No. 12-165

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

BRIEF OF RETAIL LITIGATION CENTER, INC., CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NATIONAL ASSOCIATION OF CHAIN DRUG STORES, AND SOCIETY FOR HUMAN RESOURCE MANAGEMENT AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

In *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), this Court held that a class cannot be certified if a defendant would be precluded from litigating its defenses to individual claims, and that plaintiffs seeking class certification must prove that their claims depend on the resolution of common questions that are capable of generating common answers.

In the decision below, the Seventh Circuit concluded that these holdings were inapplicable because, unlike the classes certified under Rule 23(b)(3) in this case, the class in *Dukes* was certified under Rule 23(b)(2), included over 1.5 million class members, and involved discrimination claims under Title VII.

The questions presented are:

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.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

RULES

OTHER AUTHORITIES

BRIEF OF RETAIL LITIGATION CENTER, INC., CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NATIONAL ASSOCIATION OF CHAIN DRUG STORES, AND SOCIETY FOR HUMAN RESOURCE MANAGEMENT AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF *AMICI CURIAE*[1]

The Retail Litigation Center, Inc. ("RLC") is a public policy organization that identifies and engages in legal proceedings that affect the retail industry. The RLC's members include many of the country's largest and most innovative retailers. The member entities whose interests the RLC represents employ millions of people throughout the United States, provide goods and services to tens of millions more, and account for tens of billions of dollars in annual sales. The RLC seeks to provide courts with retail-industry perspectives on important legal issues, and to highlight the potential industry-wide consequences of significant pending cases. For example, the RLC filed amicus briefs in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), and in

[1] Pursuant to this Court's Rule 37.2(a), counsel of record for all parties received timely notice of the *amici curiae*'s intention to file this brief, and all parties consented in writing to its filing. Pursuant to this Court's Rule 37.6, *amici curiae* state that this brief was not authored in whole or in part by counsel for any party, and no such counsel or any party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amici curiae*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

two class action cases that the Court will hear this Term, *Comcast Corp. v. Behrend* (No. 11-864), and *Standard Fire Insurance Co. v. Knowles* (No. 11-1450).

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents an underlying membership of more than three million businesses and professional organizations of every size, in every industry sector, and from every geographic region of the country. A principal function of the Chamber is to represent the interests of its members by filing amicus briefs in cases involving issues of vital concern to the nation's business community, including cases such as this that concern class action litigation. The Chamber has also filed amicus briefs in *Dukes*, *Comcast*, and *Knowles*.

The National Association of Chain Drug Stores ("NACDS") is the nation's largest association of retail drug stores. Chain drug stores operate 41,000 pharmacies, and employ more than 3.8 million employees, including 132,000 full-time pharmacists. The total economic impact of all retail stores with pharmacies transcends their $1 trillion in annual sales. Every $1 spent in these stores creates a ripple effect of $1.81 in other industries, for a total economic impact of $1.81 trillion, equal to 12 percent of GDP. NACDS represents 125 chains that operate these pharmacies in neighborhoods across America, and NACDS members also include almost 900 pharmacy and consumer packaged goods suppliers and service providers.

The Society for Human Resource Management ("SHRM") is the world's largest association devoted

to human resource management. Representing more than 250,000 members in over 140 countries, SHRM serves the needs of HR professionals and advances the interests of the HR profession. Founded in 1948, SHRM has more than 575 affiliated chapters within the United States.

Amici curiae represent millions of businesses employing millions of people across the country. Because these businesses are frequently targeted by class action lawsuits, *amici curiae* have a substantial interest in the development of the law of class certification, particularly in the commercial and employment contexts, and in ensuring that this Court's guidance on issues of class certification is followed by lower courts. Therefore, a*mici curiae* submit this brief in support of Charter One's petition for a writ of certiorari, and its request that this Court summarily reverse the Seventh Circuit's decision or, at a minimum, grant plenary review.

STATEMENT

This Court has repeatedly explained that the right of plaintiffs to proceed as a class is "a procedural right only, ancillary to the litigation of substantive claims." *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 332 (1980). In other words, a "class action, no less than traditional joinder (of which it is a species), merely enables a . . . court to adjudicate claims of multiple parties at once, instead of in separate suits." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1443 (2010) (plurality opinion). "[L]ike traditional joinder, [a class action] leaves the parties' legal rights and duties intact and the rules of decision unchanged." *Id.* Therefore, no less than in individualized, one-on-one adjudication, due process

requires that every plaintiff in a class action prove each element of his claim and that the defendant receive a full and fair opportunity to mount a defense to each claim. *See Philip Morris USA Inc. v. Scott*, 131 S. Ct. 1, 3–4 (2010) (Scalia, J., Circuit Justice).

Just two Terms ago, this Court reiterated the impropriety of curtailing a defendant's substantive rights in order to accommodate class action plaintiffs, instructing the lower federal courts not to certify a class if doing so would deprive a defendant of the right to litigate its defenses to each individual claim. *See Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2561 (2011). As this Court admonished, a putative class must not be certified unless the named plaintiffs prove that their claims depend on the resolution of common questions that are capable of generating common answers. *Id.* at 2551.

Despite this Court's clear directive, some lower courts—including the Seventh Circuit in this case—continue to take extreme measures to accommodate classwide adjudication, failing to adequately enforce the requirements of Rule 23 and relieving plaintiffs of their burden to affirmatively prove the existence of true common questions warranting classwide treatment. These courts have done so by artificially limiting *Dukes* to its specific factual and procedural context rather than recognizing the broad applicability of this Court's decision to class actions generally—sometimes sanctioning the very shortcuts this Court rejected in *Dukes*. *See, e.g.*, Pet. App. 16a–17a & n.7; *Jermyn v. Best Buy Stores, L.P.*, 276 F.R.D. 167, 169–73 (S.D.N.Y. 2011); *Johnson v. Gen. Mills, Inc.*, 276 F.R.D. 519, 521–24 (C.D. Cal. 2011); *see also* Ellen Meriwether, *The "Hazards" of Dukes: Antitrust Class Action Plaintiffs Need Not Fear the*

Supreme Court's Decision, Antitrust, Fall 2011, at 18, 22 ("The cases finding *Dukes* inapposite in antitrust and other Rule 23(b)(3) contexts are mounting.").

The lower courts' refusal to follow *Dukes* is reminiscent of the aftermath of this Court's decision in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), when many plaintiffs argued, and some courts agreed, that the pleading standard announced in *Twombly* was applicable only to antitrust cases. This Court was forced to dispel that flawed notion by granting certiorari only two years later in *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), where it confirmed that *Twombly*'s interpretation of the Federal Rules of Civil Procedure did not depend on the nature of the underlying claim.

Following a similar pattern, this Court recently granted certiorari in *Behrend v. Comcast Corp.*, 655 F.3d 182 (3d Cir. 2011), *cert. granted*, 80 U.S.L.W. 3442 (U.S. June 25, 2012) (No. 11-864), as a follow-up to *Dukes*. There, the Third Circuit held that *Dukes* "neither guide[d] nor govern[ed] the dispute" because the "factual and legal underpinnings of [*Dukes*]—which involved a massive discrimination class action and different sections of Rule 23—are clearly distinct from those of this case." *Id.* at 203 n.12. Like the Seventh Circuit in this case, the Third Circuit thereby contravened this Court's clear holdings through an unnaturally crabbed reading of *Dukes*.

This case—in addition to *Comcast*—provides the perfect opportunity for this Court to clarify *Dukes* and resolve uncertainty among the lower courts before the problem worsens. The Court should grant certiorari, either to summarily reverse the Seventh

Circuit or to conduct a plenary review of this case. Either way, it is imperative for this Court to make clear that its interpretation of Rule 23 in *Dukes* is applicable to *all* class actions.

REASONS FOR GRANTING THE PETITION

I. THE SEVENTH CIRCUIT CIRCUMVENTED *DUKES* BY ARTIFICIALLY LIMITING THIS COURT'S DECISION TO ITS FACTUAL AND PROCEDURAL CONTEXT.

A. In *Dukes*, this Court unanimously rejected the Ninth Circuit's endorsement of "Trial by Formula"—a flawed attempt to accommodate class action litigation by ignoring individualized issues and depriving a defendant of its right to defend itself. 131 S. Ct. at 2561. The Court disallowed this "novel project . . . [b]ecause the Rules Enabling Act forbids interpreting Rule 23 to 'abridge, enlarge or modify any substantive right,'" and therefore a defendant's right to litigate its defenses to individual plaintiffs' claims cannot be eliminated merely to facilitate classwide adjudication. *Id.* (quoting 28 U.S.C. § 2072(b)). The clear message of *Dukes* is that courts cannot replace traditional methods of proof with shortcuts in order to make class certification more practicable, an application of the long-recognized principle that "'[d]ue process requires that there be an opportunity to present every available defense.'" *Lindsey v. Normet*, 405 U.S. 56, 66 (1972) (quoting *Am. Surety Co. v. Baldwin*, 287 U.S. 156, 168 (1932)); *see also Taylor v. Sturgell*, 128 S. Ct. 2161, 2176 (2008) (noting that "protections" of Rule 23 are "grounded in due process"). To the contrary, the necessity of such shortcuts is an unmistakable sign that class certification is impermissible. *See Broussard v. Meineke Disc.*

Muffler Shops, Inc., 155 F.3d 331, 343 (4th Cir. 1998) ("That [a] shortcut was necessary in order for this suit to proceed as a class action should have been a caution signal to the district court . . . .").

In this case, Plaintiffs alleged that Charter One failed to pay overtime compensation in violation of Illinois law, and sought certification under Rule 23(b)(3) of a class of Charter One employees who allegedly were misclassified as exempt from receiving overtime compensation.[2] *See* Pet. App. 2a–4a. Under Illinois law, Charter One had a right to defend against each class member's misclassification claim on an individualized basis by establishing that the class member was "employed in a bona fide executive, administrative or professional capacity," and thus had no entitlement to overtime compensation. 820 Ill. Comp. Stat. § 105/4a(E).

The Seventh Circuit, however, inexplicably rejected Charter One's argument that, with respect to the class of employees Charter One had classified as exempt, "it ha[d] a statutory right to present its affirmative exemption defenses on an individualized basis" as a "[m]isreading" of *Dukes*. Pet. App. 16a n.7. According to the Seventh Circuit, the *Dukes* holding applied only to "a Rule 23(b)(2) class that sought equitable relief," and was therefore inapplicable to this case where plaintiffs "are seeking only monetary relief through a Rule 23(b)(3) class." *Id.* The Seventh Circuit thereby established an irrational double standard in which—despite the

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[2] Plaintiffs also sought certification of a second class of employees that Charter One had classified as non-exempt but allegedly had not received overtime compensation for all hours worked in excess of forty per week. *See* Pet. App. 4a.

Due Process Clause and the Rules Enabling Act—Rule 23 *can* alter substantive law by depriving defendants of their right to litigate defenses to individual claims so long as class certification is sought under Rule 23(b)(3), rather than Rule 23(b)(2).

Under the Seventh Circuit's reasoning, the Ninth Circuit's flawed decision in *Hilao v. Estate of Marcos*, 103 F.3d 767 (9th Cir. 1996)—a decision that served as the model for the "Trial by Formula" approach this Court rejected in *Dukes*, *see* 131 S. Ct. at 2550—would remain valid law simply because it involved a Rule 23(b)(3) class action. *See Hilao*, 103 F.3d at 771; *see also Cimino v. Raymark Indus., Inc.*, 151 F.3d 297, 319 (5th Cir. 1998) (noting that *Hilao* was a Rule 23(b)(3) class action). Moreover, the Seventh Circuit's decision revives a split in authority that *Dukes* resolved, as it directly conflicts with the decisions of other courts that had held, prior to *Dukes*, that substantive law could not be altered to accommodate class certification. *See, e.g.*, *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 231–33 (2d Cir. 2008), *abrogated in part on other grounds by Bridge v. Phx. Bond & Indem. Co.*, 553 U.S. 639 (2008); *Broussard*, 155 F.3d at 343; *In re Fibreboard Corp.*, 893 F.2d 706, 711 (5th Cir. 1990) (rejecting class certification where plaintiffs proposed adjudicating "the claim of a unit of 2,990 persons" instead of the "individual claims of 2,990 persons" because it would "inevitably restate[] the dimensions of tort liability"); *City of San Jose v. Superior Court*, 525 P.2d 701, 711 (Cal. 1974) ("Class actions are provided only as a means to enforce substantive law. Altering the substantive law to accommodate procedure would be to confuse the means with the ends—to sacrifice the goal for the going.").

This Court should therefore grant review to clarify that *Dukes* definitively resolved these conflicts and to put an end to lower courts' attempts to resuscitate the impermissible shortcuts that *Dukes* rejected.

B. This Court in *Dukes* also clarified that Rule 23(a)(2)'s commonality requirement is not satisfied merely by raising superficial common questions, but instead requires plaintiffs to prove that their claims "depend upon a common contention" that "is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." 131 S. Ct. at 2551. "'What matters to class certification . . . is not the raising of common 'questions'—even in droves—but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation.'" *Id.* (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 132 (2009)).

Although the Seventh Circuit recited this language, it declined to apply this Court's interpretation of the commonality requirement, seizing instead on irrelevant differences—which it labeled "significant distinctions"—between the factual circumstances in *Dukes* and this case. Pet. App. 16a–17a. Specifically, the Seventh Circuit dismissed *Dukes* as inapplicable because the case before it involved only a few thousand class members rather than "1.5 million nationwide claimants," and because it involved wage and hour claims, not Title VII claims that require proof of "discriminatory intent." *Id.* at 17a.

Of course, the requirements of Rule 23 are the same regardless of the size of the proposed class or the nature of plaintiffs' claims. "Rule 23 provides a one-size-fits-all formula for deciding the class-action question." *Shady Grove*, 130 S. Ct. at 1437 (plurality opinion). Nothing about this Court's decision in *Dukes* suggests it is limited only to massive nationwide classes asserting claims under Title VII or other laws requiring proof of discriminatory intent. Rather, to warrant class certification, plaintiffs must satisfy the same commonality requirement in *all* cases. *See* Fed. R. Civ. P. 1 (providing that the Federal Rules of Civil Procedure apply "in all civil actions and proceedings in the United States district courts"); *Iqbal*, 129 S. Ct. at 1953.

Only by contravening this Court's mandate in *Dukes* and limiting that case to its factual context was the Seventh Circuit able to affirm class certification here. According to the Seventh Circuit, the commonality requirement was satisfied because "both classes maintain a common claim that Charter One broadly enforced an unlawful policy denying employees earned-overtime compensation." Pet. App. 17a–18a; *see also id.* at 18a–19a ("Ultimately, the glue holding together the Hourly and ABM classes is based on the common question of whether an unlawful overtime policy prevented employees from collecting lawfully earned overtime compensation."). But Plaintiffs did not even attempt to set forth "significant proof" of such a policy. *Dukes*, 131 S. Ct. at 2553. And their unsupported contention that such a policy exists is nothing more than a bare assertion that class members "have all suffered a violation of the same provision of law"—

precisely what this Court rejected as insufficient to support certification in *Dukes*. *Id*.

By sidestepping *Dukes*, the Seventh Circuit also avoided the need to grapple with the inherent difficulties in resolving plaintiffs' claims on a classwide basis. Its decision therefore conflicts with those of numerous courts that have recognized that adjudicating exemption misclassification claims typically requires factually intensive individualized inquiries into the actual work performed by each employee—inquiries that preclude class certification. *See*, *e.g.*, *Vinole v. Countrywide Home Loans*, 571 F.3d 935, 947 (9th Cir. 2009) (affirming denial of class certification and noting "the need to hold several hundred mini-trials with respect to each [class member's] actual work performance"). The Seventh Circuit simply deemed "an individualized assessment of each [class member's] job duties" to be "not relevant." Pet. App. 18a.

The Seventh Circuit's refusal to recognize that, under *Dukes*, plaintiffs in this case failed to satisfy the commonality requirement—not to mention the "far more demanding" predominance requirement that applies under Rule 23(b)(3), *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 624 (1997)—compels this Court's review.

II. THIS CASE, IN ADDITION TO *COMCAST*, PROVIDES THE PERFECT OPPORTUNITY FOR THIS COURT TO STOP LOWER COURTS FROM DISREGARDING *DUKES*.

A. In 2007, when this Court in *Twombly* clarified the pleading standards under Federal Rule of Civil Procedure 8(a), plaintiffs sought to evade this Court's ruling by arguing—with considerable success—that lower courts should read *Twombly* as

narrowly applying only to its particular factual and procedural context. Within a year of this Court's decision, various lower courts had ruled that plaintiffs were required to plead "enough facts to state a claim to relief that is plausible on its face," 550 U.S. at 570, only in connection with antitrust or conspiracy-based claims. *See, e.g.*, *Aktieselskabet AF 21. November 2001 v. Fame Jeans Inc.*, 525 F.3d 8, 17 (D.C. Cir. 2008) (holding that "*Twombly* was concerned with the plausibility of an inference of conspiracy, not with the plausibility of a claim"); *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1047 & n.5 (9th Cir. 2008) (suggesting *Twombly*'s interpretation of Rule 8(a) was limited to the antitrust context).

As a result, just two years after deciding *Twombly*, this Court granted certiorari in a similar case to reaffirm the broad applicability of its earlier decision. In *Iqbal*, this Court explained that the meaning of a Federal Rule of Civil Procedure cannot vary based on the nature of the underlying claim, thereby putting an end to the lower courts' ability to avoid *Twombly*'s holding:

> Respondent first says that our decision in *Twombly* should be limited to pleadings made in the context of an antitrust dispute. This argument is not supported by *Twombly* and is incompatible with the Federal Rules of Civil Procedure. Though *Twombly* determined the sufficiency of a complaint sounding in antitrust, the decision was based on our interpretation and application of Rule 8. That Rule in turn governs the

> pleading standard "in all civil actions and proceedings in the United States district courts." Fed. R. Civ. Proc. 1.

129 S. Ct. at 1953 (citations omitted); *see also, e.g.*, *Knowles v. Standard Fire Ins. Co.*, No. 11-8030, 2012 WL 3828891 (8th Cir. Jan. 4, 2012), *cert. granted*, 80 U.S.L.W. 3680 (U.S. Aug. 31, 2012) (No. 11-1450) (granting certiorari one year after holding, in *Smith v. Bayer*, 131 S. Ct. 2368, 2380 (2011), that "[n]either a proposed class action nor a rejected class action may bind nonparties").

B. By artificially cabining this Court's interpretation of Rule 23, the lower courts have created a comparable—and comparably intolerable—situation in the wake of *Dukes*. This Court's recent grant of certiorari in *Comcast Corp. v. Behrend* (No. 11-864), may very well be intended to ameliorate this growing problem by clarifying and reasserting the broad applicability of *Dukes*. But a decision from this Court reversing the Third Circuit in *Comcast* may not, by itself, prevent the lower courts from flouting *Dukes* in the way the Seventh Circuit did in this case. Although both courts improperly limited *Dukes* to its factual and procedural context, the Third Circuit did so to avoid this Court's holding in *Dukes* that district courts must resolve merits questions bearing on class certification before certifying the class. *See Comcast*, 655 F.3d at 199–207. The Seventh Circuit, going even further than the Third, refused to apply this Court's holdings on "Trial by Formula" and commonality, thereby ignoring significant dissimilarities within the putative classes. Thus, even after this Court decides *Comcast*, class action plaintiffs may still be able to argue (and lower courts may agree) that the Seventh

Circuit's refusal to apply these critical holdings remains permissible.

Therefore, this Court should grant certiorari in this case in addition to *Comcast*, to stop the full panoply of ways in which plaintiffs and lower courts may attempt to undermine and limit *Dukes*.

C. Further, because the Seventh Circuit's decision is such a clear violation of this Court's binding precedent, on an issue of such great national importance, summary reversal is appropriate. *See* Eugene Gressman et al., *Supreme Court Practice* § 5.12(a) (9th ed. 2007) (a summary reversal order "usually reflects the feeling of a majority of the Court that the lower court result is so clearly erroneous, particularly if there is a controlling Supreme Court precedent to the contrary, that full briefing and argument would be a waste of time"). Indeed, this Court has not hesitated to summarily reverse lower court decisions that purport to distinguish binding rulings of this Court on grounds that are legally irrelevant. *See, e.g.*, *Am. Tradition P'ship, Inc. v. Bullock*, 132 S. Ct. 2490 (2012) (per curiam); *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201 (2012) (per curiam); *Cavazos v. Smith*, 132 S. Ct. 2 (2011) (per curiam).

As explained above, the Seventh Circuit's decision cannot be squared with *Dukes*. And the proper interpretation of Rule 23's class certification requirements—particularly in the rapidly growing area of wage and hour class actions—are of significant importance to American businesses, which routinely are forced to settle improperly certified class actions regardless of the merits of the certified claims. *See*, *e.g.*, *Shady Grove*, 130 S. Ct. at 1465 n.3 (Ginsburg, J., dissenting) ("A court's

decision to certify a class accordingly places pressure on the defendant to settle even unmeritorious claims." (citing *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978))); *see also* Petition at 26–28 (noting recent increase in number of wage and hour class actions).

Unless reversed by this Court, the Seventh Circuit's contravention of *Dukes* will serve as a dangerous template for courts around the nation presiding over putative wage and hour class actions, particularly because the Illinois statute at issue in this case is substantially similar to the Federal Labor Standards Act ("FLSA") and corresponding statutes in numerous other States. *See Condo v. Sysco Corp.*, 1 F.3d 599, 601 n.3 (7th Cir. 1993) (explaining that the overtime provisions of the Illinois Minimum Wage Law and the FLSA are "coextensive"); *see also, e.g.*, *Knepper v. Rite Aid Corp.*, 675 F.3d 249, 252 nn.2–3 (3d Cir. 2012) (Maryland and Ohio wage and hour laws parallel the FLSA); *Torres v. Gristede's Operating Corp.*, 628 F. Supp. 2d 447, 455 n.4 (S.D.N.Y. 2008) ("New York's overtime provisions expressly incorporate the FLSA exemptions.").

Summarily reversing the Seventh Circuit's flawed decision—or, at a minimum, granting and reviewing that decision in addition to *Comcast*—will send a clear message to class action plaintiffs and the lower courts that this Court meant what it said in *Dukes*.

CONCLUSION

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

Respectfully submitted,

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