No. ______

# In the Supreme Court of the United States

MEDICAL TRANSPORTATION MANAGEMENT, INC.,
*Petitioner*,

v.

ISAAC HARRIS, ET AL.,
*Respondents*.

**On Petition for Writ of Certiorari to the United States Court of Appeals for the D.C. Circuit**

## PETITION FOR WRIT OF CERTIORARI


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## QUESTION PRESENTED

Federal Rule of Civil Procedure 23 provides that a district court may certify a class action "only if," among other requirements, "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). In the decision below, the District of Columbia Circuit deepened a circuit split that has emerged post-*Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348, 350-51 (2011), as to what constitutes the "significant proof" necessary to establish the *uniformity* of an alleged policy or practice under Rule 23(a)(2).

The question presented is:

Where class certification is based on allegations that a defendant's policy or practice has injured class members, what constitutes "significant proof" that such policy or practice applies uniformly to all members of the class as required to establish commonality under Federal Rule of Civil Procedure 23(a)(2)?

## PARTIES TO THE PROCEEDING

Petitioner Medical Transportation Management, Inc., was the sole defendant in the district court and appellant in the court of appeals.

Respondents Isaac Harris, Darnell Frye, and Leo Franklin were plaintiffs in the district court and appellees in the court of appeals.

## CORPORATE DISCLOSURE STATEMENT

Petitioner Medical Transportation Management, Inc., has no parent companies, and no publicly held company has a 10% or greater ownership interest in it.

## STATEMENT OF RELATED PROCEEDINGS

United States District Court (D.D.C.)

*Harris v. Med. Transp. Mgmt., Inc.*, No. 17-cv-01371 (APM) (August 6, 2021)

United States Court of Appeals (D.C. Cir.)

*In re Med. Transp. Mgmt., Inc.*, No. 21-8006 (Mar. 17, 2022)

*Harris v. Med. Transp. Mgmt., Inc.*, No. 22-7033 (July 18, 2023)

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## PETITION FOR A WRIT OF CERTIORARI

Medical Transportation Management, Inc., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

## OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1-37) is reported at 77 F.4th 746. The court of appeals' order permitting petitioner to pursue an interlocutory appeal pursuant to Federal Rule of Civil Procedure 23(f) (App., *infra*, 38-39) is not published in the Federal Reporter but is available at 2022 WL 829169. The district court's opinion and order (App., *infra*, 40-69) is not published in the Federal Supplement but is available at 2021 WL 3472381.

## JURISDICTION

The judgment of the court of appeals was entered on July 18, 2023. On October 12, 2023, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including December 15, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

Federal Rule of Civil Procedure 23 is reproduced in the appendix to this petition. App., *infra*, 107-17.

## INTRODUCTION

MTM contracts directly with the District of Columbia to provide non-emergency transportation services to individuals receiving Medicaid in need of transportation to medical appointments. MTM is contractually prohibited from providing transportation services itself, and instead engages approximately eighty transportation service providers ("TSPs") to provide these services. Each of the individual TSPs—and not MTM—establishes the substantive terms of each driver's employment, including rate of pay, method of payment, amount of payment, and workday structure.

Respondents are drivers employed by the various TSPs and subject to their various policies. They filed suit against MTM, rather than their own employers, on July 13, 2017, for violations of the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq*., and District of Columbia wage-and-hour laws. Respondents allege they were paid in violation of federal and District wage-and-hour laws, and that MTM is liable for damages as either a joint employer or a general contractor with the TSPs.

While finding that respondents did not satisfy the predominance requirement of Rule 23(b)(3), the district court nonetheless certified an issue class under Rule 23(c)(4) on the questions whether MTM (1) is a joint employer with, and (2) is a general contractor to the various TSPs under D.C. law.

After confirming that interlocutory review of the class certification decision was appropriate, the court of appeals found that the proposed class meets

Rule 23(a)(2)'s commonality requirement on the same "common questions" that the district court had certified under subsection (c)(4)—whether MTM is a joint employer and/or a general contractor. In so doing, the court of appeals applied an approach to commonality that is directly contrary to the purpose of Rule 23(a)(2) and this Court's instructions in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011), which require "significant proof" of a policy or practice that applied uniformly to the entire class and caused "the same injury" to all class members. *Id.* at 348-54.

The court of appeals' decision allows courts to select *any* common question as a basis for commonality, even where there is no common reason for each class member's alleged injury. Such a result subverts the entire purpose of Rule 23(a). This Court should accordingly grant this petition for a writ of certiorari and reverse the judgment of the court of appeals.

## STATEMENT OF THE CASE

### I. Factual Background

As part of the administration of its Medicaid program, the District of Columbia provides non-emergency medical transportation for eligible Medicaid recipients. App., *infra*, 6. To ensure quality of service and to reduce fraud, the District engaged MTM as its outside broker to coordinate the administration of its non-emergency transportation program. *Id.*

The District and MTM entered into a series of successive contracts governing MTM's work as the District's transportation broker. C.A. App. 89-263,

265-461. MTM's contract with the District requires that MTM contract with a network of private transportation providers to provide these private transportation services. *See, e.g.*, C.A. App. 92, 108, 269, 286.

Both federal regulations and MTM's contract forbid MTM itself from providing non-emergency medical transportation services in the District, and MTM is prohibited from operating or even owning any vehicle used for transport within the District's Medicaid program. *See* 42 C.F.R. §§ 440.170(a)(4)(i)(D) & (ii)(A); C.A. App. 106, 284. Consequently, MTM contracts with approximately eighty different transportation service providers ("TSPs"). App., *infra*, 72.

MTM's contracts with the District require that MTM verify that the TSPs who participate in the program are using only drivers who meet certain eligibility requirements. *See, e.g.*, C.A. App. 120-21, 299-300. MTM has no role in establishing these eligibility requirements and no discretion to waive them. *Id.* (each driver shall have, inter alia, criminal background checks, training in first aid, a current CPR certification, and good driving habits). The TSPs that employ the drivers, *and not MTM*, establish the substantive terms of each driver's employment, including the rate of pay, the way drivers are paid (with some paid salaries, some paid hourly plus overtime, and others paid hourly without overtime), the amount of pay, and the structure of their workdays. *See, e.g.*, C.A. App. 609, 1302; App., *infra*, 94-95.

When connected with eligible Medicaid participants, the TSPs exercise discretion regarding whether to accept each trip. C.A. App. 1291-92, 2754. Further, each TSP decides which of its eligible drivers will perform any accepted trip. C.A. App. 1301. Some TSPs choose to work only on MTM-brokered trips, but many simultaneously perform other unrelated transportation work. *See, e.g.*, C.A. App. 1302, 1484-85.

## II. Procedural Background

Respondents are three drivers who work for different TSPs, two of whom worked for more than one TSP during the relevant time period. C.A. App. 41, 43, 45. They allege that they were paid improperly under federal and District wage-and-hour rules. App., *infra*, 6. However, instead of suing the TSPs that employed them, respondents filed a class action against MTM as the sole defendant on July 13, 2017, alleging that MTM should be liable for the TSPs' failure to pay the drivers their legally mandated wages as required under the FLSA, 29 U.S.C. § 201 *et seq.*, the District of Columbia's Minimum Wage Act, D.C. Code § 32-1001 *et seq.*, the Living Wage Act, D.C. Code § 2-220.01 *et seq.*, the Wage Payment and Collection Law, D.C. Code § 32-1301 *et seq.*, and contracts between the District of Columbia and MTM. App., *infra*, 6; C.A. App. 32-33, 53-59. Respondents alleged that MTM should be liable for any damages as their joint employer or the TSPs' general contractor. App., *infra*, 6-7. MTM denied that it is either. C.A. App. 515-16.

Based on the allegation in respondents' complaint that there was a "systemic, company-wide failure to pay [respondents] and hundreds of similarly

situated drivers the minimum wages, living wages, and overtime wages to which they are or were entitled" (C.A. App. 33), respondents asserted that their D.C.-based claims should be certified for class-action treatment under Federal Rule of Civil Procedure 23(b)(3) (C.A. App. 50-53). Though respondents initially sought certification under Rule 23(b)(3), they also included a one-paragraph argument suggesting that the court could "alternative[ly]" certify "the liability issue under Rule 23(c)(4)." C.A. App. 1179-80. MTM opposed certification of any class. C.A. App. 1181-1244.

The district court denied respondents' motion to certify a liability-and-damages class under Rule 23(b)(3). App., *infra*, 8, 70-106. It found that individualized inquiries into "key aspects of establishing liability," such as "(1) the different rate MTM negotiated with each TSP; (2) the compensation structure for each class member . . . ; [and] (3) how much each class member was compensated," among others, would "overwhelm the litigation." App., *infra*, 93; *see also* App., *infra*, 8. The court found "wide variation among putative class members across numerous metrics that would be relevant to assessing MTM's liability," and noted that putative class members were employed by approximately eighty different TSPs, "each of whom negotiated an individualized rate structure with MTM." App., *infra*, 94.

It found "particularly striking" variations with respect to how putative class members were paid (with some paid salaries, some paid hourly plus overtime, and others paid hourly without overtime), how much

they were paid, whether they were paid for break periods, that many "were employed by several different TSPs at different points in time," that even individuals working for a single TSP were "paid at different rates at different times," and that the minimum wage has "changed several times" during the limitations period. App., *infra*, 94-95. The court concluded that these "differences will 'give rise to a plethora of individualized inquiries relating to the determination of the amount of compensable work [respondents] performed,'" causing individualized issues to predominate and precluding class-wide liability based on common evidence. App., *infra*, 96-97.

The court rejected respondents' "attempt to gloss over these differences" by pointing to what they called a "common MTM policy—paying [to the TSPs] a flat rate for trips that does not account for all working time"—holding that the record did not allow the "logical leap to conclude that MTM's flat-rate compensation policy is responsible for the underpayment for any specific driver," let alone each driver in the putative class. App., *infra*, 95, 101.

Although the court found that MTM had no common policy or practice that might violate the wage laws, it acknowledged respondents' request, made "almost in passing," for issue-class certification under Rule 23(c)(4), and invited respondents to renew that request with additional briefing. App., *infra*, 102, 105.

Respondents then moved to certify multiple issues for class-wide resolution under Rule 23(c)(4). C.A. App. 1907-30. The court ultimately certified one issue class encompassing two questions: "(1) whether MTM is a joint employer [with the TSPs] of the

putative class members; and (2) whether MTM is a general contractor [with respect to the TSPs] under D.C. law, and thereby strictly liable for any wage law violations committed by its subcontractors." App., *infra*, 9.

While recognizing that the "evidence regarding each driver's schedule, assignments, and pay may be individualized," the court opined that MTM had some "role in devising those terms of employment" that was "likely to be defined by policies and practices that are broadly applicable to all TSPs," though the court cited *no* policy or practice, nor any other evidence at all, for its suggestion that MTM had such a "role." C.A. App. 2387.

MTM moved for interlocutory review under Rule 23(f) in the court of appeals, which the court of appeals granted. App., *infra*, 38-39. On the merits, the principal issue before the court was whether a Rule 23(c)(4) "issues class" must, like any other class action, *also* satisfy the requirements of subsections (a) and (b) of Rule 23. App., *infra*, 11-14. After determining that interlocutory review of the class certification decision was appropriate under Rule 23(f), App., *infra*, 11, the court of appeals acknowledged that all classes certified under Rule 23 must satisfy subsections (a) and (b), App., *infra*, 15-18 ("We hold that the district court abused its discretion by certifying the issue class under Rule 23(c)(4) without first determining that Rule 23's requirements for class certification were met as to the issue class. Rule 23(c)(4) does not create a fourth category of class action beyond those specified in Rule 23(b).").

Nonetheless, despite subsection (a)(2)'s demand for "significant proof" of a policy or practice that applied uniformly to the entire class and caused "the same injury" to all class members, *Dukes*, 564 U.S. at 348-54, the court of appeals held that the *same threshold questions* that the district court had certified under subsection (c)(4)—whether MTM is a joint employer and/or a general contractor—also satisfied subsection (a)(2). The court reasoned this was so because those questions "cut across all putative class members and depend on common evidence." App., *infra*, 18-19.

Ultimately, though, the court of appeals remanded the case because it concluded that the district court misapplied subsection (c)(4) in certifying an "issue class" and needed to consider whether the requirements of Rule 23(b)(3) had been satisfied with respect to the issues class. App., *infra*, 20-22.

## REASONS FOR GRANTING THE PETITION

### I. The Decision Below Entrenches A Circuit Split By Finding Commonality Based On Insufficient Evidence.

Rule 23(a) provides four prerequisites that all proposed class actions must meet to be certified: (1) numerosity, (2) commonality, (3) typicality, and (4) adequate representation. Relevant here, commonality requires that "the plaintiff . . . demonstrate that the class members 'have suffered the same injury.'" *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349-50 (2011) (quoting *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 157 (1982)). It is not enough that the class members

"all suffered a violation of the same provision of law." *Id.* at 350.

Where, as here, class certification is tied to the contention that a defendant engaged in an unlawful "pattern or practice," this Court held in *Dukes* that there must be "some glue" uniting each class member's claims for relief—namely, "[s]ignificant proof that an employer operated under a general policy" resulting in harm to class members "in the same general fashion." *Id.* at 352-53 (quoting *Falcon*, 457 U.S. at 159 n.15).

By finding commonality satisfied despite *no* evidence, much less "significant proof," that MTM promulgated a general policy or practice that resulted in uniform wage-and-hour violations across the class, the court of appeals' decision, directly contrary to *Dukes*, deepens a growing circuit split as to a plaintiff's burden for demonstrating the existence of a uniform policy or practice for purposes of meeting the commonality requirement.

The D.C. and Ninth Circuits stand alone in their deeply flawed and diluted approach to commonality, which pays mere lip service to this Court's decision in *Dukes* while rebuking its requirement that the representative plaintiff adduce significant proof of a uniform policy or practice in order to establish commonality. By joining the Ninth Circuit's lenient approach to Rule 23(a)(2) commonality, the court of appeals' decision solidifies the circuit split with respect to a named plaintiff's burden to proffer "significant proof" that an alleged policy or practice applies uniformly to the entire putative class. This Court should grant certiorari to resolve that split, reaffirm that Rule 23 is not a mere

pleading standard, and provide clear guidance to the lower courts on what is required to establish commonality under Rule 23(a)(2).

Rule 23(a)(2) requires that a plaintiff show that "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). That "language is easy to misread, since any competently crafted class action complaint literally raises common questions." *Dukes*, 564 U.S. at 349 (cleaned up). But Rule 23(a)(2) commonality "requires the plaintiff to demonstrate that the class members 'have suffered the same injury'" *and* "[t]heir claims must depend upon a common contention . . . capable of classwide resolution." *Id*. at 349-50.

For inherently individualized questions—such as whether a particular employee was lawfully paid—to be appropriate for classwide resolution, the "'plaintiff must begin by identifying the specific employment practice that is challenged.'" *Id.* at 357. Then, a plaintiff must provide "'[s]ignificant proof that an employer operated under a general policy'" that was the reason for the particular employment decision or alleged injury. *Id.* at 353. Put another way, a plaintiff must establish with evidence—not mere allegations—an injury-causing general policy or practice that is uniformly applied across the putative class to establish commonality.

Most courts to consider this question after *Dukes* have faithfully applied this standard. *See, e.g.*, *Parent/Pro. Advoc. League v. City of Springfield*, 934 F.3d 13, 29 (1st Cir. 2019) (affirming denial of class certification where the plaintiffs failed to "identify[] a uniformly applied, official policy of the school district,

or an unofficial yet well-defined practice, that drives the alleged violation"); *R.A.G. ex rel. R.B. v. Buffalo City Sch. Dist. Bd. Of Educ.*, 569 F. App'x 41, 42 (2d Cir. 2014) (affirming certification because the "[p]laintiffs' entire case is predicated on a policy that is applied uniformly to all students that qualify for supplemental services under the IDEA"); *Allen v. Ollie's Bargain Outlet, Inc.*, 37 F.4th 890, 901-02 (3d Cir. 2022) (explaining that class treatment was improper due to lack of "significant proof that Ollie's corporate policies, procedures, or practices *in fact* cause discrimination by stores nationwide"); *Ross v. Gossett*, 33 F.4th 433, 437-38 (7th Cir. 2022) ("In contrast, the evidence that was lacking in *Wal-Mart*—that the alleged discriminatory actions were undertaken pursuant to a uniform policy—is not only present in this case, it is undisputed.").

A recent Sixth Circuit decision shows how the commonality analysis should work. Putative class representatives sued Ford Motor Company over an alleged design defect in their F-150 pickup trucks, model years 2013 through 2018. *In re Ford Motor Co.*, 86 F.4th 723, 726 (6th Cir. 2023). According to the plaintiffs, Ford installed defective step-bore brake master cylinders manufactured by another company—Hitachi—and, due to the alleged defect, the trucks' brake performance suffered. *Id.*

Like the district court here, the district court in *In re Ford Motor Co.* found that the plaintiffs' proposed classes failed Rule 23(b)(3)'s predominance requirement, but it still certified "issue classes" under Rule 23(c)(4), which were "(1) whether the trucks' brake systems were defective; (2) whether Ford

possessed pre-sale knowledge of the defect; and (3) whether concealed information about the defect would be material to a reasonable buyer." *Id.* at 727.

The Sixth Circuit reversed because neither the named plaintiffs nor the district court explained how these issues classes satisfied the commonality requirement. With respect to the first issue, Hitachi had made "many design and manufacturing changes" to the units over the years, and the Sixth Circuit held the district court failed to explain how these design alterations, made at different times and places, and over the course of many years, would not defeat commonality across the class. *Id.* at 727-28.

The Sixth Circuit held similar commonality problems were present in the other issue classes. *Id.* at 728. In particular, the court explained that Hitachi's changes to the brakes over time created commonality problems with respect to *both* Ford's knowledge and the materiality of any alleged defects across the timespan—2013 through 2018—of the would-be issue classes. *Id.*; *accord id.* at 727 ("[T]he underlying analysis does not make clear that the three certified issues can each be answered 'in one stroke.'" (quoting *Dukes*, 564 U.S. at 350)). In short, the district court "neglect[ed] to perform the rigorous analysis Rule 23(a) requires of *all* classes." *Id*. at 727 (emphasis added).

The court of appeals' decision below charts a different course that puts it in the minority camp with the Ninth Circuit, with both courts failing to follow *Dukes*' demand for "significant proof" of a common policy or practice that applies uniformly across a putative class. *Owino v. CoreCivic, Inc.*, 60 F.4th 437

(9th Cir. 2022), *cert. denied*, 143 S. Ct. 2612 (2023), decided last year, is illustrative of the Ninth Circuit's lax approach to commonality.

Underlying that decision was the federal government's contract with CoreCivic, Inc., to hold immigration detainees in 24 facilities across 11 states. *Id.* at 441. Regulations prohibited CoreCivic from requiring detainees to clean areas beyond "their immediate living areas." Performance-Based National Detention Standards 2011 § 5.8(II), (V)(C). But two former detainees filed a putative class action claiming that they and other detainees *across all 24 facilities* were forced to perform cleaning tasks beyond the personal housekeeping tasks allowed by those standards. 60 F.4th at 442-43.

A Ninth Circuit panel held that commonality was present even though (1) the plaintiffs' principal evidence of the nationwide, common policy and practice were the declarations of four detainees, all from the same facility, together with written corporate policies that were ambiguous as to the conduct that the plaintiffs complained of; and (2) there was no finding of uniform application of such a policy or practice across the 24 facilities. *Id.* at 444-46.

Judge VanDyke, joined by five others, dissented from the denial of rehearing en banc, arguing in particular that the panel decision contravened *Dukes*:

> The panel thus created a new rule of commonality that authorizes class certification so long as a movant can offer anecdotal evidence of misconduct limited to a small fraction of a class, coupled with

> written policies that at most are unclear about the complained-of conduct. That rule is inconsistent with Rule 23 and *Dukes*, and charts an attractive and sure-to-be-followed path for those seeking an easy class action certification.

*Id.* at 456-59 (VanDyke, J., dissenting from denial of rehearing en banc).

Similarly, in *Parsons v. Ryan*, the Ninth Circuit affirmed the certification of a class of inmates challenging isolation unit policies and practices of the Arizona Department of Corrections ("ADC") under the Eighth Amendment because all class members shared an "alleged exposure, as a result of specified statewide ADC policies and practices that govern the overall conditions of health care services and confinement, to a substantial risk of serious future harm to which the defendants are allegedly deliberately indifferent." 754 F.3d 657, 678 (9th Cir. 2014). This was so notwithstanding that any Eighth Amendment "injury" would "result in different future harm for different inmates—ranging from no harm at all to death." *Id.*; *see also Jimenez v. Allstate Ins. Co.*, 765 F.3d 1161, 1162-66 (9th Cir. 2014) (finding commonality satisfied based on an "unofficial policy of discouraging reporting of such overtime" while deferring consideration of whether this informal policy actually existed until trial).

This time Judge Ikuta, joined by five others, dissented from the denial of rehearing en banc, again pointing out that that panel's decision contravened *Dukes*. *Parsons v. Ryan*, 784 F.3d 571 (9th Cir. 2015) (order) (Ikuta, J., dissenting from denial of rehearing

en banc). This was true not only because the class included members with no health problems at all, *id.* at 577, but also because the evidence

> show[ed] only that a range of inmates with different medical needs may be able to demonstrate deliberate indifference to a substantial risk of serious harm based on a range of different policies.

*Id.* at 579. And this meant that "even those prisoners who are not healthy do not have the sufficiently similar serious medical needs necessary to raise a common Eighth Amendment issue under *Dukes*." *Id.*

The court of appeals' decision below effectively joins the Ninth Circuit without saying so, because the court of appeals did not require that respondents demonstrate that a common wage-and-hour policy or practice applied uniformly to all class members. Indeed, far from the required "rigorous analysis," *Dukes*, 564 U.S. at 350-51, the court of appeals' perfunctory consideration of commonality did not address this point at all. App., *infra*, 18-19. This decision thus further solidifies a circuit split and will create confusion among lower courts as to a plaintiff's burden when attempting to establish commonality.

This Court should grant certiorari to clarify the requirements of Rule 23(a)(2) and of *Dukes* and resolve the conflict as to whether, and under what standard, named plaintiffs must prove that an alleged policy or practice applies uniformly across the entirety of a putative class.

## II. The Decision Below Is Wrong Because It Ignores This Court's Clear Directive That Significant Proof Of A Uniform Policy Or Practice Is Required To Establish Commonality.

This Court should grant certiorari to reaffirm its directives in *Dukes* and prevent lower courts from circumventing its requirement of significant proof of a common policy or practice that applies uniformly across the putative class. *Dukes*, 564 U.S. at 353. The court of appeals' finding on commonality based on threshold questions—*i.e.*, whether MTM is a general contractor or joint employer—ignores the unequivocal fact that is dispositive of the commonality question: the class members' claims for relief are based on different wage-and-hour policies from a variety of TSPs requiring individualized inquiries.

The court also completely ignored *Dukes*, in which this Court made clear that cherry-picking some common facts or legal issues among putative class members does not satisfy Rule 23. *Dukes*, 564 U.S. at 349. The Court explained that the following questions, although common threshold questions required to establish liability, are insufficient to establish Rule 23 commonality: "Do all of us plaintiffs indeed work for Wal-Mart? Do our managers have discretion over pay? Is that an unlawful employment practice? What remedies should we get? Reciting these questions is not sufficient to obtain class certification." *Id.* (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 131-32 (2009)).

The parallels between the facts of this case and those of *Dukes* emphasize the court of appeals' error.

In *Dukes*, female Wal-Mart employees sued under Title VII, alleging that Wal-Mart discriminated against them on the basis of sex with respect to pay and promotions. 564 U.S. at 343. Though the class members worked at different store locations and under different local managers who had "broad discretion" to make pay and promotion decisions, the plaintiffs sought class certification based on an alleged uniform corporate culture that resulted in discrimination against *all* female employees nationwide. *Id.* at 343, 344-45.

Just as the *Dukes* plaintiffs attempted to certify their class based on a uniform corporate culture of discrimination, respondents here allege a "systemic, company-wide failure" by MTM to comply with wage-and-hour laws. C.A. App. 33. Yet, contrary to *Dukes*' direction, and as discussed more below, respondents failed to provide any proof that this alleged company-wide failure was the result of a common policy or practice enforced by MTM, much less one that applied uniformly to all members of the putative class.

The TSPs in the present case are akin to the local Wal-Mart managers in *Dukes*. Just as the Wal-Mart managers were given discretion to make their own pay and promotion decisions, each TSP has discretion to—and did—establish the substantive terms of the employment of each driver working for them, including rate of pay, method of payment, amount of payment, and workday structure. The record and the district court's findings of fact make this clear: Some TSP employees were paid salaries, and others were paid hourly; some were paid overtime, and others were not. These facts alone demonstrate a

total absence of a uniform policy or practice. Indeed, whereas the local Wal-Mart managers might be loosely connected through Wal-Mart's general policy of discretion in pay and promotion, MTM does not determine the terms of driver employment or pay, and thus each TSP is free to form its own policies and practices pertaining to wages and hours independently of both each other and of MTM.

In practice, this means that, even assuming each class member suffered a violation of the same wage-and-hour law, each harm is individualized, resulting from a different policy and based upon different facts and reasoning. But as this Court has found "obvious[], the mere claim by employees of the same company that they have suffered [an injury based on the same law], gives no cause to believe that all their claims can productively be litigated at once." *Dukes*, 564 U.S. at 350. Here, just as Title VII can be "violated in many ways," so too can wage-and-hour laws. *Id.* Additional glue—in the form of a general policy or practice that applies uniformly to all putative class members—is thus required to bind class members together. *Id.* at 353. And because Rule 23 is no mere pleading standard, allegations of such a uniform policy or practice are not enough: *Significant proof* is required. *Id.* at 350, 353.

Not only did respondents fail to meet their burden to demonstrate a uniform policy or practice with significant proof, they provided *no such proof at all*. In fact, the record below affirmatively shows the opposite: A uniform policy or practice pertaining to wages and hours did not and could not have existed, given the fact—which respondents have never

refuted—that it is the TSPs, and not MTM, that determine the terms of each class members' employment. C.A. App. 609, 1302.

**III. The Case Involves An Issue Of Exceptional Importance Because The Court Of Appeals' Decision Dilutes The Requirements Of Rule 23(a)(2) And Would Result In The Certification Of Numerous Class Actions With Individualized Merits Inquiries.**

The "grant of class status can propel the stakes of a case into the stratosphere." *Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 834 (7th Cir. 1999). To ensure the appropriate use of the potent litigation device, Rule 23 serves as a gatekeeper with threshold safeguards, one of which is commonality. Because the question of commonality thus arises in every class action filed across the country, guidance from this Court is critical where different circuits inconsistently apply the same aspect of Rule 23 at class certification. That is why this Court regularly grants certiorari to resolve inconsistent applications of Rule 23's requirements across the circuits. *See, e.g.*, *Dukes*, 564 U.S. at 349-55 (clarifying the Rule 23(a) commonality standard); *Comcast Corp. v. Behrand*, 569 U.S. 27 (2013) (clarifying the Rule 23(b)(3) predominance requirement). It should do so again here.

If plaintiffs can establish commonality by pointing to *any* question relevant to all putative class members with no need to prove that they were uniformly impacted by the same allegedly unlawful policy or practice, Rule 23 will be reduced to the mere pleading standard that this Court explicitly foreswore in *Dukes*. 564 U.S. at 350. At least one common

question—no matter how tangential—will exist in every case.

Moreover, in the Ninth and D.C. Circuits, commonality can be met even where the merits of each plaintiff's claims would need to be tried separately. This is precisely the situation that Rule 23(a) intends to exclude from class treatment: If the existence of *any* common question satisfies the commonality requirement, most proposed classes would satisfy commonality, eviscerating one of the threshold safeguards erected by Rule 23. *See, e.g.*, *id.* at 349 (merely "[r]eciting [common] questions is *not sufficient* to obtain class certification" (emphasis added)).

The class-action mechanism is intended to be the exception, not the rule. *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979). But the court of appeals' and the Ninth Circuit's lenient approach to commonality threatens this longstanding reality by diluting the class certification standard. And the principles at stake in this case matter not only in large damages actions like this one, but also in actions for injunctive relief. As the Ninth Circuit's decision in *Parsons* makes clear, a lax commonality standard is a windfall for plaintiffs engaged in litigation aimed at changing public policy through judicial decree. Rule 23 provides the appropriate vehicle for "achieving broad injunctive relief" for plaintiffs, but only where its requirements are actually met. *See* Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 Harv. L. Rev. 417, 475-76 (2017). Diluting Rule 23's requirements encourages ever more creative class definitions geared at securing overbroad injunctive relief against public officials and agencies. This case

offers the Court an opportunity to stem the tide and reiterate and clarify the important limits of Rule 23(a).

By joining the Ninth Circuit and its recurring error as to Rule 23(a), the D.C. Circuit further incentivizes forum shopping among representative plaintiffs and plaintiff's counsel. If plaintiffs can obtain class certification of nationwide classes through scattered anecdotal evidence, the Ninth and D.C. Circuits will see an ever-increasing flow of class-action litigation challenging all manner of alleged corporate and governmental policies on a nationwide basis. Without this Court's intervention to correct the course, Rule 23(a) commonality will become meaningless in most circuits in cases where plaintiffs can target a defendant's alleged policies as the common straw. Those cases will simply be brought in the Ninth and D.C. Circuits.

This Court should grant review to reaffirm what is required to establish commonality and preserve the class-action mechanism only for those instances in which plaintiffs' claims are truly united.

## IV. This Case Is An Ideal Vehicle To Address The Now-Entrenched Circuit Split Over This Issue.

The court of appeals squarely ruled on the question presented by rejecting petitioner's assertion that the class lacked commonality because there was no common policy that applied uniformly to all class members. App., *infra*, 18-19. Although the court of appeals remanded, it instructed the district court to consider only the requirements of subsection (b)(3) as they related to the subsection (c)(4) issue class. App.,

*infra*, 20-21. Absent this Court's intervention, the court of appeals' decision as to commonality is law of the case.

Additionally, the facts of this case allow this Court to pinpoint what evidence is needed to establish commonality where class treatment is based on an allegedly unlawful policy or practice applying uniformly across a class. Respondents presented *no* evidence of a uniform common policy or practice causing class-wide harm and MTM has a *complete lack* of control over the varied payment and workday policies put forth by over eighty TSPs. These facts provide this Court with an ideal opportunity to resolve the growing circuit split on a crucial aspect of class certification clearly and definitively.

This Court recently denied a petition for a writ of certiorari in *CoreCivic, Inc. v. Owino*, 143 S. Ct. 2612 (2023) (No. 22-1019). But that petition argued that the *CoreCivic* decision "cleaves *the Ninth Circuit* from other courts of appeals that faithfully apply *Wal-Mart*'s significant-proof requirement to ensure that a policy is uniformly applied and causes 'the same injury' to class members." Pet. at 19 (emphasis added). Now, the District of Columbia Circuit, subsequent to this Court's denial of CoreCivic's petition, has joined the Ninth Circuit in its lax application of Rule 23(a)(2), thus creating a genuine, entrenched circuit split that only this Court can resolve.

Accordingly, this petition presents not only an appropriate, but an ideal, vehicle for this Court to resolve the important issues in this case. Review should be granted.

## CONCLUSION

The Court should grant the petition for certiorari and reverse the court of appeals' holding that the commonality requirement of Rule 23(a)(2) is satisfied.

Respectfully submitted,


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