No. 11-864

IN THE

Supreme Court of the United States

COMCAST CORPORATION, *et al.*,
Petitioners,

v.

CAROLINE BEHREND, *et al.*
Respondents.

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

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONERS

RAE T. VANN
Counsel of Record
NORRIS, TYSSE, LAMPLEY & LAKIS, LLP
1501 M Street, N.W.
Suite 400
Washington, DC 20005
rvann@ntll.com
(202) 629-5600

Attorneys for *Amicus Curiae* Equal Employment Advisory Council

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The Equal Employment Advisory Council (EEAC) respectfully submits this brief as *amicus curiae*. The brief supports the Petitioners and urges reversal of the decision below.[1]

[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission of the brief.

INTEREST OF THE *AMICUS CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its membership includes approximately 300 major U.S. corporations that collectively provide employment to roughly 20 million workers. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

Comprising potential defendants to large-scale employment class action litigation, the nationwide constituency that EEAC represents has a direct and ongoing interest in the issue presented in this case regarding the type of analysis a district court must undertake in deciding whether class certification is appropriate under Rule 23 of the Federal Rules of Civil Procedure. EEAC is especially concerned with the panel majority's erroneous conclusion that district courts may not reconcile conflicting expert and other evidence at the class certification stage because doing so would amount to a merits-based review in contravention of this Court's reasoning in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974).

The panel majority's decision below effectively rejects the "rigorous analysis" standard for district court review of class certification motions established by this Court in *General Telephone Co. of the South-*

west v. Falcon, 457 U.S. 147 (1982), and reaffirmed last term in *Wal-Mart Stores, Inc. v. Dukes*, ___ U.S. ___, 131 S. Ct. 2541 (2011), by requiring only a minimal evidentiary showing by plaintiffs that their claims meet the threshold requirements of Rule 23. Such a rule, if permitted to stand, would allow class certification of virtually any well-pled complaint, thus undermining the purposes of the class action tool and profoundly disadvantaging the employers having to defend such actions.

Since 1976, EEAC has participated in numerous cases in this Court raising substantive and procedural issues related to litigation of employment discrimination claims, including the proper interpretation and application of Rule 23.[2] Because of its experience in these matters, EEAC is well-situated to brief the Court on the concerns of the business community and the significance of this case to employers in particular.

STATEMENT OF THE CASE

Respondents are six non-basic cable television customers of Comcast. Pet. App. 5a. In 2003, they filed an action in the U.S. District Court for the Eastern District of Pennsylvania accusing Comcast of engaging in anti-competitive business practices that resulted in customers having to pay more for cable service, in violation of the Sherman Act, 15 U.S.C. §§ 1-2. *Id.* Seeking to represent a class of present and former Comcast cable subscribers in the Phila-

[2] *See, e.g., Wal-Mart Stores, Inc. v. Dukes*, ___ U.S. ___, 131 S. Ct. 2541 (2011); *Gen. Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147 (1982); *Gen. Tel. Co. of the Northwest v. EEOC*, 446 U.S. 318 (1980); *East Tex. Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395 (1977).

delphia area, they moved for class certification pursuant to Rule 23 of the Federal Rules of Civil Procedure. *Id.* at 6a-8a.

On May 3, 2007, the district court certified a Rule 23(b)(3) class, rejecting Comcast's contention that because the plaintiffs' theory of damages could not be established through class-wide proof, class certification was improper. Pet. App. 89a-188a. A divided panel of the Third Circuit agreed, and affirmed the district court's class certification ruling. Pet. App. 2a-52a. Relying on pre-*Dukes* dicta from this Court's decision in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974), the panel majority rejected the notion that a trial court is required to resolve the merits of competing expert and other evidence going to the propriety of class certification, declaring that *Eisen* "precludes" such an inquiry. Pet. App. 33a. In doing so, it implicitly rejected the "rigorous analysis" standard established by this Court in *General Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147, 161 (1982) and reaffirmed last Term in *Wal-Mart Stores, Inc. v. Dukes*, ___U.S.___, 131 S. Ct. 2541, 2551 (2011) – a decision which it said "neither guides nor governs the dispute before us." Pet. App. 41a.

Judge Jordan dissented in part. Pet. App. 53a. He would have denied class certification on the ground that damages were not capable of being proven using evidence common to the class, noting among other things that the Respondents' argument rests entirely on an expert opinion that should have been deemed inadmissible pursuant to Rule 702 of the Federal Rules of Evidence and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Pet. App. 68a. Following denial by the Third Circuit of their petition

for rehearing *en banc*, Petitioners filed a petition for writ of certiorari, which this Court granted on June 25, 2012.

SUMMARY OF ARGUMENT

The decision below cannot be reconciled with this Court's repeated command that trial courts conduct a "rigorous analysis" of all evidence offered in support of (and against) class certification so as to ensure that every element required by Rule 23 of the Federal Rules of Civil Procedure has been established by a preponderance of the evidence. Because it evinces, at best, a fundamental misunderstanding of the proper role of district courts in evaluating Rule 23 motions for class certification and, at worst, a blatant disregard for this Court's jurisprudence, the ruling should be reversed and class certification denied.

Last Term, this Court in *Wal-Mart Stores, Inc. v. Dukes* made clear that to the extent a passing statement in its 1974 decision in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), has been misconstrued by a number of lower courts as prohibiting any merits-based inquiry at the class certification stage, "it is the purest *dictum* and is contradicted by other cases." *Wal-Mart Stores, Inc. v. Dukes*, ___U.S.___, 131 S. Ct. 2541, 2552 n.6 (2011). Indeed, shortly after *Eisen* was decided, the Court suggested that assessing the propriety of class treatment often, if not always, will require an analysis of the underlying merits, *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978), and declared outright in *General Telephone Co. of the Southwest v. Falcon* that trial courts must conduct a rigorous analysis of the evidence offered on the class certification question, regardless of whether the proof also goes to facts at issue on the merits. 457 U.S. 147 (1982).

The Court did not explain in *Falcon* what an appropriately rigorous analysis should entail. *Dukes*, however, speaks in terms of "'significant proof,'" implying that plaintiffs must establish every Rule 23 element by a preponderance of the evidence, and the district court must resolve any challenge to that evidence, prior to certifying a class. 131 S. Ct. at 2553. *Dukes* also strongly suggests that whenever a request for class certification rests upon controverted expert evidence, the district court must conduct a full *Daubert* assessment prior to certifying the class.

The Third Circuit below failed to hold the district court to those expectations, declining to accord any weight to *Falcon* and explicitly rejecting *Dukes* as inapposite. Instead, it relied exclusively on *Eisen* to conclude, among other things, that district courts may not reconcile conflicting expert evidence at the class certification stage because doing so would amount to a prohibited, merits-based review. All that is required, according to the court below, is that the trial court "evaluate expert models to determine whether the theory of proof is plausible." Pet. App. 44a n.13 (citation omitted). Because "plausible" proof of conduct affecting a class as a whole falls well short of the "significant" proof required by *Falcon* and *Dukes*, however, it plainly is inadequate as a matter of law to support Rule 23 class certification.

A district court's commitment to fully evaluate all evidence going to the propriety of class certification, including the reliability of contested expert testimony, is especially important in the employment context, in which expert testimony regularly is offered as proof that Rule 23's requirements have, or have not, been met. Because the act of certifying a class significantly increases the pressure on a defend-

ant, wary of the substantial, "bet the farm" costs associated with mounting an adequate defense, to settle even questionable class claims, courts must be able to understand and faithfully apply the rules in a manner that ensures consistency and fairness for both plaintiffs and defendants.

ARGUMENT

I. THE DECISION BELOW REFLECTS A PROFOUND DISREGARD FOR THE PROPER ROLE OF DISTRICT COURTS IN EVALUATING MOTIONS FOR CLASS CERTIFICATION UNDER RULE 23 OF THE FEDERAL RULES OF CIVIL PROCEDURE AND SHOULD BE REVERSED

The decision below, which embraces an erroneous, "no merits" standard for evaluating the propriety of class certification under Rule 23 of the Federal Rules of Civil Procedure, establishes such a low threshold that it is difficult to imagine a circumstance under which its application would not result in class certification. It departs from decisions of several other courts of appeals and is inconsistent with this Court's admonition that district courts perform a "rigorous analysis" as to whether plaintiffs' evidence supports Rule 23 class certification, and therefore should be reversed.

To maintain a class action in federal court, plaintiffs generally must satisfy all four requirements of Rule 23(a), and at least one of the requirements of Rule 23(b), of the Federal Rules of Civil Procedure. Fed. R. Civ. P. 23. Rule 23(a) permits class certification only when "(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the

claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a).

Rule 23(b)(2), in turn, allows certification only when the defendant "has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). Rule 23(b)(3) permits certification where "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).

A. This Court's Longstanding Jurisprudence, Up To And Including *Dukes*, Demands That District Courts Undertake A Robust Evaluation Of All Relevant Evidence Bearing On The Propriety Of Rule 23 Class Certification

Last Term, this Court in *Wal-Mart Stores, Inc. v. Dukes* clarified and reaffirmed the well-established principle that district courts must conduct a "rigorous analysis" in evaluating Rule 23 motions for class certification, even if doing so involves an examination of the underlying merits. ____U.S.____, 131 S. Ct. 2541, 2551 (2011). Nevertheless, some courts, including the panel majority below, continue to resist that sensible notion, choosing instead to perpetuate an unfounded yet persistent misunderstanding of a single statement made by this Court in *Eisen v.*

Carlisle & Jacquelin, 417 U.S. 156 (1974), which seemed to suggest that merits-based reviews are off-limits at the class certification stage.

The Court in *Eisen* said there is "nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits" when considering whether or not the requirements of Rule 23 have been met. *Id.* at 177. Shortly after *Eisen* was decided, however, the Court went on to observe that the "[e]valuation of many of the questions entering into determination of class action questions is intimately involved with the merits of the claims … [of which] typicality … adequacy … and the presence of common questions of law or fact are obvious examples." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 n.12 (1978) (citation and internal quotation omitted).

Four years later in *General Telephone Co. of the Southwest v. Falcon*, the Court declared more definitively that district courts, in determining whether plaintiffs seeking class certification have met the requirements of Rule 23, must engage in a "rigorous analysis" of the facts presented in support of the request. 457 U.S. 147, 161 (1982). In doing so, it sometimes "may be necessary for the court to probe behind the pleadings before coming to rest on the certification question." *Id.* at 160. *Falcon* thus clarified that the Court's earlier statement in *Eisen*, which on its face seemed to establish a bright-line rule barring merits-based inquiries at the class certification stage, should not be read to prohibit such an inquiry where it "may be necessary." *Id.*

The Court in *Dukes* further sought to dispel the misperception among some lower courts that *Eisen* prohibits merits-based inquiries in assessing Rule 23

motions for class certification. Observing that the "class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action," 131 S. Ct. at 2552 (citation omitted), the Court acknowledged that *Eisen's* no-merits language "is sometimes mistakenly cited to the contrary." *Id.* at 2552 n.6. It said, "To the extent the quoted statement goes beyond the permissibility of a merits inquiry for any other pretrial purpose, it is the purest *dictum* and is contradicted by other cases." *Id.*

1. *Dukes* requires significant proof that all relevant Rule 23 factors have been satisfied

The Court in *Dukes* ultimately ruled that a group of as many as 1.5 million women currently or formerly employed by Walmart[3] could not sue on a class-wide basis for unlawful sex discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, concluding among other things that that the plaintiffs – who alleged a pattern of systemic sex discrimination in pay and promotions across various positions and by different supervisors at thousands of Walmart stores – could not establish commonality, as required by Rule 23(a). It observed:

> Rule 23 does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance

[3] Wal-Mart Stores, Inc. (NYSE: WMT) is the legal name of the corporation. The name "Walmart," expressed as one word and without punctuation, is a trademark of the company and is used analogously to describe the company and its stores. *See* http://www.walmartstores.com/aboutus/ (last visited Aug. 22, 2012).

> with the Rule – that is, he must be prepared to provide that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc. We recognized in *Falcon* that "sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question," and that certification is proper only "if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied."

131 S. Ct. at 2551 (citations omitted).

The Court reiterated that "[c]onceptually, there is a wide gap" between "an individual's claim" (there, of disparate treatment discrimination) and "the existence of a class of persons who have suffered the same injury as that individual …." *Id.* at 2553. It read *Falcon* as suggesting "two ways in which that conceptual gap might be bridged:" (1) by showing that the defendant applied a selection procedure, like an employment test, to an entire class of individuals; or (2) by producing "'significant proof' that an employer operated under a general policy of discrimination …." *Id.*

Carried to its logical end, "significant proof" in this context would seem to require that plaintiffs establish every Rule 23 element by a preponderance of the evidence, and the district court resolve any challenge to that evidence, prior to certifying a class. A number of courts of appeals already adhere to that view. *See, e.g., Teamsters Local 445 Freight Div. Pension Fund v. Bombardier, Inc.*, 546 F.3d 196, 202 (2d Cir. 2008); *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 320 (3d Cir. 2008); *Alaska Elec. Pension Fund v. Flowserve Corp.*, 572 F.3d 221, 228-29 (5th Cir. 2009). As the Second Circuit explained:

> Although we did not use the words "preponderance of the evidence" in *In re IPO* to describe the standard of proof applicable to Rule 23 issues, we in effect required the application of a cognate standard by directing district courts "to assess all of the relevant evidence admitted at the class certification stage," to "resolve[] factual disputes relevant to each Rule 23 requirement," and "[to] find[] that whatever underlying facts are relevant to a particular Rule 23 requirement have been established," notwithstanding an issue's overlap with the merits. Today, we dispel any remaining confusion and hold that the preponderance of the evidence standard applies to evidence proffered to establish Rule 23's requirements.

Teamsters, 546 F.3d at 202 (citation omitted).

Sidestepping *Dukes*, and with nary a reference to *Falcon*, the panel majority below conceded that the plaintiffs "must establish that the alleged damages are capable of measurement on a class-wide basis using common proof" in order to establish Rule 23(b)(3) predominance, Pet. App. 34a, but nevertheless declared, "[D]etermining on the merits whether the [plaintiffs' proffered] methodology is a just and reasonable inference or speculative … ha[s] no place in the class certification inquiry." Pet. App. 47a-48a. It concluded, "[A] district court may inquire into the merits only insofar as it is 'necessary' to determine whether a class certification requirement is met. *Eisen* still precludes any further inquiry." Pet. App. 33a.

Expressly rejecting Comcast's argument that *Dukes* controls, the panel majority determined that the "factual and legal underpinnings of *Wal-Mart* –

which involved a massive discrimination class action and different sections of Rule 23 – are clearly distinct from those of this case. *Wal-Mart* therefore neither guides nor governs the dispute before us." Pet. App. 41a n.12. To the contrary, *Dukes* is directly relevant, if not dispositive, and should not have been disregarded by the court below.

While the underlying dispute in *Dukes* did involve Title VII sex discrimination, not antitrust, claims, the issue before the Court there, as here, was whether the plaintiffs presented adequate proof – including expert evidence – to satisfy Rule 23's class certification requirements. The Court did not decide *Dukes* on the merits, but rather on the procedural Rule 23 question, and the fact that the case was brought under a different federal law is, for all intents and purposes, irrelevant.[4]

Dukes makes clear that *Eisen* no longer should be misconstrued as precluding a merits-based review in determining whether a party seeking class certification has satisfied all of the requirements of Rule 23. The panel majority below thus improperly relied on that discredited interpretation of *Eisen* in condoning the district court's failure to conduct a sufficiently

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[4] Lower courts generally have not ignored this Court's Rule 23 jurisprudence simply because the underlying claims dealt with irrelevant substantive law, *see, e.g., Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 581, 595 (9th Cir. 2010) (citing *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974) (antitrust and securities law)), *rev'd*, __ U.S. __, 131 S. Ct. 2541 (2011); *Ellis v. Costco Wholesale Corp*., 657 F.3d 970, 980 (9th Cir. 2011) (citing *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978) (same)); *In re IPO Sec. Litig*., 471 F.3d 24 (2d Cir. 2006) (citing *Gen. Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147 (1982) (employment discrimination)).

robust Rule 23 analysis. In fact, had the lower court adhered to and properly applied this Court's teachings in *Falcon* and *Dukes*, it would have found the district court's Rule 23 analysis of the proffered evidence plainly lacking.

2. Whenever a request for class certification rests upon controverted expert evidence, *Dukes* strongly suggests that the district court must conduct a full *Daubert* analysis prior to certifying the class

Rule 702 of the Federal Rules of Evidence limits the admissibility of expert witness testimony to that which is based on "specialized knowledge [that] will help the trier of fact to understand the evidence or to determine a fact in issue" and which is both reliable and relevant to resolution of the underlying claims. Fed. R. Evid. 702(a). In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), this Court clarified the proper standard to be applied in evaluating the admissibility of expert scientific evidence under Rule 702. There, the Court articulated a framework that vests district courts with "gatekeeping responsibility" for determining "whether the reasoning or methodology underlying the testimony is scientifically valid and … properly can be applied to the facts in issue." 509 U.S. at 592-93. Its subsequent ruling in *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), "clarified that this gatekeeper function applies to all expert testimony, not just testimony based in science." Fed. R. Evid. 702 advisory committee's notes on 2000 amendments.

This Court strongly suggested in *Dukes* that whenever a request for class certification rests on expert evidence, the reliability of which is challenged, the

district court must conduct a full *Daubert* analysis prior to certifying the class. *See Dukes*, 131 S. Ct at 2553-54 ("The District Court concluded that *Daubert* did not apply to expert testimony at the certification stage of class-action proceedings. We doubt that is so …") (citation omitted). The panel majority below disagreed, suggesting that doing so "would turn class certification into a mini trial." Pet. App. 43a-44a n.13. It said:

> We understand the Court's observation [in *Dukes*] to require a district court to evaluate whether an expert is presenting a model ***which could evolve to become admissible evidence***, and not requiring a district court to determine if a model is perfect at the class certification stage. This is consistent with our jurisprudence which requires that at the class certification stage, we evaluate expert models to determine ***whether the theory of proof is plausible***."

Pet. App. 44a n.13 (emphasis added).

Dukes reaffirmed that plaintiffs seeking class certification must present "significant" proof that *all* Rule 23 factors have been met. 131 S. Ct. at 2562. Yet the panel majority, in concluding that the plaintiffs' expert evidence was admissible because it appeared to be "plausible" on its face, embraced a standard that falls far short of that framework. Pet. App. 44a n.13.

By definition, "significant" proof requires that the evidence on which the plaintiffs rely establishes *more* than a plausible case. Indeed, in contrast to "significant" – which is defined as "important" or "momentous", Webster's New World Dictionary, Third Coll. Ed. (1989) – the term "plausible" generally

means "that which at first glance appears to be true, reasonable, valid, etc. but which may or may not be so." *Id.* As Judge Jordan pointed out in his dissent, "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." Pet. App. 66a n.18.

Other courts of appeals have recognized that conducting a careful review of expert evidence offered in support of class certification is critical to ensuring that the plaintiff has satisfied, by a preponderance of the evidence, all of the relevant requirements of Rule 23. *See Bennett v. Nucor Corp.*, 656 F.3d 802 (8th Cir. 2011); *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970 (9th Cir. 2011); *Am. Honda Motor Co. v. Allen*, 600 F.3d 813 (7th Cir. 2010); *In re IPO Sec. Litig.*, 471 F.3d 24 (2d Cir. 2006); *West v. Prudential Sec., Inc.*, 282 F.3d 935 (7th Cir. 2002). In *In re IPO*, the Second Circuit clarified its views regarding the proper standard for granting class certification in the context of so-called "statistical dueling" between the parties on a Rule 23 factor (there, commonality), abandoning the approach it previously had adopted in *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283 (2d Cir. 1999). 471 F.3d at 39-40. It noted that *Caridad* condemned "'statistical dueling'" between experts based on *Eisen's* purported no-merits-inquiry approach, *id.* at 35, observing that "*Caridad*, by the imprecision of its language, left unclear whether the merits dispute between the experts was not to be resolved at the class certification stage or whether their dispute about a class certification requirement was not to be resolved at that stage." *Id.* (footnote omitted).

The Second Circuit in *In re IPO* repudiated its prior holding in *Caridad*, concluding that judges must resolve those very types of disputes before ruling on whether to certify a class:

> With *Eisen* properly understood to preclude consideration of the merits only when a merits issue is unrelated to a Rule 23 requirement, there is no reason to lessen a district court's obligation to make a determination that every Rule 23 requirement is met before certifying a class just because of some or even full overlap of that requirement with a merits issue.

Id. at 41.

As the Seventh Circuit pointed out more recently in *American Honda Motor Co. v. Allen*, "a plaintiff cannot obtain class certification just by hiring a competent expert. … 'A district judge may not duck hard questions by observing that each side has some support. … Tough questions must be faced and decided, if necessary by holding evidentiary hearings and choosing between competing perspectives." 600 F.3d 813, 815-16 (2010) (citation omitted); *see also West v. Prudential Sec., Inc.*, 282 F.3d 935, 938 (7th Cir. 2002) (Accepting at face value a plaintiff's evidence, regardless of the existence of other, conflicting proof, "amounts to a delegation of judicial power to the plaintiffs, who can obtain class certification just by hiring a competent expert").

This Court made clear in *Dukes* that plaintiffs seeking class certification must present "significant," not merely "plausible," proof that *all* Rule 23 factors have been met. 131 S. Ct. at 2562. To the extent that the decision below embraces a standard requiring no more than a "plausible" showing that Rule 23

has been satisfied, it is contrary to *Dukes* and therefore must be reversed.

B. A District Court's Commitment To Fully Evaluate All Evidence Pertinent To The Class Certification Question Is Especially Important In The Employment Context, Where Expert Testimony Routinely Is Used To Satisfy Rule 23 Factors

Demanding that district courts fully evaluate all evidence offered in support of class certification, including the reliability of contested expert testimony, is especially important in the employment context, where expert proof routinely is used to satisfy Rule 23. In Title VII pattern-or-practice discrimination claims, for instance, statistical evidence is frequently, if not universally, used to supplement anecdotal evidence of discrimination. As one commenter has observed:

> Systemic disparate treatment cases require plaintiffs to establish a "standard operating procedure" of discrimination. As a result, systemic disparate treatment cases are generally brought as class actions. … [T]he general policy of discrimination required to achieve class certification tends to overlap with the "standard operating procedure" required to prove systemic disparate treatment. Statistical evidence is often used or even required to meet these class certification requirements.

Paetzold & Willborn, *The Statistics of Discrimination* § 2:7 (West 2011 & Supp. 2012) (footnote omitted).

Indeed, "[i]n the problem of race discrimination, statistics often tell much, and courts listen." *Ala-*

bama v. United States, 304 F.2d 583, 586 (5th Cir.), *aff'd*, 371 U.S. 37 (1962) (footnote omitted). Because they also can be misleading, however, statistics must be used with great precision and care in seeking to establish or defend against allegations of class-wide disparate treatment discrimination. Even this Court, in approving the use of statistics to prove hiring discrimination, cautioned that "statistics are not irrefutable, they come in infinite variety and, like any other kind of evidence, they may be rebutted." *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 339-40 (1977).

The same is true for the use of statistics to establish common questions of Title VII disparate impact discrimination. In order to make out a prima facie case, Title VII disparate impact plaintiffs must be able to point to a specific employment policy or practice that while facially non-discriminatory, as applied, produces a statistically significant adverse impact on the protected group. Statistical adverse impact can fluctuate widely based on a variety of factors, including for instance the specific group to which the statistics are being applied; the level of aggregation (*i.e.*, five years vs. two years of hiring data); and/or the unit of aggregation (*i.e.*, managers in New York vs. managers across the Northeast).

In fact, minor differences in selection rates can appear to be statistically significant when large numbers of individuals are being compared. *See Dukes*, 131 S. Ct. at 2555. For example, suppose a group of female applicants seeks to represent a class of all women who applied for, but were denied, employment with X Company, a nationwide employer. One set of statistics might show that of 200 applicants, 99 out of 100 men and 98 out of 100

women were hired. The difference in selection rates between men (selected at a rate of 99%) and women (selected at a rate of 98%) is statistically insignificant.

As the total number of applicants increases, however, this one percentage point difference in selection rates becomes increasingly significant from a statistical perspective. For instance, if the total number of applicants were 3,200 (1,600 men and 1,600 women), and 99% of the men versus 98% of the women were hired, a statistical analysis using the most common test to measure differences in selection rates would yield a standard deviation of 2.3269, greater than the two standard deviation difference generally used by courts to establish statistical significance. If the total number of applicants were increased to 6,400 (3,200 men and 3,200 women), the selection rate standard deviation would grow to 3.2908.

Statistical evidence of that kind is ubiquitous in Title VII disparate impact litigation, and is routinely subject to challenge from the opposing party's own expert. To the extent that such proof regularly is offered through experts to establish questions of fact or law common to the class as a whole, district courts must be required to closely examine and resolve the competing evidence so as to ensure that class certification is, in fact, proper.

II. IMPROPER CERTIFICATION OF EMPLOYMENT DISCRIMINATION CLASS ACTIONS SIGNIFICANTLY DISADVANTAGES EMPLOYERS, WHO OFTEN ACQUIESCE TO THE PRESSURE TO SETTLE SUCH CLAIMS, REGARDLESS OF THEIR MERIT

A district court's decision on a Rule 23 motion for class certification "is often the defining moment in class actions (for it may sound the 'death knell' of the litigation on the part of plaintiffs, or create unwarranted pressure to settle nonmeritorious claims on the part of defendants)." *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d at 310 (citation omitted). As this Court observed in *AT&T Mobility LLC v. Concepcion*, "[W]hen damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable. Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims." ___U.S.___, 131 S. Ct. 1740, 1752 (2011). Because of the importance of Rule 23 class certification determinations, courts must be able to understand and faithfully apply the rules in a manner that ensures consistency and fairness for both plaintiffs and defendants.

It bears repeating that the potentially ruinous costs associated with defending a class action create enormous pressure on any corporate defendant to settle. The larger a class, the greater the potential liability and defense costs, which very well could lead to what some courts have called "judicial blackmail." *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) (footnote omitted). The improper certification below of this class represents an abandonment of

the traditional role of the courts to act as gatekeepers in eliminating frivolous claims at the certification stage, and ignores the reality that class certification almost invariably leads to a settlement, even in cases of questionable merit.

CONCLUSION

Accordingly, the *amicus curiae* Equal Employment Advisory Council respectfully requests that the decision of the court below be reversed and class certification denied.

Respectfully submitted,

RAE T. VANN
Counsel of Record
NORRIS, TYSSE, LAMPLEY
& LAKIS, LLP
1501 M Street, N.W.
Suite 400
Washington, DC 20005
rvann@ntll.com
(202) 629-5600

Attorneys for *Amicus Curiae*
Equal Employment Advisory
Council

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