12-165

No. 12-

IN THE

Supreme Court of the United States

RBS CITIZENS, N.A. d/b/a CHARTER ONE and CITIZENS FINANCIAL GROUP, INC.,

Petitioners,

v.

SYNTHIA G. ROSS, JAMES KAPSA, and SHARON WELLS, on behalf of themselves and all others similarly situated,

Respondents.

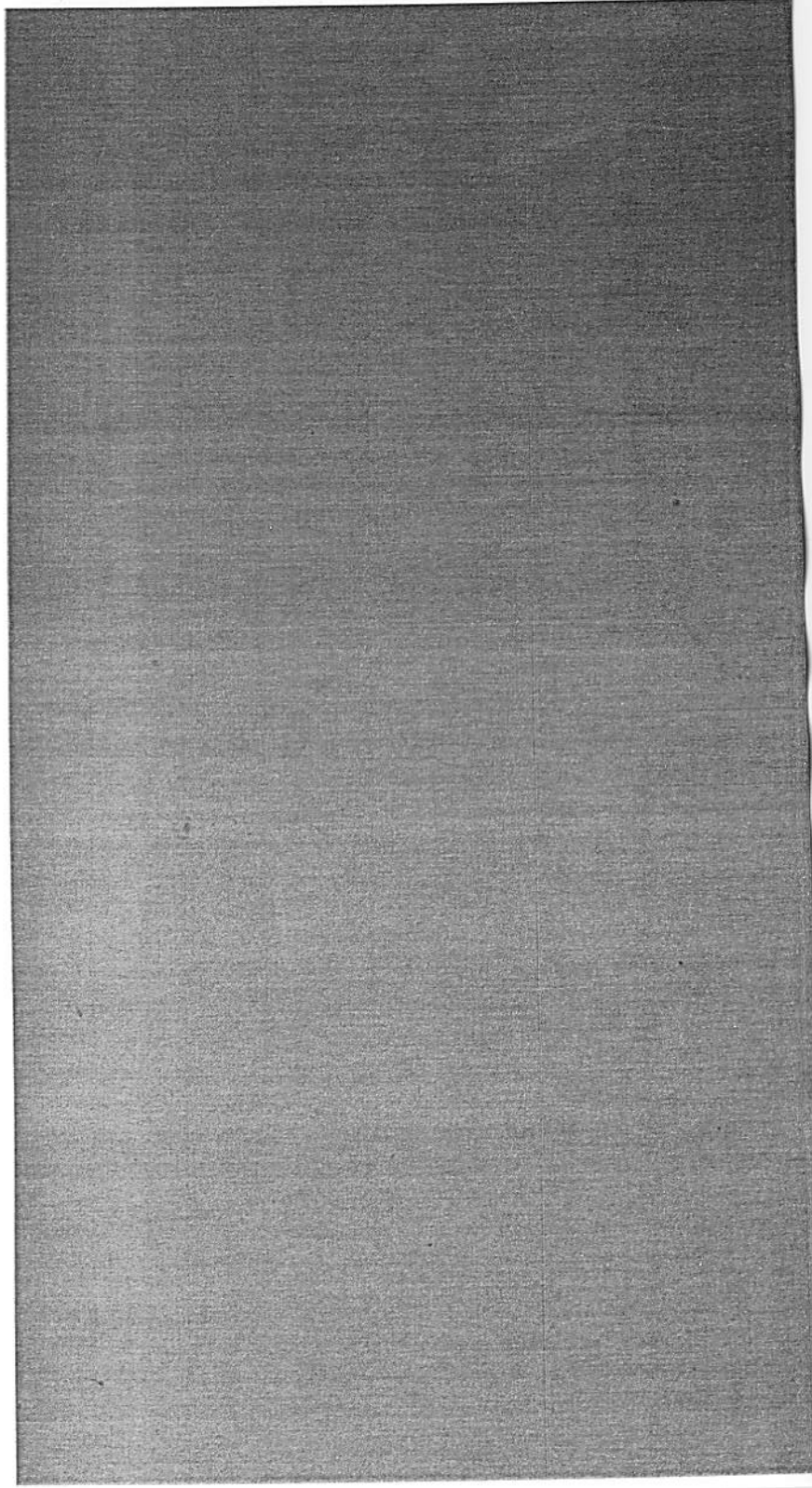
ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

MARK W. BATTEN
PROSKAUER ROSE LLP
One International Place
Boston, MA 02110
(617) 526-9600

MARK D. HARRIS
Counsel of Record
ELISE BLOOM
PROSKAUER ROSE LLP
Eleven Times Square
New York, NY 10036
(212) 969-3000
mharris@proskauer.com

AMANDA D. HAVERSTICK
PROSKAUER ROSE LLP
One Newark Center
Newark, NJ 07102
(973) 274-3000



QUESTIONS PRESENTED

1. Whether it is consistent with *Wal-Mart Stores, Inc. v. Dukes* to hold that a defendant to a Rule 23(b)(3) class action has no right to raise statutory affirmative defenses on an individual basis if the class seeks "only" monetary relief.

2. Whether a district court can conclude that the Rule 23(a)(2) commonality requirement is satisfied when a class claims the denial of overtime pay, without resolving whether dissimilarities in the class would preclude it from establishing liability on a class-wide basis.

PARTIES TO THE PROCEEDING

There are no additional parties to the proceedings other than those listed in the caption. Despite being part of the official case caption, Sharon Wells was voluntarily dismissed from the case on her own motion and is no longer a party to the proceeding.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioners state that no publicly held company owns 10% or more of the stock of RBS Citizens, N.A. or Citizens Financial Group, Inc. ("CFG"). CFG is the parent company of RBS Citizens, N.A. RBSG International Holdings Limited and RBS CBFM North America Corporation, neither of which is publicly held, are the parent companies of CFG.

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INTRODUCTION

In *Wal-Mart Stores, Inc. v. Dukes*, this Court reaffirmed the importance of the commonality requirement for class actions under Rule 23. As *Dukes* set forth, a party seeking class certification cannot rest on mere allegations that the action is suited for class treatment. The party must "affirmatively demonstrate" that there is "*in fact*" at least one common question of law or fact—meaning a contention of such a nature that it will resolve an issue "central to the validity of each one of the [class members'] claims in one stroke." The Court stressed, in particular, that a court evaluating class certification must consider whether dissimilarities in the class would defeat the party's ability to prove such a common question.

The Court also held that Rule 23, like every other rule of civil procedure, cannot be applied in a way that abridges a defendant's right to raise statutory affirmative defenses. Hence, a class cannot be certified—and commonality cannot be found—on the premise that the defendant will not be allowed to present its defenses to individual claims for relief on an individual basis.

In the decision below, the Seventh Circuit violated both of these holdings. The case involves two classes of current and former employees of Charter One Bank who brought claims for denial of overtime pay under a state wage-and-hour law. Although the company's official policy was to pay overtime to any eligible employee who worked more than 40 hours in a given week, the classes claimed the existence of an "unofficial" policy to deny overtime pay at the company, which they tried to prove with a sampling of declarations from individual class members

describing their personal job experiences. In affirming class certification, the Seventh Circuit failed to consider whether the lack of uniformity in class members' alleged experiences—or the affirmative evidence of dissimilarities in those experiences—disproved the existence of any unlawful overtime policy that applied class-wide.

The Seventh Circuit also rejected Charter One's challenge to commonality based on its right to individual determinations of its statutory defenses—for example, defenses that individual employees did not work more than 40 hours per week without overtime pay, that the company did not know that employees were working off-the-clock, or that the employees were exempt from the overtime requirements altogether. The Seventh Circuit held that Charter One did not have the right to raise those defenses on an individual employee basis. Astonishingly, the court justified that result by holding that *Dukes* only protected the substantive rights of defendants in Rule 23(b)(2) class actions for *equitable* backpay damages, not in 23(b)(3) class actions for *monetary* damages—a distinction that finds no support in the language or the logic of *Dukes*.

Each of the Seventh Circuit's rulings does violence to the holding of *Dukes*, as well as to fundamental principles of law embodied in Rule 23, the Rules Enabling Act, and the Due Process clause. Most disturbingly, the court's decision dramatically alters the standards for Rules 23(a)(2) and 23(b)(3) on both ends of the litigation process. A plaintiff class would be able to win certification without a full vetting of whether the evidence can actually generate common answers to all class members' claims. And at the same time, a defendant would be blocked from defeating certification by demonstrating its right to litigate

its defenses on an individualized basis. That latter ruling, in particular, not only violates long-standing precedents of this Court, but also creates a split with the majority of circuits. Other circuits hold that any interpretation of Rule 23(b)(3) that abridges substantive rights is prohibited. The fact that the Seventh Circuit rendered its decision in a wage-and-hour dispute is even more alarming because of the acute potential for abuse that class actions pose in this area of law.

This Court should grant the petition in order to clarify and restore *Dukes*' standards for both the Rule 23 commonality element and the scope of the Rules Enabling Act. If the "rigorous analysis" of class claims and defenses that *Dukes* requires is to mean anything at all, the decision below must be reversed.

OPINIONS BELOW

The decision of the Seventh Circuit is reported at 667 F.3d 900 (7th Cir. 2012). App. 1a-19a. The Seventh Circuit's order denying a petition for rehearing *en banc* is not reported. App. 40a-41a. The district court's decision certifying the two classes is not reported. App. 20a-39a.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on January 27, 2012. By order dated April 3, 2012, the Seventh Circuit denied rehearing *en banc*. On June 21, 2012, Justice Kagan extended the time to file a petition for a writ of certiorari to and including August 1, 2012. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND RULES INVOLVED

Pertinent portions of Federal Rule of Civil Procedure 23 and the Rules Enabling Act, 28 U.S.C. § 2072, are set forth at App. 42a-43a.

STATEMENT OF THE CASE

A. The Illinois Overtime Requirements and Exemptions

The Illinois Minimum Wage Law (IMWL), like its federal counterpart, the Fair Labor Standards Act (FLSA), provides that employees are entitled to overtime pay for hours worked in excess of forty per week. 820 I.L.C.S. § 105/4a(1). To qualify for overtime, an employee must show that he or she worked more than forty hours without compensation and that the employer had actual or constructive knowledge of the uncompensated work. *Kellar v. Summit Seating Inc.*, 664 F.3d 169, 173 (7th Cir. 2011) (FLSA); *DeMarco v. Nw. Mem'l Healthcare*, No. 10 C 397, 2011 WL 3510896, at *3 (N.D. Ill. Aug. 10, 2011) (IMWL elements same as FLSA elements).

The IMWL sets forth several categories of employees who are exempt from overtime, including any employee "employed in a bona fide executive [or] administrative" capacity. 820 I.L.C.S. § 105/4a(2)(E) (adopting FLSA executive and administrative exemptions). The executive exemption applies to an employee whose "primary duty" is managerial and who, among other criteria, customarily and regularly directs the work of two or more other employees, and either has authority to hire or fire or

provides input into those types of employment actions. *See* 29 C.F.R. § 541.100 (2003 & 2012). The administrative exemption applies to an employee whose "primary duty" is both performing office or non-manual work directly related to management policies or general business operations and exercising discretion and independent judgment. *See id.* § 541.200. Establishing either exemption is an affirmative defense of the employer. *Kellar*, 664 F.3d at 173.

Governing regulations and Department of Labor (DOL) guidelines provide that the applicability of an exemption depends on what job duties an employee actually performs and how an employee actually spends his or her work time. The employee's job title, job description, and the like are not determinative. Rather, it is the employee's "*actual* job duties" that matter. DOL Administrator's Interpretation No. 2010-10 (Mar. 24, 2010) (emphasis added; citation omitted); *see also* 29 C.F.R. § 541.103 (the determination of an employee's "primary duty" for purposes of the executive and administrative exemptions "must be based on all the facts in a particular case").

Consistent with these regulatory guidelines, courts conduct a fact-intensive analysis of an individual employee's actual day-to-day job experiences to determine if the employee falls within a statutory exemption. Even if two employees at the same employer have the same job position or title, their qualification for an exemption may differ, depending on the specifics of the duties for which they are in fact responsible and the way they actually spend their time on the job. *Smith v. Johnson & Johnson*, 593 F.3d 280, 283 n.1, 285 (3d Cir. 2010) (FLSA administrative exemption); *see also Ale v. Tenn.*

Valley Auth., 269 F.3d 680, 688-89 (6th Cir. 2001) (FLSA executive and administrative exemptions).

B. Proceedings Below

1. Charter One is a retail bank with more than 100 branches throughout Illinois.[1] Each branch is run by a branch manager ("BM"), working with one or more assistant branch managers ("ABMs"). According to the official ABM job description, an ABM is responsible for assisting the BM in all aspects of daily operations, including supervising branch employees such as bankers and tellers. For purposes of the applicable state and federal overtime laws, BMs and ABMs are classified as falling within the executive or administrative exemption, while the employees they supervise are classified as non-exempt. Charter One's official policy is to compensate all its employees properly for all time worked. Non-exempt branch employees are paid on an hourly basis at a time-and-a-half premium rate for all time worked beyond 40 hours per week.

Respondents are former Charter One branch employees who brought suit in 2009 after they were fired for misconduct. Their suit asserts a denial of overtime pay in violation of the IMWL.[2] Respondents sought

1. Petitioners are the corporate owners of Charter One Bank and operate the Illinois branches under the Charter One brand name.

2. Respondents also assert claims under the FLSA, but proceedings under that statute have been litigated on a separate track, and no ruling as to collective certification of those claims has reached the appellate level or is raised by this petition.

certification under Rule 23(b)(3) for two classes of current and former Charter One branch employees who were "subject to Charter One's unlawful compensation policies of failing to pay overtime compensation for all hours worked in excess of forty per work week": an "ABM" class, defined to include all ABMs; and an "Hourly" class, defined to include all employees in non-exempt branch positions. App. 4a.

In support of ABM class certification, Respondents argued that ABMs were misclassified as exempt because, despite their official job description, all ABMs allegedly spent the majority of their time on non-exempt tasks. They submitted form declarations from 24 of the estimated 300-member ABM class, in which the declarants attested to spending between 50% and 95% of their time on non-exempt tasks.[3] In opposition, Charter One submitted declarations from other ABMs who described in detail their daily job tasks, which were primarily exempt. Charter One also submitted declarations from ABMs' supervisors who attested that ABMs are expected to perform primarily exempt duties and to their knowledge did so.

3. Plaintiffs' declarations were all attorney-drafted, boilerplate forms. The ABM forms asked putative class members selected by class counsel to fill in the blank to indicate what percentage of time was spent on "non-exempt" tasks and to check whether the ABM "did" or "did not" perform a variety of listed exempt tasks. For example: "I do/did not have the authority to hire any employees," "I do/did not provide advice to Charter One'[s] upper management." Similarly, the Hourly class forms listed four different unlawful overtime practices, pre-defined by class counsel, and asked putative class members to check the box next to the ones they had experienced, if any.

In support of the Hourly class, Respondents contended that notwithstanding Charter One's lawful official overtime policy, upper management "dictated" an "unofficial policy" of denying overtime pay, using one of four different methods: (1) instructing employees not to record time worked beyond 40 hours per week; (2) erasing or modifying recorded overtime hours; (3) providing "comp time" instead of overtime pay; and (4) requiring that work be performed during unpaid breaks. *Id.* at 34a. Respondents submitted form declarations from 96 of the estimated more than 1,000 Hourly class members, each of whom alleged one or more of the methods for being denied overtime pay. Subsequent depositions of many of these declarants revealed a lack of uniformity among the alleged overtime practices. Several declarants conceded that certain BMs followed Charter One's official overtime policy at certain branches or during certain time periods.[4] Some also admitted that they were in fact paid for all overtime work, contrary to their declarations.

2. Despite this record of material inconsistencies among members of each class, and over Charter One's objection, the district court certified both classes pursuant to Rule 23(b)(3). The court reasoned that Rule 23 "should be liberally construed to support the policy favoring the maintenance of class actions." App. 25a. It described the Rule 23(a)(2) commonality requirement as a "low hurdle

4. Respondent (and class representative) Kapsa, for example, testified that the practices of two of his branch managers were polar opposites: one paid overtime regularly, whereas another permitted none at all. Kapsa Dep. 57, 74, 88, 92-93, 178, 183-84, Mar. 11, 2010. Respondent (and class representative) Ross allegedly experienced a different practice: she claimed she was paid for up to two overtime hours per week. Ross Dep. 101, 102, 170, Mar. 10, 2010.

easily surmounted." *Id.* at 26a. Accordingly, it analyzed commonality only in the context of determining whether common issues predominated over individual ones.

As to the ABM class, the court held that the misclassification question was common to members of that class. *Id.* The court believed that the "primary duty" test as to whether an employee should be classified as exempt did not require an individualized analysis of each employee's actual duties. *Id* at 37a. While it acknowledged that Charter One had countered Respondents' 24 declarations with evidence that many ABMs in fact performed primarily exempt duties, the court held (without explanation) that the "primary duty" test made those dissimilarities irrelevant. *Id.* at 38a.

As to the Hourly class, the court recognized that Charter One's official overtime policy was lawful on its face. It ruled, however, that the number of declarations Respondents had submitted alleging denials of overtime pay allowed an "inference" that there was a common question as to whether a company-wide policy to deny overtime existed. *Id.* at 35a. At the same time, the court acknowledged that there were relevant individual issues for determination, such as whether any individual BMs knew or should have known that any Hourly class member was working off-the-clock. *Id.* at 35a-36a. The court said that such questions were "more relevant" to the determination of individual damages rather than liability. *Id.* at 36a. To the extent they did bear on liability, according to the court, "solutions can be devised to make the inquiry fair, efficient, and manageable." *Id.* It did not explain what those "solutions" would be.

3. Charter One petitioned for review of the class certifications under Rule 23(f). The Seventh Circuit granted the petition only on the narrow question of whether the district court had sufficiently defined the class and the class claims, issues, or defenses under Rule 23(c)(1)(B). Following oral argument, this Court decided *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), holding that plaintiffs must *prove* that there is a common question in order to win certification, and that the right of a defendant to raise individual statutory defenses to liability cannot be abridged. The court requested briefing on whether *Dukes* "alter[ed]" the proper commonality analysis in this case. App. 5a n.2.

The Seventh Circuit held that *Dukes* was distinguishable, primarily because the plaintiffs there were required to prove individual discriminatory intent to sustain their Title VII claims, whereas the Hourly and ABM class plaintiffs here "maintain[ed] a common claim" that Charter One enforced an unlawful policy to deny earned overtime pay. App. 18a. The court looked to the declarations submitted by Respondents in support. It acknowledged that there were "slight variations" in the company practices alleged by Respondents' declarants. *Id.* But it deemed those variations "not relevant" in light of the common claims the classes were maintaining. *Id.* The court did not specifically analyze Charter One's contrary evidence, nor did it determine whether the dissimilarities in the classes would prevent Respondents from *proving* the existence of an unlawful class-wide policy.

In response to Charter One's argument that the ABM class lacked commonality because Charter One could demonstrate that many individual ABM class members performed primarily exempt duties, the court held that the

company "has no such statutory right" to raise individual exemption defenses, because the classes were seeking "only" monetary relief through a 23(b)(3) class. *Id.* at 16a n.7. The court reasoned that *Dukes*' holding on individual defenses applied only to an employer's right to avoid equitable damages under Title VII in a 23(b)(2) case, not individual monetary relief in the form of overtime pay in a 23(b)(3) case. *Id.*

The Seventh Circuit also expressly affirmed the district court's holding that the two classes' claims of unlawful policies at Charter One were "the *only* claims that require resolution at trial." *Id.* at 14a (emphasis in original). According to the Seventh Circuit, whatever defenses Charter One sought to raise were "merely issues of trial strategy or proof," as opposed to "overall . . . issues necessitating resolution," notwithstanding their statutory basis. *Id.* Elsewhere, the court went even further, declaring that an individualized assessment of each ABM's job duties "*is not relevant*" to the claim that an unlawful company-wide policy existed. *Id.* at 18a (emphasis added).

REASONS FOR GRANTING THE PETITION

I. THE SEVENTH CIRCUIT'S DENIAL OF *PETITIONERS' RIGHT TO RAISE THEIR STATUTORY DEFENSES VIOLATES THE RULES ENABLING ACT AND CREATES A CIRCUIT CONFLICT.*

The Seventh Circuit held that Charter One was not entitled to raise individual statutory defenses to the misclassification claims of individual ABM class members, and therefore rejected Charter One's challenge

to commonality. The court reasoned that although *Dukes* recognized the right of a defendant to raise individual defenses to class members' claims, that holding only applied in the context of a Rule 23(b)(2) class seeking equitable damages. App. 16a n.7. Where a class is certified under Rule 23(b)(3) and seeks "only" monetary damages, however, the Seventh Circuit held there was no such right. *Id.* The court reached this result even though *Dukes* itself drew no distinction between types of Rule 23(b) classes or forms of relief sought.

The court's decision not only distorts *Dukes*, but also violates the Rules Enabling Act and flies in the face of bedrock principles of due process that this Court has affirmed repeatedly. That decision is so contrary to long-standing precedent that it should be summarily reversed. At the least, the Court should grant plenary review to clarify that *Dukes* meant no such distinction and to resolve the circuit conflict on this issue that the decision below creates.

That a rule of procedure cannot trump the demands of substantive law has been settled law since Congress first delegated to this Court in the Rules Enabling Act the power to prescribe rules of practice and procedure, under the express proviso that no rule could "abridge, enlarge, nor modify the substantive rights of any litigant." *See Sibbach v. Wilson & Co.*, 312 U.S. 1, 17 (1941) (citing Rules Enabling Act, 48 Stat. 1064 (currently codified at 28 U.S.C. §§ 2072)). At no time since that delegation has this Court wavered in its strict enforcement of the limits imposed by the Act. To the contrary, this Court has repeatedly held that no rule of civil procedure, including Rule 23, can be construed or applied so as to alter a substantive

right of any party, including a defendant. *E.g.*, *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431 (2010); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997). Parallel due process principles similarly guarantee a defendant the "opportunity to present every available defense" before it can be held accountable for allegedly unlawful conduct. *Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007) (quoting *Lindsey v. Normet*, 405 U.S. 56, 66 (1972)).

Dukes adhered completely to these principles. The plaintiff class there sought certification under Rule 23(b)(2) for backpay relief. According to Title VII's remedial scheme, if the employer could show that it took adverse employment action against an employee for any reason other than discrimination, then it would not be liable for backpay to that employee. *Dukes* held that the employer had the right to "individualized determinations" of each putative class member's claim for individual backpay relief. *Dukes*, 131 S. Ct. at 2560. It rejected use of a "Trial by Formula," under which the employer's liability to a representative subset of class members would be extrapolated to the class as a whole, holding that such a procedure would violate the Rules Enabling Act. *Id.* at 2561. The Court concluded that "a class cannot be certified on the premise that [the defendant-employer] will not be entitled to litigate its statutory defenses to individual claims." *Id.* (citing 28 U.S.C. § 2072(b); *Ortiz*, 527 U.S. at 845).

Just like the Title VII liability defense to claims for individual monetary backpay relief at issue in *Dukes*, an employer has a statutory liability defense to claims

for *all* forms of relief under the IMWL. The IMWL expressly provides that employees "employed in a bona fide executive, administrative, or professional capacity" are not eligible for overtime pay. 820 I.L.C.S. § 105/4a(E). In an individual action, Charter One indisputably would have the right to raise such defenses as a shield against liability. *E.g., Urnikis-Negro v. Am. Family Prop. Servs.*, 616 F.3d 665, 670 (7th Cir. 2010), *cert. denied*, 131 S. Ct. 1484 (2011). The plain force of the Rules Enabling Act is that Charter One cannot lose its right to show that individual employees were properly classified as exempt simply because they seek to aggregate their claims into a class action.

The Seventh Circuit inexplicably read *Dukes* as a *limitation* on the established principle that a procedural rule cannot abridge substantive defense rights, postulating that *Dukes* applied only to Rule 23(b)(2) actions for equitable relief. But *Dukes* drew no such distinction. The statutory defenses at issue there happened to concern equitable backpay relief, but that fact was irrelevant to the logic of the Court's decision. All that mattered was that Wal-Mart had a right by statute to contest the individual *Dukes* plaintiffs' claims—just as Charter One has a right by statute to contest individual ABM plaintiffs' claims.[5]

5. Further, there is no intrinsic difference between Title VII "equitable" backpay relief and other forms of monetary relief, such as the overtime pay that ABMs seek here. As this Court has held, under Title VII, backpay is equitable "only in the narrow sense" that it may be awarded by a court along with other equitable relief. *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 218 n.4 (2002). Tellingly, at least one of the cases that the Court GVR'd in light of *Dukes* involved plaintiffs who had sought class treatment to recover statutory overtime pay, as here. *See Chinese Daily News, Inc. v. Wang*, 132 S. Ct. 74 (2011).

The notion that a defendant's right to raise statutory defenses would somehow be weaker in a 23(b)(3) class action than in a 23(b)(2) class action reverses *Dukes'* own logic. *Dukes* held that claims for individual relief—such as backpay in that case or overtime pay here—belong in Rule 23(b)(3), precisely because they require "'complex individualized determinations.'" *Id.* at 2560 (quoting *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 415 (5th Cir. 1998)). It was in order to avoid such determinations that the Court considered whether backpay could be justified as relief that was merely incidental to the uniform class-wide declaratory and injunctive relief available under Rule 23(b)(2). The Court rejected that proposal because the employer's right to raise statutory defenses on an individual basis could not be abridged. If the employer has such a right in a 23(b)(2) action, surely it would have it in a 23(b)(3) action that already contemplates the necessity of individual proceedings beyond class-based proceedings.

The Seventh Circuit's holding that a defendant in a 23(b)(3) class action for individual monetary relief loses the right to raise individual statutory defenses also conflicts with the decisions of every other circuit that has reached the issue. These circuits have repeatedly held that the Rules Enabling Act applies to 23(b)(3) classes and prevents the class action device from abridging substantive defenses. *See, e.g., Sacred Heart Health Sys., Inc. v. Humana Military Healthcare Servs., Inc.*, 601 F.3d 1159, 1176 (11th Cir. 2010) (ratification and waiver affirmative defenses to breach of contract claims); *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 232 (2d Cir. 2008) (individual defenses to fraud claims), *abrogated in part on other grounds by Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639 (2008); *In re Fibreboard Corp.*,

893 F.2d 706, 709, 711-12 (5th Cir. 1990) (defenses against injury and causation in products liability action); *see also Sepulveda v. Wal-Mart Stores Inc.*, 275 F. App'x 672 (9th Cir. 2008) (affirming denial of 23(b)(3) certification of misclassification claims because statutory exemption defenses must be determined individually), *motion for reh'g granted and adhered to in relevant part*, 464 F. App'x. 636, 637 (9th Cir. 2011); *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 192-93 (3d Cir. 2001) (affirming denial of 23(b)(3) certification in non-misclassification case); *Windham v. Am. Brands, Inc.*, 565 F.2d 59, 66 (4th Cir. 1977) (affirming denial of 23(b)(3) certification in non-misclassification case). These courts recognized no difference regarding a defendant's right to raise all defenses among types of Rule 23 actions or the kind of relief sought.

The Seventh Circuit's decision is incompatible with these cases and will cause confusion and uncertainty about the standards for class certification. If the Court does not summarily reverse, it should at least grant the petition in order to resolve the conflict within the circuits and to clarify the meaning of *Dukes*.

II. THE SEVENTH CIRCUIT FAILED TO DETERMINE WHETHER DISSIMILARITIES AMONG CLASS MEMBERS PREVENTED THEM FROM PROVING THE EXISTENCE OF AN UNLAWFUL COMPANY-WIDE POLICY TO DENY OVERTIME.

In addition to erring in its approach to Petitioners' challenges to commonality, the Seventh Circuit misapprehended the nature of plaintiffs' burden to affirmatively prove commonality. Its failure to assess

the significance of dissimilarities among class members departed from the mandatory course laid out in *Dukes*. And it also created conflicts with decisions by the Ninth Circuit, which has consistently rejected attempts to certify classes in misclassification cases that turn on the individual facts of each employee's actual duties, and by the Fifth Circuit, which requires consideration of dissimilarities before a court can hold that a class satisfies Rule 23(a)(2).

A. The Court Failed To Assess Whether Dissimilarities In Job Experiences "Impede The Generation Of Common Answers," Contrary To *Dukes*.

The Seventh Circuit held that plaintiffs satisfied the Rule 23(a)(2) commonality requirement for both classes because they alleged that Charter One maintained an unlawful "unofficial policy" to deny overtime. App. 17a. In the court's eyes, that was the "glue" holding together members of both the ABM and the Hourly classes. *Id.* at 19a. The district court, however, which had issued its class certification order before *Dukes* was decided, did not conduct a "rigorous analysis" of the record evidence to determine whether there were dissimilarities within the plaintiff classes that would prevent proof of a common question. The Seventh Circuit repeated that error. Had it adopted the correct approach, it would have determined that the plaintiffs fell far short of establishing a necessary common question under *Dukes*.

Dukes held that a party seeking class certification must "affirmatively demonstrate" its compliance with Rule 23—including, in particular, by showing that there is *"in fact"* a common contention of law or fact to satisfy

Rule 23(a)(2). 131 S. Ct. at 2551 (emphasis in original). The district court's duty is to "probe behind the pleadings" and determine, after a "rigorous analysis," whether there is a common contention capable of class-wide resolution, where the answer to such contention would resolve an issue central to each class member's substantive claim. *Id.* In assessing commonality, *Dukes* stressed the importance of "focus[ing] on the dissimilarities between the putative class members . . . in order to determine (as Rule 23(a)(2) requires) whether there *is* [e]ven a single [common] question." *Id.* at 2256 (emphasis in original; citation omitted). The reason is that "[d]issimilarities within the proposed class are what have the potential to impede the generation of common answers." *Id.* at 2551 (citation and quotation omitted). In other words, if the answer to the supposed common question would not resolve an issue relevant to all of the putative class members, then there is no commonality.

The Seventh Circuit distinguished *Dukes* on two grounds. It reasoned that whereas the Title VII claims at issue in *Dukes* required proof of "individual discriminatory intent," the IMWL claims of plaintiffs here did not. App. 17a. It also noted that the size of the *Dukes* class was far larger than either of the classes at issue here. *Id.*

Neither of those distinctions is significant. The question is not whether plaintiffs' proof depends on individual *intent*, but whether it depends on individual *issues*.[6] To establish liability, plaintiffs must show that

6. Indeed, the *Dukes* plaintiffs claimed both intentional discrimination and disparate impact discrimination—the latter of which requires no proof of intent. 131 S. Ct. at 2548; *see also id.* at 2551 ("[T]he mere claim by employees of the same company that they have suffered a Title VII injury, or even a disparate-impact

each class member was eligible for overtime, actually earned overtime wages that were not paid, and did so with the employer's knowledge. They must also overcome any exemptions based on the duties class members actually performed and the way they actually spent their work time.[7] Those issues are as irreducibly individual as the central question in *Dukes*. The size of the class is also a red herring. *Dukes* did not lay down a rule for million-member classes only; the principles it announced flow from the text of Rule 23, which applies to all class actions in federal court alike. Fed. R. Civ. P. 1.

The Seventh Circuit also failed to perform a proper analysis of the dissimilarities within each class, despite *Dukes*' teaching that dissimilarities are a litmus test of commonality. Here, those dissimilarities were striking. Charter One submitted undisputed evidence that many ABM class members performed primarily exempt functions. For the Hourly class, Charter One submitted evidence that the company expected that its official overtime policy would be followed at all branches and that branch managers had no knowledge that Hourly employees were working off-the-clock. The Hourly class

Title VII injury, gives no cause to believe that all their claims can productively be litigated at once.") (emphasis added).

7. It does not matter that some of these factors are technically affirmative defenses. "The 'defense' is in reality the 'mirror image' of plaintiffs' claim—plaintiffs claim they were legally entitled to overtime, and [the employer] counters that they were not." *Myers v. Hertz Corp.*, 624 F.3d 537, 551 (2d Cir. 2010) (claim for overtime wages under FLSA and New York law), *cert. denied*, 132 S. Ct. 368 (2011). Moreover, while the employer may bear the ultimate burden of proving the merits of any exemption argument, at the certification stage the plaintiffs have the obligation to show that they can satisfy Rule 23's requirements. *Id.*

members themselves admitted substantial differences in the overtime pay practices they experienced, depending on the branch and the branch manager—including many that were lawful. The court conceded that "there might be slight variations" in Charter One's overtime practices and in the exact duties that each ABM performs. App. 18a. It deemed those variations irrelevant, however, because both classes "maintain a common *claim*" that the company followed an unlawful policy. *Id.* (emphasis added).

The Seventh Circuit's reasoning is fatally flawed. The fact that the classes maintained a common claim does not solve the problem that the classes themselves were not homogeneous with respect to the way they were (or were not) affected by the alleged unlawful policy. The whole teaching of *Dukes* is that plaintiffs must *prove* commonality rather than simply allege that they were all treated similarly—especially where the evidence shows that some were *not* treated similarly. Put another way, the issue is not whether plaintiffs "maintain" a common claim, but whether they can *sustain* it with common evidence.

In *Dukes* itself, this Court concluded that despite the plaintiff class's allegation of a company-wide discriminatory policy, the class was unable to provide "convincing proof" that such a policy existed. 131 S. Ct. at 2556. Hence, certification failed. Key to that conclusion was the Court's rigorous analysis of the "anecdotal evidence" supplied by the plaintiffs, which it concluded was insufficient to show a "common mode" of exercising discretion at the company, even in combination with statistical evidence showing company-wide gender disparities. Respondents here did not even attempt any statistical evidence to bind their individual anecdotes. When the Seventh Circuit emphasized the importance of

plaintiffs' maintaining a common claim, it adhered to the approach that *Dukes* rejected. Its decision violates *Dukes* and therefore must be reversed.

B. The Court's Ruling Regarding The ABM Class Is Irreconcilable With Decisions Of The Ninth Circuit And The Fifth Circuit.

The Seventh Circuit's commonality ruling as to the ABM class also creates a conflict with the standards for certification in the Ninth and Fifth Circuits. The Ninth Circuit has consistently rejected Rule 23 certification in misclassification cases where the ultimate question is what class members actually do in their jobs on a daily basis, and where the only evidence of misclassification consists of individuals' dissimilar reports of their own job experiences. Likewise, the Fifth Circuit recently vacated certification where the district court failed to consider dissimilarities among the class members challenging Texas' treatment of children in state protective services. The panel's decision cannot be reconciled with these cases.

In *Vinole v. Countrywide Home Loans, Inc.*, the Ninth Circuit rejected certification of a class of home loan consultants who claimed they were misclassified as exempt under California wage-and-hour law, which exemptions are analogous to those in the IMWL and FLSA. 571 F.3d 935, 938 (9th Cir. 2009). Their employer categorized them as falling within the "outside salesperson" exemption. That exemption applies to any employee who works more than half his working time away from the employer's place of business, and entails a "primary duty" analysis like the executive and administrative exemptions at issue here. The consultants contended that they were primarily engaged in non-exempt activities inside the office, and

they submitted a number of declarations from individual employees in support of that contention. The employer submitted other declarations from employees with experiences that conflicted with those from the plaintiffs.

The Ninth Circuit upheld the decision of the district court that the plaintiffs could not satisfy the requirement of Rule 23(b)(3) to show that common issues predominated over individual issues. In light of the fact that the time individual consultants spent outside the office "varie[d] greatly," the court held that the determination of the plaintiffs' claims would require "a fact-intensive, individual analysis of each employee's exempt status." *Id.* at 938, 947. That problem could not be solved by any so-called "innovative procedural tools" such as "questionnaires, statistical or sampling evidence, representative testimony, separate judicial or administrative mini-proceedings, expert testimony, etc." *Id.* at 947. Given the irreducibly individual nature of the question at issue—how each employee spent his or her time on the job—none of those "tools" would help. Where there was no "standard policy governing how employees spend their time" that could serve as common evidence on the propriety of class-wide exemption, and there was evidence of variation in job duties, the exemption question was not a common one, and class certification was inappropriate. *Id.* at 946-47, 948.

Similarly, in *Marlo v. United Parcel Service, Inc.*, a misclassification case involving supervisors at UPS, the Ninth Circuit agreed with the district court that the plaintiffs had failed to provide "common proof" that class members' primary duty was performance of non-exempt work. 639 F.3d 942, 946 (9th Cir. 2011). As here, the executive and administrative exemptions

required individualized proof, and the totality of the evidence showed great variation in supervisors' actual duties. Neither an annual survey conducted by UPS, nor a telephone survey of some 160 supervisors, nor the declarations submitted by the parties could supply the needed common evidence. To the contrary, the "variations in job duties . . . appear to be a product of employees working at different facilities, under different managers, and with different customer bases." *Id.* at 949. Hence, the supervisors' qualifications for exemption was not a common question, and thus common issues could not predominate. *See also Delodder v. Aerotek Inc.*, No. 10-56755, 2012 WL 862819 (9th Cir. Mar. 15, 2012) (affirming denial of class certification where evidence showing diversity in plaintiff recruiters' actual work activities made class certification of their misclassification claims inappropriate).

That these cases were decided under Rule 23(b)(3)'s predominance requirement, rather than under Rule 23(a)(2)'s commonality requirement, does not lessen the conflict. *Vinole* and *Marlo* were decided before *Dukes* strengthened the commonality requirement, at a time when many courts evaluated the existence of common questions as part of the more demanding predominance requirement. In both cases, the reason that common issues did not predominate was that determining class members' actual job duties was held to present individual questions—in direct conflict with the decision below.

Indeed, the four-Justice partial dissent in *Dukes* argued that the majority's commonality standard "blend[ed]" courts' prior interpretation of Rule 23(a)(2) with the more demanding Rule 23(b)(3)—reasoning that the majority's examination of class members' differences

mimicked the traditional predominance test, and its focus on whether such differences could impede common adjudication duplicated the traditional superiority test. *See* 131 S. Ct. at 2565-66 (Ginsburg, J., concurring in part and dissenting in part). While disputing those characterizations, the *Dukes* majority agreed that examination of the differences among class members was an important factor in determining whether even one common question existed for purposes of Rule 23(a)(2). *See id.* at 2556. When deciding that misclassification plaintiffs could not satisfy Rule 23(b)(3), the Ninth Circuit's reliance on the same standards that *Dukes* ultimately held apply to Rule 23(a)(2) makes its decisions directly relevant to—and irreconcilable with—the decision below.

Likewise, the Fifth Circuit has held that under *Dukes*, dissimilarities within a class *must* be considered as part of the commonality analysis under Rule 23(a)(2). In *M.D. v. Perry*, the court considered whether a class consisting of 12,000 children in state protective services could sue as a 23(b)(2) class to challenge certain "systemic failures" in the administration of that agency. 675 F.3d 832, 835 (5th Cir. 2012). The court determined that some of the claims of the class required individualized inquiry—for example, whether the state's conduct in particular instances "shock[ed] the conscience." *Id.* at 843. The district court, however, failed to consider whether there were dissimilarities in the class that would prevent it from asserting a common question that would resolve an issue central to all claims. The Fifth Circuit vacated the class certification and remanded, directing the district court to consider any dissimilarities "with reference to the *elements and defenses* and requisite proof for each of the proposed class claims." *Id.* (emphasis added).

To be sure, there are misclassification cases that do satisfy commonality—in particular, where a detailed job description exists for a position that requires employees to perform primarily non-exempt duties, or there is a comprehensive task list that requires all employees in a given position to perform the same non-exempt job tasks every day. In such cases, the propriety of exemption can be decided "in one stroke" since the same evidence will determine the validity of the exemption defense for all class members at once. *See, e.g., Damassia v. Duane Reade, Inc.*, 250 F.R.D. 152, 159-60 (S.D.N.Y. 2008) (class certification appropriate if duties "are largely defined by comprehensive corporate procedures and policies" that the parties agree apply uniformly); *cf. Morgan v. Family Dollar Stores, Inc.*, 551 F.3d 1233, 1248-51 (11th Cir. 2008) (FLSA collective certification appropriate where class members' common job description set forth detailed list of stock clerk, janitorial, and other non-exempt daily tasks). Tellingly, those are cases where there are by definition no material dissimilarities within the class, and thus no obstacles to commonality. But here, any common class policies do not provide a comprehensive list of required daily job duties; Respondents primarily rely on anecdotal testimony from a subset of the class who say their actual job duties deviated from and were inconsistent with their exempt job description; and a rigorous analysis of all the evidence reveals wide variation in class members' actual duties. In those circumstances, class certification is inappropriate. *Damassia*, 250 F.R.D. at 159-60.

The Court should review the Seventh Circuit's rejection of *Dukes*' required commonality analysis and resolve the conflict it creates with the Ninth and Fifth Circuits.

III. THE DECISION BELOW WILL EXACERBATE THE HEAVY BURDEN PLACED ON EMPLOYERS BY THE RISING TIDE OF WAGE-AND-HOUR LITIGATION.

This Court has long recognized the unique dangers posed by class action litigation. The burden imposed by the broad discovery necessary before a class trial, coupled with the risk of a potentially bankrupting judgment, combine to create an *in terrorem* effect that often forces defendants into settlements far out of proportion to the merits of the case. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 741-43 (1975); *see also* Fed. R. Civ. P. 23(f), Committee Notes on Rules, 1998 Amendment (certification "may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability"). Accordingly, the judicial act of certification is often "the most significant decision rendered . . . in these class-action proceedings," because it unleashes the substantial financial pressures inherent in that mechanism. *Deposit Guar. Nat'l Bank v. Roper*, 455 U.S. 326, 339 (1980).

Nowhere is this more true than in the wage-and-hour setting. To take just one set of statistics, over the past decade or so, only 0.25% of all wage-and-hour class actions in California proceeded to trial, with the overwhelming majority being resolved beforehand, primarily through settlement with the classes and their counsel.[8] Nationwide, employers paid some $1.77 billion to settle the 139 most

8. Michael D. Singer, *Settling Wage and Hour Class Actions in Light of Recent Legal Developments*, CA Labor & Employment Bulletin, 311, 311 (Sept. 2010).

recently resolved wage-and-hour class cases, for an average of $12.8 million per case.[9] As one witness recently testified before Congress, "when you look at the threat of these . . . lawsuits and you understand the risks of going to trial, decisions are made on a business level to make payments that are dramatic compromises."[10]

There is no doubt that these financial realities have contributed to the explosion in the number of wage-and-hour actions filed nationwide during the past decade. Between 2002 and 2012, the number of FLSA claims brought annually (either independently or in combination with state wage law claims) increased by more than 250%.[11] Between 2010 and 2011 alone, the single-year increase was more than 15%.[12] The lion's share of these filings have been class actions or FLSA-based collective

9. *See* Dr. Denise Martin, *et al.*, *Recent Trends in Wage and Hour Settlements*, NERA 2 (Mar. 22, 2011).

10. *The Fair Labor Standards Act: Is It Meeting the Needs of the Twenty-First Century Workplace?*, Hearing Before the Subcomm. on Workforce Protections of the H. Comm. on Educ. & the Workforce, 112th Cong. 2, 29 (2011) (statement of Richard L. Alfred).

11. In the 12-month period ending March 31, 2002, there were 2,035 filings. Administrative Office of the U.S. Courts ("AO"), *Federal Judicial Caseload Statistics* ("*FJCS*") 46 (2002). In the 12-month period ending March 31, 2012, there were 7,064 filings. Kevin P. McGowan, *FLSA Lawsuits Hit Record High in 2012, Continuing Recent Trend of Sharp Growth*, 145 Daily Lab. Rep., Jul. 27, 2012.

12. In the 12-month period ending March 31, 2010, there were 6,081 filings. AO, *FJCS* 48 (2010). For 2011, there were 7,006 filings. AO, *FJCS* 48 (2011).

actions. Indeed, since 2002, wage-and-hour aggregate actions filed in federal courts have been more numerous than any other type of class or collective action, far outnumbering Title VII class actions such as *Dukes*.[13] In 2011, a staggering *90%* of all state and federal statutory claims filed as class or collective actions involved wage-and-hour allegations.[14]

While *Dukes* restored some measure of balance to the class action process, the decision below undoes several of the basic safeguards that it erected. By allowing classes to be certified where plaintiffs allege an "unofficial" policy that did not affect all class members in the same manner, the decision hollows out the *Dukes* commonality standard. And eliminating the ability of employers to raise defenses on an individual basis not only prevents them from demonstrating dissimilarities at the certification stage, but literally disables their defenses at the merits stage.

This Court's review is needed to ensure that the requirements of Rule 23 are not jettisoned by the Seventh Circuit's approach, which reduces the obligations on plaintiff classes even as it eliminates defendants' abilities to defend themselves. Nowhere is that need as urgent as in the wage-and-hour setting, where a tidal wave of litigation is overwhelming so many of the Nation's employers.

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13. *See* Nancy Montwieler, *Wage-Hour Class Actions Surpassed EEO In Federal Courts Last Year, Survey Shows*, 56 Daily Lab. Rep., at C-1, Mar. 22, 2002.

14. Laurent Badoux, *Trends in Wage and Hour Litigation Over Unpaid Work Time and the Precautions Employers Should Take*, ADP, 2011, at 1.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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Respectfully submitted,

MARK W. BATTEN
PROSKAUER ROSE LLP
One International Place
Boston, MA 02110
(617) 526-9600

MARK D. HARRIS
Counsel of Record
ELISE BLOOM
PROSKAUER ROSE LLP
Eleven Times Square
New York, NY 10036
(212) 969-3000
mharris@proskauer.com

AMANDA D. HAVERSTICK
PROSKAUER ROSE LLP
One Newark Center
Newark, NJ 07102
(973) 274-3000

Counsel for Petitioners