circuit failed to ensure that the common claims were "*sustain*[*ed*] . . . with common evidence"); *id.* at 20 (criticizing plaintiffs' supposed lack of statistical proof); *but see* 7th Cir. App. 15-134, 406-578 (voluminous record of class member declarations and statistical summary of testimony). Correcting alleged misapplications of law to fact is not the function of this Court's certiorari jurisdiction. S. Ct. R. 10.

Crucially, Petitioners do not take issue with the basic proposition of law the Seventh Circuit applied: a uniform policy resulting in plaintiffs' injuries can satisfy the requirement of commonality. *See* Pet. 25 (acknowledging that misclassification cases can satisfy commonality based on an employer's common policy regarding job duties).[1] Petitioners claim merely that, in applying this rule, the Seventh Circuit focused insufficiently on alleged dissimilarities among the members of these particular classes. *See id.* 17-20. But the Seventh Circuit *did* consider dissimilarities; it merely found the dissimilarities insufficient to negate the presence of a common question. *See* Pet. App. 17a (considering "slight variations in how Charter One enforced its overtime policy," along with content of ninety-six declarations from hourly class members and twenty-four declarations from ABMs, in affirming district court's commonality finding); *id.* at 18a (weighing "slight variations in the exact duties that each ABM performs," against class members' declarations about their primary duties, in affirming district court's commonality finding). Thus, Petitioners' true complaint is not that the Seventh Circuit applied an incorrect rule or considered the wrong factors, but that it came to a result that did not favor Petitioners.

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[1] Interestingly, Petitioners cite *Damassia v. Duane Reade, Inc.*, 250 F.R.D. 152 (S.D.N.Y. 2008), in support of this concession regarding commonality. Pet. 25. Citing *Damassia* with approval, another district court recently certified a class of ABMs advancing the same claim raised here against the same defendants. *See Cuevas v. Citizens Financial Group, Inc.*, No. 10-CV-5582, 2012 WL 1865564, at *1-3 (E.D.N.Y. May 22, 2012).

The gravamen of the Petition is nothing more than a plea for error correction, and so certiorari is inappropriate.

II. The Decision Below Creates No Circuit Split Regarding The Rule 23(a)(2) Commonality Requirement.

Petitioners' various claims that the Seventh Circuit's holding conflicts with the decisions of other circuits do not withstand scrutiny. Petitioners point out two Ninth Circuit cases involving the classification of employees for purposes of wage and hour laws. These cases upheld district courts' findings that common questions did not *predominate* over individual ones. *See Marlo v. United Parcel Service, Inc.*, 639 F.3d 942, 946-49 (9th Cir. 2011); *Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935, 946-48 (9th Cir. 2009). As Petitioners acknowledge, these cases did not concern the Rule 23(a)(2) *commonality* requirement at issue here; instead, they address the *predominance* inquiry under Rule 23(b)(3). Pet. 23. This Court explicitly distinguished commonality and predominance in *Dukes*, which — like the Seventh Circuit decision in this case — addressed only commonality. *See* 131 S. Ct. at 2556 (rejecting the contention that the Court was blending the predominance and commonality inquiries); *see also id.* at 2550 ("The crux of this case is commonality[.]").[2] Contrary to Petitioners' suggestion (which relies on the *dissent* in *Dukes*), these inquiries are not fungible: whereas commonality focuses on a specific question that has a

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[2] Predominance (not commonality) is also the issue before the Court this Term in *Comcast Corp. v. Behrend*, No. 11-864.

yes-or-no answer — whether the plaintiffs have demonstrated at least one common question, *see id.* at 2556 — predominance involves a multi-factor balancing test. *See Vinole*, 571 F.3d at 946 (requiring "consideration [of] all factors that militate in favor of, or against, class certification" in order to answer the "overarching" question of "whether trial by class representation would further the goals of efficiency and judicial economy").

Moreover, neither of the Ninth Circuit cases cited by Petitioners held that predominance could *never* be established in a case concerning the scope of plaintiffs' job duties, only that in the particular circumstances presented in those cases, the district courts had not abused their discretion by denying certification. *See Marlo*, 639 F.3d at 949; *Vinole*, 571 F.3d at 947-48. If the cases stand for anything broader, it is the proposition that *predominance* is to be determined by a multi-factor analysis, rather than reliance on one factor to the exclusion of others. *See Vinole*, 571 F.3d at 946. The decision below did not address, much less disagree with, that principle.

To the extent Petitioners are objecting to the district court's finding of predominance rather than commonality, the predominance issue is not properly before this Court. It was not addressed below, as it was neither certified for appellate review under Rule 23(f) nor included in the Seventh Circuit's supplemental briefing order following the decision in *Dukes*. *See* Order Granting Appeal (7th Cir. Nov. 30, 2010) (defining as "sole issue" for appellate review "whether the district court complied with Rule 23(c)(1)(B)"); Order For Supplemental Briefing (7th Cir. Sept. 14, 2011) (requiring additional briefing regarding "whether the two certified classes satisfied

the Rule 23(a)(2) commonality element" in light of *Dukes*).

Petitioners' claim of a circuit split based on *M.D. ex rel. Stukenberg v. Perry*, 675 F.3d 832 (5th Cir. 2012), is likewise unavailing. Although that case, unlike the Ninth Circuit cases cited, did involve the question of commonality, the court did not ultimately rule on whether the plaintiffs had demonstrated commonality. Rather, the Fifth Circuit held that the district court had not analyzed commonality with sufficient rigor in light of *Dukes*, and therefore remanded for reconsideration. *Id.* at 841-45, 849; *see also id.* at 842 ("Some of the Plaintiffs' legal claims may depend on common contentions of law capable of classwide resolution, and some may not. But as it stands, we cannot affirmatively identify the scope of the 'common questions of law' found by the district court . . . .").

Additionally, the substantive claims were quite different from those at issue here. In *M.D.*, a group of children in the state foster care system claimed that systemic failures resulted in various substantive and procedural due process violations. *See id.* at 835. The Fifth Circuit pointed to the individualized nature of the substantive due process standard — whether the state's conduct "shocks the conscience" — as a reason to question whether the district court's analysis of commonality was sufficient. *See id.* at 843. The application of the context-specific "shocks the conscience" standard to 12,000 children all over Texas is a far cry from the question of whether an employer's common policies required its hourly employers to work off the clock and misclassified other employees as exempt from overtime pay requirements. Because the legal question in *M.D.* is

distinguishable, and its commonality holding limited, it does not conflict with the decision below.

III. This Court Should Not Grant Certiorari To Address Ambiguous Dicta In A Footnote.

Based on one footnote, Petitioners make the sweeping claim that the opinion below, in violation of the Rules Enabling Act, universally strips class action defendants of their right to assert substantive defenses. Pet. 11-16 (discussing Pet. App. 16a n.7). The Seventh Circuit held nothing of the kind. Rather, in the footnote, the court merely rejected the argument that the existence of individualized defenses *necessarily* defeats commonality. The court interposed no obstacle to the presentation of defenses on an individualized basis in this case at the relief stage — an inquiry that the district court explicitly contemplated and the Seventh Circuit in no way disturbed. *See* Pet. App. 36a.

Moreover, the footnote must be read in light of the entire opinion, which found commonality based on the "common claim that Charter One broadly enforced an unlawful policy denying employees earned-overtime compensation." Pet. App. 17a-18a. The Seventh Circuit did not determine how individualized defenses would be presented, only that a common question made the case susceptible to class resolution. Petitioners' broad reading of the footnote as denying defendants the right to assert any defenses at all in any manner is implausible.

In any event, the footnote is dicta. The holding of the decision below is that commonality exists, not that individualized defenses may not be presented. The issues of how the trial would proceed and what

sorts of evidence would be presented were not before the Seventh Circuit. The court's reasons for finding commonality — the common questions of whether Petitioners' policies resulted in the unlawful denial of wages, and the class size and nature of claims, *see id.* at 17a-19a — do not depend on the manner in which defendants will be able to present defenses. In fact, a court asked to certify a class in a future case of this type could, consistent with the decision below, recognize the existence of commonality and yet still deny certification if the primacy of individualized defenses defeats predominance. The Ninth Circuit cases Petitioners cite demonstrate precisely this.

Review by this Court is not required to address an unlikely interpretation of dicta in a footnote. In the unlikely circumstance that a future court reads the footnote as Petitioners do and follows it, the Court can address the issue at that time, in a case that squarely presents it.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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