IN THE
SUPREME COURT OF THE UNITED STATES

No. ____

MEDICAL TRANSPORTATION MANAGEMENT, INC.,

Applicant,

v.

ISAAC HARRIS, ET AL.,

Respondents.

UNOPPOSED APPLICATION TO THE HON. CHIEF JUSTICE JOHN G. ROBERTS, JR., FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE D.C. CIRCUIT

Pursuant to Supreme Court Rule 13(5), Medical Transportation Management, Inc. ("MTM") hereby applies, without objection from Respondents, for an extension of time of 60 days, up to and including December 15, 2023, for the filing of a petition for a writ of certiorari. Unless an extension is granted, the deadline for filing the petition for certiorari will be October 16, 2023.

In support of this request, Applicant states as follows:

1. The United Stated Court of Appeals for the District of Columbia Circuit rendered its decision on July 18, 2023 (Exhibit 1). This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the exceptionally important question of what evidence is required to establish commonality under Federal Rule of Civil Procedure 23(a)(2).

2. 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. Ex. 1 at 5. MTM is prohibited from providing transportation services itself, and instead engages approximately eighty subcontractors, or "transportation service providers," to provide these services. Each of the individual transportation service providers, 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.

3. Respondents are drivers employed by the various transportation service providers, and they filed suit against MTM, rather than their employers, 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 in particular that 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. Ex. 1 at 5-6. The district court certified an issue class under Rule 23(c)(4), encompassing the questions whether MTM (1) is a joint employer with, and/or (2) is a general contractor to the various transportation service providers under D.C. law. *Id.* at 7.

4. MTM appealed. After confirming that interlocutory review of the class certification decision was appropriate, *id.* at 9-12, the D.C. Circuit 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.[1] *Id.* at 16-17.

5. The D.C. Circuit applied an approach to commonality that is directly contrary to this Court's precedent. Rule 23(a) provides four prerequisites that all proposed class actions must meet to obtain certification: (1) numerosity, (2) commonality, (3) typicality, and (4) adequate representation. 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. Telephone Co. of the Sw. v. Falcon*, 457 U.S. 147, 157 (1982)), and it is not enough that the class members "all suffered a violation of the same provision of law," *id.* at 350.

6. Respondents here allege that they suffered violations of wage-and-hour laws and had the same employer, which *Dukes* makes clear is insufficient to establish commonality. Again, each transportation service provider establishes the substantive terms of each driver's employment, including rate of pay, method of payment, amount of payment, and workday structure. *Cf. Dukes*, 564 U.S. at 350 ("Quite obviously, the mere claim by employees of the same company that they have suffered a Title VII injury, or even a disparate-impact Title VII injury, gives no cause to believe that all their claims can productively be litigated at once.").

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[1] The D.C. Circuit ultimately remanded because it concluded that the district court misapplied Subsection (c)(4) in certifying an "issue class," even if these questions did meet Subsection (a)(2)'s "commonality" requirement.

7. The various transportation service providers employing Respondents are thus akin to the various managers of Walmart in *Dukes*, each independently of both each other and of MTM. *Cf. Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 652 (9th Cir. 2010) (en banc) (Kozinski, J., dissenting) ("[T]he half-million members of the majority's approved class held a multitude of jobs, at different levels of Wal-Mart's hierarchy, for variable lengths of time, in 3,400 stores, sprinkled across 50 states, with a kaleidoscope of supervisors (male and female), subject to a variety of regional policies that all differed depending on each class member's job, location and period of employment. Some thrived while others did poorly. They have little in common but their sex and this lawsuit.").

8. Due to the lack of a uniform policy or practice that unites the class members, the merits of each Respondent's case would need to be tried separately, which is precisely the type of case that Rule 23(a) intends to exclude from class treatment. After all, if the existence of *any* question common to the class capable of classwide resolution can create commonality, most every proposed class—including the proposed class in *Dukes*—would be able to establish commonality.

9. The D.C. Circuit's decision as to commonality further entrenches a circuit split that has emerged post-*Dukes* regarding a named plaintiff's burden to demonstrate that an alleged policy or practice applies uniformly to the entire class. After *Dukes*, most federal courts of appeals have recognized that, where a proposed class is based on allegations that the defendant has a policy or practice that affects all class members, such policy or practice must be shown to uniformly apply across

the class, resulting in the same harm to each plaintiff. *See, e.g.*, *Allen v. Ollie's Bargain Outlet, Inc.*, 37 F.4th 890, 902 (4th Cir. 2022); *Ross v. Gossett*, 33 F.4th 433, 437-38 (7th Cir. 2022); *Parent/Pro. Advoc. League v. Springfield*, 934 F.3d 13, 29 (1st Cir. 2019); *Yates v. Collier*, 868 F.3d 354, 365 (5th Cir. 2017); *Brown v. Nucor Corp.*, 785 F.3d 895, 910 (4th Cir. 2015).

10. The Ninth Circuit, on the other hand, has taken a more lenient approach, requiring only that the plaintiffs *allege* the existence of a uniform policy or practice. *Parsons v. Ryan*, 754 F.3d 657, 664, 678 (9th Cir. 2014). The D.C. Circuit effectively joins the Ninth Circuit, as it did not require that Respondents demonstrate that a common wage-and-hour policy or practice applied uniformly to all class members. Indeed, the D.C. Circuit's two sentences of reasoning regarding commonality did not consider this point at all. Both the Ninth and D.C. Circuit's decisions are directly contrary to the Supreme Court's instructions in *Dukes*. 564 U.S. at 350-51, 353 (class certification is proper only if a court is satisfied "after a rigorous analysis" that each of the Rule 23 prerequisites have been met, and class certification based upon the contention that there is a uniform policy or practice requires "significant proof").

11. Counsel of Record, Jean-Claude André, has recently had and continues to have substantial appellate briefing obligations, including, *inter alia*, a brief in opposition to certiorari to this Court in *Thornell v. Jones*, No. 22-982 (filed Aug. 23, 2023) (capital case); an opening brief to the Washington Court of Appeals in *Mullen-Deland v. Pharmacia LLC*, No. 84982-4-I (due Oct. 26, 2023); a reply brief to the

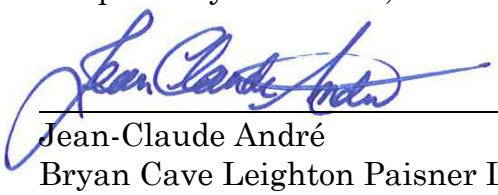
Washington Court of Appeals in *Long v. Pharmacia LLC*, No. 83895-4-I (due Nov. 4, 2023); an opening brief to the Fourth Circuit in *Buffalo Seafood House LLC v. Republic Services, Inc.*, No. 23-1922, (due Nov. 15, 2023); an answering brief to the California Court of Appeal in *Gee v. National Collegiate Athletic Association*, 2d App. Dist. No. B327691 (due Nov. 28, 2023); and an answering brief to the Second Circuit in *Jackson-Mau v. Walgreen Co.*, No. 23-642-cv (due Dec. 1, 2023).

12. Applicant requests this extension of time for counsel to fully research the complex legal issues presented in this case and to prepare a petition that fully addresses the significant issues raised by the decision below and to frame those issues in a manner that will be most helpful to the Court.

13. Applicant has conferred with counsel for Respondents, Messrs. Michael T. Kirkpatrick and Joseph M. Sellers, who do not object to the requested extension.

WHEREFORE, for the foregoing reasons, Applicant requests that an extension of time to and including December 15, 2023, be granted within which Applicant may file a petition for a writ of certiorari.

Respectfully submitted,



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October 6, 2023