

IN THE
Supreme Court of the United States

TAYLOR FARMS PACIFIC, INC. D/B/A TAYLOR FARMS,

Petitioner,

v.

MARIA DEL CARMEN PENA, CONSUELO HERNANDEZ,
LETICIA SUAREZ, ROSEMARY DAIL, WENDELL T.
MORRIS, on behalf of themselves and on behalf of all
other similarly situated individuals,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

REPLY BRIEF FOR PETITIONER

JESSE A. CRIPPS
SARAH ZENEWICZ
JOSEPH C. HANSEN
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071-3197
(213) 229-7000

MARK A. PERRY
Counsel of Record
JOSHUA S. LIPSHUTZ
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
mperry@gibsondunn.com

Counsel for Petitioner

RULE 29.6 STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

TABLE OF CONTENTS

	Page
REPLY BRIEF FOR PETITIONER	1
I. THE QUESTION PRESENTED WARRANTS THIS COURT’S REVIEW	1
II. THIS CASE IS A PERFECT VEHICLE TO RESOLVE THE QUESTION PRESENTED	6
III. THE QUESTION PRESENTED IS RECURRING AND IMPORTANT	10
CONCLUSION	12

TABLE OF AUTHORITIES

	Page(s)
 CASES	
<i>Am. Honda Motor Co., Inc. v. Allen</i> , 600 F.3d 813 (7th Cir. 2010).....	3
<i>In re Blood Reagents Antitrust Litig.</i> , 783 F.3d 183 (3d Cir. 2015)	4
<i>Comcast Corp. v. Behrend</i> , 133 S. Ct. 1426 (2013).....	1, 6, 11
<i>Daubert v. Merrell Dow Pharms., Inc.</i> , 509 U.S. 579 (1993).....	5
<i>Eisen v. Carlisle & Jacquelin</i> , 417 U.S. 156 (1974).....	2, 7
<i>Ellis v. Costco Wholesale Corp.</i> , 657 F.3d 970 (9th Cir. 2011).....	4
<i>Halliburton Co. v. Erica P. John Fund, Inc.</i> , 134 S. Ct. 2398 (2014).....	11
<i>Lujan v. Cabana Mgmt., Inc.</i> , 284 F.R.D. 50 (E.D.N.Y. 2012).....	3
<i>Mars Steel Corp. v. Cont’l Bank N.A.</i> , 880 F.2d 928 (7th Cir. 1989).....	3
<i>Parkinson v. Hyundai Motor Am.</i> , 258 F.R.D. 580 (C.D. Cal. 2008)	6

TABLE OF AUTHORITIES (*continued*)

CASES (<i>continued</i>)	Page(s)
<i>In re Rail Freight Fuel Surcharge Antitrust Litig., 725 F.3d 244 (D.C. Cir. 2013)</i>	4
<i>Unger v. Amedisys Inc., 401 F.3d 316 (5th Cir. 2005)</i>	3
<i>Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338 (2011)</i>	2, 6, 11
<i>In re Zurn Pex Plumbing Products Liability Litigation, 644 F.3d 604 (8th Cir. 2011)</i>	2, 7
RULES	
Fed. R. Evid. 101	3
OTHER AUTHORITIES	
Oral Argument, <i>Pena v. Taylor Farms Pacific, Inc.</i> , 2017 WL 1735315 (9th Cir. Apr. 19, 2017) (No. 15- 15965), https://tinyurl.com/yb2yk3bv	7, 8

REPLY BRIEF FOR PETITIONER

Respondents obtained class certification by relying on a single inadmissible document—a 9,000-page spreadsheet analysis created by *respondents’ counsel* through an undisclosed methodology with untraceable data points. The district court refused to apply *any* evidentiary scrutiny to that document on the basis that “evidence presented in support of class certification need not be admissible at trial.” Pet. App. 10a (citation omitted). And the Ninth Circuit affirmed “[f]or the reasons set forth” by the district court. *Id.* at 3a.

This petition thus squarely presents an important and recurring question that has divided the courts of appeals: Whether a district court may certify a class action based on information that does not meet the standards of admissibility set forth in the Federal Rules of Evidence and Civil Procedure. *See* Pet. i.

I. THE QUESTION PRESENTED WARRANTS THIS COURT’S REVIEW

A. The Court has made clear, repeatedly, that the Rule 23 class-certification inquiry must be rigorous. Pet. 10-11. It has not yet ruled, however, on whether information submitted at the class-certification stage must be admissible. In fact, this Court previously agreed to decide “[w]hether a district court may certify a class action without resolving whether the plaintiff class had introduced *admissible* evidence.” *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1431 n.4 (2013) (emphasis added). But the Court was unable to decide the admissibility question in that case, leaving it unresolved.

Respondents do not even cite *Comcast* in their opposition brief. Thus, in arguing that the question presented does not warrant this Court's review (*see* Opp. 8, 20), respondents fail to recognize that this Court has already ruled against them. The rest of their opposition is no more persuasive.

B. The courts of appeals are divided on the question presented, as the chart at page 15 of the petition makes clear. Respondents try to limit each case to its facts, but the standards applied by the courts vary greatly.

Most importantly, respondents mischaracterize the Eighth Circuit's holding in *In re Zurn Pex Plumbing Products Liability Litigation*, 644 F.3d 604 (8th Cir. 2011). According to respondents, the Eighth Circuit split from its peers "based on differences in the record, not because it was adopting a different test." Opp. 19. That is incorrect. The Eighth Circuit described class certification as "prospective and subject to change," and therefore held that certification is "not accompanied by the traditional rules and procedure applicable to civil trials." *In re Zurn*, 644 F.3d at 613-14 (quoting *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974)). Tellingly, the Eighth Circuit relied on the very dicta from *Eisen* that this Court has since disavowed. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351 n.6 (2011).

The Eighth Circuit's approach to evidentiary questions at the certification stage is directly at odds with the rigorous approach of the Second, Third, Fifth, Seventh, and D.C. Circuits. Pet. 12-15.

Respondents contend that the Fifth Circuit is in accord with the Ninth Circuit (Opp. 17), but that is

not correct. The Fifth Circuit’s holding—that “a careful certification inquiry is required” and must be accompanied by “adequate admissible evidence to justify class certification” (*Unger v. Amedisys Inc.*, 401 F.3d 316, 319 (5th Cir. 2005))—would have led to denial of certification in this case. Although respondents contend that “no Fifth Circuit case has set forth the rule sought by Taylor Farms” in this case (Opp. 17-18), *Unger itself* holds that a district court “must ... base its [class-certification] ruling on admissible evidence.” 401 F.3d at 325. Just so.

With respect to the Seventh Circuit, respondents ignore Judge Easterbrook’s explanation that “[t]he Federal Rules of Evidence ‘govern proceedings in the courts of the United States’” and Rule 23 is “not among the proceedings excepted from the Rules of Evidence.” *Mars Steel Corp. v. Cont’l Bank N.A.*, 880 F.2d 928, 938 (7th Cir. 1989) (en banc) (quoting Fed. R. Evid. 101). Respondents also try to limit the Seventh Circuit’s reasoning to the context of expert evidence (Opp. 18), but the court’s opinions are broader. See, e.g., *Am. Honda Motor Co., Inc. v. Allen*, 600 F.3d 813, 817 (7th Cir. 2010) (“a district court must make the necessary factual and legal inquiries and decide all relevant contested issues prior to certification,” including “resolv[ing] the issue of ... admissibility”).

Respondents claim the Second Circuit’s decisions “cannot be fairly read as adopting a rule concerning whether evidence considered at the class certification stage must meet the standard for admissibility at trial.” Opp. 20. But the district courts within that circuit *do* read the Second Circuit’s decisions as requiring admissible evidence at class certification. E.g., Pet. 13-14 (citing *Lujan v. Cabana Mgmt., Inc.*, 284 F.R.D. 50, 64 (E.D.N.Y. 2012)).

Respondents ignore the Third Circuit, even though that court has held that class certification cannot be premised on evidence that “could evolve” to become admissible. Pet. 14 (citing *In re Blood Reagents Antitrust Litig.*, 783 F.3d 183, 186 (3d Cir. 2015)). Here, of course, no such evolution is possible: Respondents themselves admitted that the document on which the district court relied in certifying the class would “never be introduced at trial.” C.A. Dkt. 19 at 24.

And as to the D.C. Circuit, respondents are forced to acknowledge that the court requires a rigorous analysis of evidence submitted at class certification. Opp. 19 n.9; see *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 253 (D.C. Cir. 2013). That is the polar opposite of what happened in this case.

The Ninth Circuit rejected the majority approach, and threw in its lot with the Eighth Circuit, by approving the district court’s approach to class-certification evidence that is directly traceable back to the same misconstrued quote from *Eisen*. Pet. 18. Respondents do not cite or address *Eisen*, or try to explain how it is even remotely acceptable for lower courts to continue to rely on a misunderstanding of this Court’s precedent that this Court itself has disavowed.

C. It is no answer to say (as respondents do) that some of the appellate cases involved expert testimony. See Opp. 15, 20. It is true that the Ninth Circuit has recognized that expert testimony must meet minimum standards of reliability to support class certification. See *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 982 (9th Cir. 2011). But this just means that the Ninth Circuit applies *one* of the Federal Rules of Evi-

dence at the certification stage. *See Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 589 (1993) (interpreting FRE 702); Pet. 21-22. The question presented by this petition is whether *all* the evidentiary rules must be applied at class certification; and both the court of appeals and district court answered “no” to that question.

Indeed, the approach taken here allows a litigant to avoid *Daubert* scrutiny simply by repackaging an expert report as an attorney declaration, as petitioner’s counsel objected in the district court at the class-certification hearing:

So what it appears that plaintiffs have tried to do in this case is take expert—otherwise expert testimony, bring it under the rubric of a declaration by the attorney and argue that even though *Daubert* evidence would be required if an expert had submitted it, [Plaintiffs’ counsel] can in effect serve as their expert without being subject to cross-examination about the foundation, authenticity, who prepared it, under what circumstances it was prepared, what exactly does it show.

C.A. E.R. 69-70. Respondents also have no answer to the observation that an attorney declaration has no more evidentiary value than the allegations in a complaint, which this Court has already held do not suffice for class certification. Pet. 21.

In short, there is a lopsided split of authority in the circuit courts regarding whether class certification evidence must be admissible. The Ninth Circuit exacerbated this split by erroneously deciding, contrary to the great weight of appellate authority, that admissibility is irrelevant at this stage.

II. THIS CASE IS A PERFECT VEHICLE TO RESOLVE THE QUESTION PRESENTED

Respondents argue that the admissibility question presented in the petition was not actually litigated below and was not central to the lower courts' rulings. Opp. 9-13. The record tells a very different story.

A. In opposing the motion for class certification, petitioner objected that respondents were seeking to rely on inadmissible evidence, including particularly Exhibit 17. C.A. E.R. 1615-16, 1622 (citing *Dukes*, *Comcast*, and the Federal Rules of Evidence). In response, respondents argued to the district court that class certification does not require admissible evidence, writing (in bolded font) that “**a motion for class certification ... need not be supported by admissible evidence.**” C.A. E.R. 329 (quoting *Parkinson v. Hyundai Motor Am.*, 258 F.R.D. 580, 599 (C.D. Cal. 2008)) (ellipsis added by respondents).

The district court accepted respondents' argument and certified the pertinent subclass based on information—the attorney-prepared spreadsheet known as Exhibit 17—that is not admissible in evidence. The court said, “evidence presented in support of class certification need not be admissible at trial.” Pet. App. 10a (citing, *inter alia*, *Parkinson*, 258 F.R.D. at 599).

Petitioner sought Rule 23(f) review based on the admissibility issue, arguing that “[e]vidence submitted to support class certification must be at least admissible.” C.A. Dkt. 1-2 at 13-14 (Case No. 15-80035) (citing *Comcast* and the Federal Rules of Evidence). The Ninth Circuit granted Rule 23(f) review. And in the lead argument of its opening brief to the Ninth Circuit, petitioner asserted that “[t]he District Court

erred by relying on Plaintiffs’ lawyers’ foundationless analysis to certify a class without applying any evidentiary scrutiny. Evidentiary rules apply at the stage of class certification: the *Daubert* standard must be applied to expert evidence, all evidence must be admissible, and a district court must analyze the reliability and persuasiveness of evidence submitted.” C.A. Dkt. 11 at 19.

In the court of appeals, respondents defended the certification ruling on the ground that “[e]vidence need not be admissible at trial to be considered at class certification.” C.A. Dkt. 19 at 20. They relied on the same language in *Eisen* that the Eighth Circuit utilized. *See id.* at 22 (quoting *Eisen*, 417 U.S. at 178); *see also In re Zurn*, 644 F.3d at 613-14. And they offered a lengthy string cite of district court cases in support of that proposition (C.A. Dkt. 19 at 21 n.3), which petitioner demonstrated in its reply brief could all be traced back to the same faulty sentence in *Eisen* (C.A. Dkt. 27 at 9). Then, at oral argument, respondents argued that the Ninth Circuit “shouldn’t adopt the at trial admissibility standard [for] Rule 23.” Oral Argument at 24:45, *Pena v. Taylor Farms Pacific, Inc.*, 2017 WL 1735315 (9th Cir. Apr. 19, 2017) (No. 15-15965), <https://tinyurl.com/yb2yk3bv> (hereinafter “Oral Argument”).

The Ninth Circuit affirmed the district court “[f]or the reasons set forth in its order.” Pet. App. 3a. Petitioner then sought en banc rehearing on the same issue (C.A. Dkt. 50 at 5-11), and received a stay of the mandate based on the argument that the evidentiary scrutiny to be applied at class certification is a substantial legal issue for this Court to resolve (C.A. Dkt. 53 at 3-5; C.A. Dkt. 56).

The notion that the admissibility question was not central to the case, both in the district court and in the Ninth Circuit, is absurd.

B. Perhaps recognizing that the certification order cannot be sustained on the basis of inadmissible evidence, respondents now argue that Exhibit 17 *was admitted* by the district court. Opp. 9-10. This new argument—which respondents did not make below—is wrong; respondents quote no such statement by the district court, because there is none. Indeed, in the Ninth Circuit, respondents *conceded* that Exhibit 17 is inadmissible. See Oral Argument at 14:23 (Exhibit 17 “could have been presented better, and we would have avoided this entire situation”); *id.* at 20:47 (same); *id.* at 15:40 (“Boy, do I wish that we had hired an [expert].”); C.A. Dkt. 19 at 24 (Exhibit 17 is “simply a tool [we] used to help prove that common issues predominated,” which will “never be introduced at trial.”). They argued instead that “admissibility ... is irrelevant.” C.A. Dkt. 19 at 24. They even asked the Ninth Circuit for a remand “to cure any potential evidentiary defects.” *Id.* at 25.

Respondents now cobble together rulings on *different* evidence (largely in connection with a *different* motion) to pretend that the district court ruled that Exhibit 17 was admissible under Rule 1006 as a summary of voluminous evidence. Opp. 2-4, 10-11. But they asked the Ninth Circuit for a remand so they could “submit a summary of the timekeeping records pursuant to Federal Rules of Evidence 1006” (C.A. Dkt. 19 at 25)—a plain recognition that Exhibit 17 was *not* such a summary. Nor could Exhibit 17 possibly have been admitted under Rule 1006: The document was itself voluminous, at over 9,000 pages long; it was “*derived* from [counsel’s] *analysis*” (C.A.

E.R. 1670 n.20 (emphasis added)); not a *single* entry in the document was traceable to the underlying time records upon which respondents claimed it was based; and it omitted essential identifying aspects of the source materials, including employee ID numbers, dates, punch-out times, and punch-in times, making it impossible for petitioner to reproduce the spreadsheet or verify its accuracy and completeness. *See* Pet. 5-6.

Respondents also point to the district court's statement that "documents may 'be authenticated by review of their contents if they appear to be sufficiently genuine.'" Opp. 10 (citation omitted). As petitioner already explained, this statement pertained to *other* evidence to which petitioner objected under Federal Rule of Evidence 901. Pet. 6 n.2. Petitioner did *not* object to Exhibit 17 on authenticity grounds (C.A. E.R. 1622); thus, the district court's remark about authenticity did not pertain to Exhibit 17. Indeed, irrespective of Exhibit 17's authenticity under Rule 901, the document was inadmissible under several other Rules of Evidence, none of which the district court addressed. *See* Pet. 5.

C. Exhibit 17 was necessary to the certification of the pertinent subclass. Again, respondents admitted as much in the Ninth Circuit. C.A. Dkt. 19 at 40 ("Faced with conflicting testimony as to what was actually occurring, the court turned to Taylor Farms' timekeeping records" to find predominance).

Respondents now maintain that Exhibit 17 "was not vital to the district court's conclusion" because the district court "relied primarily on" the employee handbook. Opp. 12. Not so. The district court found that *commonality* was satisfied by the employee handbook. Pet. App. 39a-42a. But to analyze *predominance*, the

court—in respondents’ own words—“turned to the time records.” Opp. 7. Exhibit 17 was necessary to find predominance because the “[d]ifferent plaintiffs describe[d] different experiences” (Pet. App. 32a) and there was not *any* evidence “that TFP implemented the policy of ... meal and rest breaks exactly as set forth in its Handbook” (*id.* at 43a). It was only Exhibit 17, and not the handbook, that “shed some light on deponents’ differing views.” *Ibid.* (citing Exhibit 17).

The record leaves no doubt that Exhibit 17 was necessary to certification because the district court *denied* certification of a rest-break subclass on the basis that “[t]he timekeeping data do not disclose when employees took rest breaks and therefore cannot resolve whether TFP’s Handbooks accurately describe whether TFP actually offered putative class members rest breaks.” Pet. App. 43a-44a. Respondents’ contrary argument, made for the first time in this Court, is merely a last-gasp effort to avoid review.

III. THE QUESTION PRESENTED IS RECURRING AND IMPORTANT

Three amicus briefs attest to the importance of the question presented. Tellingly, respondents have absolutely nothing to say about any of them, or the important legal and policy points made therein—including:

- “[T]here is a need to ensure that courts uniformly adopt the same stringent evidentiary standards applicable at trial at the class certification stage to protect both defendants and absent class members from the ramifications of a wrongly decided class certification decision.” Cato Br. 18.

- “Demanding greater scrutiny of evidence at the class certification stage is necessary to ensure fundamental fairness to plaintiffs, defendants, and absent class members, as well as to protect employers from frivolous and baseless litigation. It also spares courts from having to adjudicate unsupported claims with no legal basis.” CWC Br. 15.
- “[C]lass action defendants should receive the protections built into Rule 23 and the Federal Rules of Evidence before becoming subject to the threat of massive liability that accompanies an unfavorable class certification decision.” DRI Br. 12.

More generally, respondents do not dispute that the applicability of evidentiary requirements at class certification is a recurring issue that arises in every class-action proceeding. Pet. at 23-25. This Court has made clear in a series of cases that Rule 23’s rigorous scrutiny applies to proponents *and* opponents of class certification. See, e.g., *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2414-17 (2014); *Comcast*, 133 S. Ct. at 1432-35; *Dukes*, 564 U.S. at 353-58. Yet the Ninth Circuit has refused to follow those decisions.

This case is not about “review[ing] dicta” in a district court decision, as respondents blithely contend. Opp. 1. Respondents took the position in the district court and in the court of appeals that standards of admissibility *do not apply* to class-certification evidence. Both courts below accepted that argument, and the class was certified based on inadmissible information.

Yet, in this Court, respondents lack the courage of their convictions: They nowhere defend the rulings that they themselves procured regarding the inapplicability of evidentiary rules at class certification. That is undoubtedly because the clear weight of authority, from this Court and other courts of appeals, is against them. This Court should grant review to make clear, for the benefit of litigants and judges in this case and other class actions, that the rulings below are wrong.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

JESSE A. CRIPPS	MARK A. PERRY
SARAH ZENEWICZ	<i>Counsel of Record</i>
JOSEPH C. HANSEN	JOSHUA S. LIPSHUTZ
GIBSON, DUNN & CRUTCHER LLP	GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue	1050 Connecticut Avenue, N.W.
Los Angeles, CA 90071-3197	Washington, D.C. 20036
(213) 229-7000	(202) 955-8500
	mperry@gibsondunn.com

Counsel for Petitioner

January 25, 2018