No. 26-183

IN THE

Supreme Court of the United States

UNITED AIRLINES, INC.,
Petitioner,

v.

GENISE KINCANNON, ON HER OWN BEHALF AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE INTERNATIONAL FRANCHISE ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

The International Franchise Association ("IFA") respectfully submits this brief as *amicus curiae* in support of the petition for a writ of certiorari filed by United Airlines, Inc.

Founded in 1960, the IFA is the oldest and largest trade association in the world devoted to representing the interests of franchising. The IFA's membership includes franchisors, franchisees, and suppliers. The IFA's mission is to safeguard and enhance the business environment for franchising worldwide. In addition to serving as a resource for franchisors and franchisees, the IFA and its members advise public officials across the country about the laws that govern franchising. Through its public-policy programs, it protects, enhances, and promotes franchising on behalf of more than 1,400 brands in more than 300 different industries.

The franchise industry is a cornerstone of the American economy. In 2025, there were more than 830,000 franchise establishments operating in the United States, employing nearly 8,800,000

[1] Counsel of record for all parties were notified 10 days in advance of the intent to file this *amicus* brief. No counsel for any party authored this brief in whole or in part and no person or entity, other than *amicus curiae*, their members or their counsel made any monetary contribution specifically for the preparation or submission of this brief. S. Ct. R. 37.6.

individuals.[2] The franchise model depends on a carefully calibrated balance: franchisors set common brand standards to ensure system quality and consistency, while individual franchisees exercise independent control over day-to-day operations, including employment decisions.

The IFA has a strong interest in the correct application of Rule 23 because its members are particularly vulnerable to the consequences of loosened class certification standards. Franchise businesses operate under common brand standards and franchise agreements, making them prime targets for plaintiffs seeking to satisfy commonality and predominance requirements through the mere existence of system-wide policies. The Fifth Circuit's decision in *Kincannon v. United Airlines, Inc.*, 168 F.4th 713 (5th Cir. 2026), threatens to expand dramatically the circumstances in which classes may be certified against franchise networks, imposing enormous litigation costs on small-business franchisees who can least afford them.

SUMMARY OF ARGUMENT

This Court should grant certiorari because the Fifth Circuit's decision in *Kincannon* fundamentally distorts Rule 23's commonality and predominance requirements in ways that will inflict severe and irreparable harm on franchise businesses operating

[2] International Franchise Association, 2026 Franchising Economic Outlook, at 2 (https://indd.adobe.com/view/c09364f3-8c80-4b2f-bbcc-56414924ae67).

in the Fifth Circuit and in any court that adopts its erroneous holding.

The panel's approach conflicts with this Court's precedent. In *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011), this Court held that a common question must be "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." The Fifth Circuit turned this requirement on its head by holding that commonality and predominance are satisfied whenever plaintiffs present a common theory a jury *could* credit—even where rejecting that proposed class theory would require individualized determinations that differ across class members. As Judge Willett observed, under the majority's reasoning, "no putative class would ever fail the commonality requirement." *Kincannon*, 168 F.4th 713, 738. Future plaintiffs in all types of class actions will now throw against the wall a litany of common policies—that ignore individualized issues—and potential class theories and questions—that do not necessarily resolve issues for the entire class—and, if the court is bound by *Kincannon* or convinced by its reasoning, that class will be wrongly certified. Such certifications would contradict this Court's precedent.

Kincannon poses unique and devastating threats to franchise businesses. The franchise model is built on a fundamental duality: common brand standards coupled with decentralized, independently operated locations. A franchise agreement or operating manual establishes a common source of standards, but it does not establish common implementation, common legal responsibility, or common injury. Under *Kincannon*'s reasoning, however, plaintiffs in employment discrimination, wage-and-hour, and consumer class actions against franchise networks could argue that the mere existence of these common franchise policies satisfies Rule 23's requirements, even where employee-by-employee credibility determinations, differing job duties, varying compensation structures, and location-specific circumstances should defeat certification pursuant to this Court's precedent.

The consequences are particularly dire because franchise networks are composed overwhelmingly of small businesses. The settlement pressure generated by an improperly certified class—which this Court (and others) recognize amounts to insurmountable pressure to settle regardless of the merits—can be existential for a franchisee operating on thin margins. And the Fifth Circuit's "class rostering" innovation, which contemplates droves of individualized mini-trials, imposes crushing procedural costs on defendants who must litigate each one if that defendant does not want to succumb to the "judicial blackmail" that often occurs with class certification.

The question presented is exceptionally important. The decision will influence class certification law well beyond the Fifth Circuit. It provides a roadmap for plaintiffs' attorneys to exploit the structural features of the franchise model as a shortcut to class certification that conflicts with this Court's precedent. And it will generate enormous settlement pressure on small businesses that lack the resources to endure protracted class litigation. This

Court should grant certiorari to restore the proper application of Rule 23 and protect the thousands of small businesses from this grave threat.

ARGUMENT

I. The Petition Raises Questions of Immense Importance to *Amicus* and its Members.

The Fifth Circuit's decision in *Kincannon* significantly lowered the bar to class certification in a way that contradicts well-settled precedent of this Court. Although this Court instructs that the class action is "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only" and "certification is proper only if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied", *Dukes*, 564 U.S. at 348–49, lower courts often take the opposite approach and certify large classes pursuant to the outdated concept that it can certify a large class now and figure out the details later. *See, e.g., Sibley v. Sprint Nextel Corp.*, 254 F.R.D. 662, 670 (D. Kan. 2008) ("Courts should err on the side of class certification because they have broad discretion to later redefine (or even decertify) the class if necessary.") (citing *Esplin v. Hirschi*, 402 F.2d 94, 99 (10th Cir.1968) ("[I]f there is to be an error made, let it be in favor and not against the maintenance of the class action.")); *Stone v. Signode Indus. Grp., LLC*, 594 F. Supp. 3d 993, 996 (N.D. Ill. 2022) ("Rule 23 must be liberally interpreted as its policy is to favor maintenance of class actions.") (quoting *King v. Kansas City Southern Indus.*, 519 F.2d 20, 25-26 (7th

Cir. 1975)) (internal quotation marks omitted). The *Esplin* (1968) and *King* (1975) decisions are still cited by lower courts to justify class certification even though both decisions pre-date this Court's decision in *Dukes* and the 2003 amendments to Rule 23 that "reject[ed] tentative decisions on certification and encourage[d] development of a record sufficient for informed analysis." *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 321 (3d Cir. 2009) (citing Fed. R. Civ. P. 23 advisory committee's note, 2003 Amendments ("A court that is not satisfied that the requirements of Rule 23 have been met should refuse certification until they have been met.")).

Kincannon has given these courts—and plaintiffs' lawyers—a new, and troubling path for class certification: class rostering. Specifically, *Kincannon* instructs that even if there is a class with a highly individualized issue that goes to the heart of the merits, that class should still be certified; the defendant's only recourse is to conduct comprehensive individualized inquiries to determine who in the class should be excluded. Certify now, figure out the details later.

But especially for small businesses, those details are often never figured out because class certification functions as a financial and litigation death blow. After class certification, a small business finds itself on the horns of dilemma: engage in expensive protracted litigation or succumb to an in terrorem settlement. Either choice could be existential.

The ease and willingness with which district courts might now certify (improperly) large classes pursuant to *Kincannon* presents an issue of particular significance with respect to *Amicus's* members. For example, there were more than 830,000 franchise establishments, employing nearly 8,800,000 individuals, operating in the United States in 2025.[3] The dangers posed by *Kincannon* are particularly acute for the franchisee and franchisor members of *Amicus* because it is commonplace for the named plaintiff in a "class action" to sue not only the franchisee who employed them, but also a business-model franchisor who does not control the terms and conditions of their employment. As a result, franchisees and business-model franchisors alike are frequently drawn into protracted and expensive class action litigation that has nothing to do with them or their employees, due to the district courts' refusal to consider threshold joint employer issues. Without action by this Court, *Amicus* and its members will continue to be plagued by unsupported certification that needlessly multiplies claims.

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[3] International Franchise Association, 2026 Franchising Economic Outlook, at 2 (https://indd.adobe.com/view/c09364f3-8c80-4b2f-bbcc-56414924ae67).

II. The Fifth Circuit's Approach to Commonality and Predominance Conflicts with This Court's Precedent.

A. The "One Stroke" Rule Requires That Common Questions Generate Common Answers.

Rule 23 permits class certification only where "there are questions of law or fact common to the class" and, for damages classes, where "questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(a)(2), (b)(3).

In *Dukes*, 564 U.S. at 350, this Court explained that commonality requires more than merely raising a common question. The question must be "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." *Id.* A class must "generate common *answers* apt to drive the resolution of the litigation." *Id.* (citing Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N. Y. U. L. Rev. 97, 131–132 (2009)) (emphasis in original).

This Court reinforced the "one stroke" principle in *Amgen Inc. v. Connecticut Retirement Plans & Trust Funds*, 568 U.S. 455 (2013), explaining that if the failure of classwide evidence "gives rise to a need for individualized proof," the question is not genuinely common. *Id.* at 474. And in *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013), the Court held that Rule 23 demands that a class demonstrate that its damages model is "capable of measurement on a classwide basis" and not the result of individualized proof. *Id.* at 34.

The Fifth Circuit's decision in *Kincannon* departs from these principles. The panel held that commonality was satisfied because plaintiffs presented classwide evidence that a jury *could* credit. *Kincannon*, 168 F.4th at 731. But the panel acknowledged that if the jury rejected that evidence for some class members (for example, by finding that a particular plaintiff's objection was not sincerely religious), the result would not be a classwide loss but rather individualized liability determinations that differ from member to member. *Id.* at 730–32.

The panel's approach conflates common types of evidence with common questions. Judge Willett agrees, as explained in his partial concurrence. *Id.* at 736. Where different class members offered different religious justifications, such evidence "is not *the same* evidence; it is merely evidence of the *same type*." *Id.* at 736 (emphasis in original). Judge Willett warned that "[i]f that sort of independent-but-parallel proof were enough, no putative class would ever fail the commonality requirement." *Id.*

This is precisely the error *Dukes* forbids. The "one stroke" rule established by this Court means that a common question must produce a common answer, not merely a common framework for asking the question. Where the answer to the supposedly common question depends on individualized credibility determinations about each class member's subjective beliefs, the question cannot "resolve an issue that is central to the validity of each one of the claims in one stroke." *Dukes,* 564 U.S. at 350.

B. The Novel "Class Rostering" Rule Announced By The Fifth Circuit Conflicts With This Court's Precedent.

To account for the individualized issues, the panel created a wholly novel procedural mechanism: "class rostering". *Kincannon*, 168 F.4th at 730. When the panel announced the phrase "class rostering" in the decision, it did not cite a single case. *See id.* This Court has never used the phrase "class rostering" in any decision. Moreover, the undersigned is not aware of the phrase "class rostering" in any Rule 23 jurisprudence. Its application to solve a commonality problem is wholly made up.

What's worse, the implementation of "class rostering" as announced by the panel, in practice, functions as the very type of individualized inquiry and litigation that are the antithesis of a class action. *See id.* Specifically, the panel instructs (as just one "example") that a court, "during class rostering . . . may entertain evidence showing that a particular employee" does not meet an element of the claim. *Id.* But how is a defendant to find those employees? A defendant would be required to conduct extensive individualized discovery. But the need for such an exercise demonstrates that the class should never be certified in the first place. *See, e.g., In re Rail Freight Fuel Surcharge Antitrust Litig. - MDL No. 1869*, 934 F.3d 619, 624 (D.C. Cir. 2019) (affirming district court's denial of class certification where "district court held that the need for "individualized inquiries to determine which of at least 2,037 (and possibly more) class members were actually injured by the alleged conspiracy . . . precluded a finding of predominance.") (citation omitted) (internal quotation marks omitted); *Davoll v. Webb*, 194 F.3d 1116, 1146 (10th Cir. 1999) (affirming denial of class certification, in part, because "[t]he district court would have had to conduct individualized inquiries to determine whether a potential class member met the statutory definition" of the ADA and noting that "the proposed definition would be administratively infeasible") (citations omitted)[4]; *Lienhart v. Dryvit Sys., Inc.*, 255 F.3d 138, 149 (4th Cir. 2001) ("If such an individualized inquiry is needed to determine the membership of a workable class, it is clear that common issues do not predominate over individual issues as required by Rule 23(b)(3)."; noting "individualized proof of damage causation—would be essential to liability, destroying predominance.").

The Fifth Circuit previously instructed that "[a] district court cannot manufacture predominance through the nimble use of management tools." *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 745 n.21 (5th Cir. 1996). Yet, the panel decision creating the "class rostering" tool is requiring a district court to do exactly that—use a "management tool" to manufacture commonality and predominance or, at minimum, use it to attempt in vain to plug the gaping holes in both. Certify now, figure out details later.

[4] Notably, *Davoll* was cited by the *Kincannon* panel in support of affirming denial of the ADA class, *Kincannon*, 168 F.4th at 726, but *Davoll*, and its sound principles regarding class membership, was not cited in the religious discrimination section of the decision. *See id.* at 727-735.

Rule 23 is supposed to "limit[] judicial inventiveness," not invite it through the inefficient and novel "class rostering" process. *See Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 620 (1997).

Moreover, the use of the "for example" phrase in the description of "class rostering", *Kincannon*, 168 F.4th at 730, indicates that the specific class rostering procedure *Kincannon* endorsed is an open-ended invitation for lower courts to devise new (and nimble) variants of individualized inquiry at the class certification stage. That open-ended license empowers district courts to fashion the kind of claimant-by-claimant merits screenings that *Dukes* forbids. Equally troubling, *Kincannon* fails to provide any real limiting principle to cabin how far those ad hoc procedures may extend.

The "class rostering" mechanism also raises Seventh Amendment concerns. The Rules Enabling Act provides that procedural rules "shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b). A procedure that certifies a class while deferring the individualized determinations that would normally defeat certification—and then subjects defendants to a litany of mini-trials—misses the point of Rule 23 and this Court's precedent. *See, e.g., In re Rail Freight Fuel Surcharge Antitrust Litig. - MDL No. 1869*, 934 F.3d at 624.

The panel justified its "class rostering" procedure by citing this Court's *Halliburton* decision. *Kincannon*, 168 F.4th at 730, 732 (citing *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 276 (2014) ("That the defendant might attempt to pick off the occasional class member here or there through individualized rebuttal does not cause individual questions to predominate.")). As an initial matter, the operative phrase from *Halliburton* is "occasional class member here or there." *Halliburton*, 573 U.S. 258, 276. *Halliburton* did not contemplate a scenario in which a portion of the certified class is uninjured. Nor did *Halliburton* sanction anything like a "class rostering" process whereby determining who among the class suffered injury requires individualized discovery. This Court's reasoning in *Halliburton* rested on the premise that individualized issues would be, at most, marginal to the predominant common questions. *See id.* Where, as here, individualized determinations are not marginal but central, *Halliburton*'s reasoning has no application.

In addition, *Halliburton* arose in the context of securities fraud class actions, where the fraud-on-the-market doctrine provides a class-wide mechanism for establishing reliance. *Basic Inc. v. Levinson*, 485 U.S. 224, 245–47 (1988). It was against that backdrop that the Court in *Halliburton* concluded that occasional, individualized rebuttal of the presumption would not defeat predominance. *Halliburton*, 573 U.S. at 276 (noting that the *Basic* presumption requires proof of several prerequisites "before class certification": "publicity, materiality, market efficiency, and market timing."). Consequently, *Halliburton* should not be used to save the Fifth Circuit's "class rostering" invention.

C. The Fifth Circuit's Concern About A Bright-Line Rule Against Religious-Discrimination Class Cases Is Unfounded And Further Support To Grant This Petition.

The Fifth Circuit created a novel "management tool" that courts must use even when there are individualized issues that undermine commonality and predominance, because the Fifth Circuit appears to be overly concerned that doing otherwise "would effectively be establishing a bright-line rule against class actions in religious-discrimination cases." *Kincannon*, 168 F.4th at 730. The Fifth Circuit went so far as to announce that it "decline[d] to be the first to hinder the vindication of religious freedom in this way." *Id.* (noting that the Supreme Court has not held "that such [religious discrimination] claims are excluded from Rule 23.").

Although the Fifth Circuit is correct that religious freedom is a fundamental right to protect, the Fifth Circuit's concern merely evidences the dearth of precedent from this Court that trial and appellate courts need for guidance in this crucial area. Moreover, the Fifth Circuit's concern is unfounded. This Court's decision in *Dukes* did not eliminate Title VII gender discrimination class claims nor hinder the rights of litigants looking to vindicate Title VII rights on behalf of an aggrieved class. Instead, this Court provided the necessary guidance on when to certify Title VII gender discrimination class cases and when certification in such putative class cases should be denied. Without this Court's vital guidance, there is substantial risk that lower courts will deny certification in religious discrimination class cases (when it should be granted) and grant certification in such cases (when it should be denied), as occurred in the Title VII gender discrimination class cases prior to *Dukes.*

Indeed, the Fifth Circuit's new approach departs from that of numerous courts in other circuits that have denied certification of religious accommodation claims. *See* Pet. 16-17. It also departs from this this Court's Rule 23 precedent. This Court should grant the petition to prevent any confusion about certification in religious discrimination cases. A decision from this Court not only can resolve important issues under Rule 23 relevant to all areas of substantive law but also clarify how courts analyze commonality and predominance for religious accommodation claims, so that lower courts draw the certification lines in the right place.

III. The Decision Poses Unique and Severe Threats to Franchise Businesses, Which Are Typically Small Businesses Most Susceptible to "In Terrorem" Settlements After Class Certification.

A. Because Franchises Are Often Small Businesses, Wrongly Certified Class Actions Can Pose An Existential Threat.

The settlement pressure generated by an improperly certified class—which this Court (and others) recognize amounts to "in terrorem" pressure to settle regardless of the merits, *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011) is well known. *See also Castano v. Am. Tobacco Co.*, 84 F.3d at 746 (noting that class certification "skew[s] trial outcomes" and can "create[] insurmountable pressure on defendants to settle" to avoid "[t]he risk of . . . an all-or-nothing verdict . . . even when the probability of an adverse judgment is low") (citations omitted). Such settlements after class certification "have been referred to as judicial blackmail." *Id.*

In his concurrence, Judge Willett appreciates this litigation reality makes class actions "perilous". *Kincannon*, 168 F.4th at 735 (citing cases, including *Castano*). And the Fifth Circuit's "class rostering" innovation, which contemplates endless individualized mini-trials, imposes crushing procedural costs on defendants who must litigate each one if that defendant does not want to succumb to such judicial blackmail.

Despite the public perception of franchisors as large corporations, most franchisees are actually small, local businesses: 85% of franchise owners operate where they live and 64% are first-time business owners.[5][6] Dragging these small, local business franchisees into potentially national class actions brought against entirely different franchisees, based solely on the name on their store sign, their common relationship with a franchisor, and the

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[5] International Franchise Association, 2026 Franchising Economic Outlook, at 22 (https://indd.adobe.com/view/41aaf895-c7f7-43ff-9004-9455305199f3).

[6] International Franchise Association, The Value of Franchising 2026, at 6 (https://www.franchise.org/wp-content/uploads/2026/01/IFA_ValueOfFranchisingFINAL.pdf).

common resources that franchisor may provide, imposes immense burdens on franchisees whose policies may differ entirely from those at issue in the class action.[7]

And franchise businesses span virtually every sector of the American economy: automotive, business services, child services, commercial and residential services, full-service and quick-service restaurants, health and wellness, lodging, personal services, real estate, and retail. *Kincannon*'s drastic loosening of the certification standard threatens industries far beyond the airline industry.

[7] The reach *Kincannon* could have on the franchise industry is demonstrated by this sampling of recent class actions against franchisors and franchisees. *See, e.g., Patel v. 7-Eleven*, 81 F.4th 73, 76 (1st Cir. 2023); *Destiny Rivera v. Panera, LLC*, No. 5:26-cv-02416 (C.D. Cal. 2026); *Valeria Parra-Ochoa v. 7-Eleven, Inc.*, No. 2:26-cv-05753 (C.D. Cal. 2026); *Tragan Campbell v. The Ritz-Carlton Hotel Company, LLC*, No. 2:26-cv-03340 (C.D. Cal. 2026); *Diana A. Bernardo v. Carl's Jr. Restaurants LLC*, No. 2:25-cv-00826 (C.D. Cal. 2025); *Anderson v. 7-Eleven, Inc.*, No. 3:25-cv-03577 (S.D. Cal. 2025); *Wise v. InterContinental Hotels Group Resources, Inc.*, No. 4:24-cv-01161 (N.D. Cal. 2024); *Arnold v. Marriott International Inc.*, No. 2:24-cv-00221 (W.D. Wash. 2024); *Cuevas v. Little Caesar Enterprises, Inc.*, No. 3:23-cv-03166 (N.D. Cal. 2023); *Lopez v. Marriott International, Inc.*, No. 1:23-cv-03308 (D. Colo. 2023); *Baldino-Miller v. Courtyard Management Corporation*, No. 1:23-cv-01613 (E.D. Cal. 2023); *Avalos-Aviles v. Red Robin International, Inc.*, No. 2:22-cv-01257 (E.D. Cal. 2022); *Fairley v. McDonald's Corporation*, No. 1:20-cv-02273 (N.D. Ill. 2020); *Chavez v. Crunch LLC*, No. 4:20-cv-02362 (N.D. Cal. 2020); *Fodera v. Equinox Holdings, Inc.*, No. 3:19-cv-05072 (N.D. Cal. 2019).

B. The Panel's Decision Makes Franchises Easy Class Action Targets.

While *Kincannon* will affect all employers, its consequences will be uniquely devastating for franchise businesses. The structural features that define franchising, such as common brand standards, uniform operating manuals, and system-wide policies, are precisely the features that plaintiffs will exploit under the panel's loosened certification standard.

Class action plaintiffs routinely sue not only the franchisee that employs them, but also the business-model franchisor, even when the franchisor exercises little to no control over the terms and conditions of their employment. Under *Kincannon,* the superficial appearance of uniformity across franchise locations would allow these plaintiffs to create classes of employees from multiple different franchise locations, ignoring the reality that most franchise employees are subject to different employment standards depending on the franchise location at which they work.

Although franchisors typically establish brand standards, training procedures, and operating guidelines, individual franchisees independently control the employment decisions that are typically at issue in employment class litigation: hiring, discipline, supervision, scheduling, hours, and compensation. Many franchisors provide optional tools and resources, such as HR guidance, scheduling software, or employee resources, but franchisees are free to adopt, reject, or modify these tools as they see fit. The result is that employees of different franchisees are often subject to materially different workplace policies and practices, notwithstanding the common franchise relationship. Put another way, the "common" connection is merely superficial and should have no legal significance in the class action context.

Kincannon's loosened class certification standard, however, if allowed to stand, will sweep franchisees into litigation to which they have no connection. Consider a franchisor that offers model job descriptions and training materials for "Store Managers" to its franchisees. Franchisee A and Franchisee B use those job descriptions and training materials, but the job duties of the Store Managers at both franchisees vary drastically in legally significant ways that impact the FLSA exemption analysis. Under *Kincannon*, a Store Manager of Franchisee A could obtain certification of a class that includes Franchisee B's Store Managers, solely because the franchisor offered the same resources to both. Franchisee B, now roped into litigation relating to a different franchisee's employees who were subject to entirely different workplace standards, would then be forced to endure protracted litigation until a belated "class rostering" procedure finally removed its employees from the class. The mere availability of a common resource provided by a franchisor thus becomes grounds for class certification, regardless of the factual and legal realities.

The unintended policy consequences of *Kincannon* are real. Faced with increased litigation exposure from the availability of common resources, franchisors will be encouraged to provide fewer optional resources and training materials to franchisees. But these resources enable individuals to enter industries without having to start from scratch, encouraging and supporting the first-time business owners who are vital to our economy. Removing access to these resources due to the increased risk of litigation will harm not only franchisees who depend on this support, but also their employees, who will lose access to resources that can improve workplace conditions.

A franchise agreement establishes a common source of standards, but it does not establish common implementation, common legal responsibility, or—in the case of a class action lawsuit—common injury. The same franchise operating manual may be implemented differently at a location in Houston than in Chicago, depending on local management decisions, budget, local labor market conditions, the franchisee's independent business judgment, and countless other location-specific factors.

The *Kincannon* court's reasoning potentially collapses this critical distinction if a franchise faced a class action pursuant to the *Kincannon* standard. The panel found commonality satisfied in part because "each member here incurred the same harm—unpaid leave" and because United supposedly possessed the compensation data for a common damages methodology while ignoring many individual issues involving liability and damages. *See Kincannon,* 168 F.4th at 733 n.10, 11. Similarly, in the franchise context, different franchisees pay different wages, offer different benefits, impose different schedules, make different employment decisions, and are—quite often—vastly different businesses, all under the umbrella of the same franchise agreement.

The franchise model thus presents an illustrative case of common policies, individualized application. A franchisor's decision to include an HR policy template in its operating manual does not mean that every franchisee implements that template identically, that every employee experiences the policy in the same way, or that any deviation from the policy produces the same injury. Under this Court's precedent, the individualized nature of these determinations should defeat class certification. Under *Kincannon*, there is a risk that it will not.

C. The "Class Rostering" Innovation Is Particularly Dangerous for Franchise Defendants.

The panel's novel procedural mechanism of "class rostering" is particularly threatening to franchise defendants. *Kincannon*, 168 F.4th at 730. Although the panel called the process "class rostering," the process should have been called "individualized discovery to determine the class." In practice, "class rostering" could become a tool courts use (nimbly, and wrongly) to grant class certification when the proposed class—like the one at issue here—suffers from fundamental commonality and predominance problems. During the "class rostering" phase ordered by the panel, individualized determinations are made about each class member. But the only way for a defendant to explore the fundamental merits question would be to conduct individualized discovery of every member of the class.

This procedure is unprecedented in Rule 23 jurisprudence.

In a class action alleging system-wide employment violations, the "class rostering" phase would require individualized mini-trials for each class member. In the matter of *In re Rail Freight Fuel Surcharge Antitrust Litig. - MDL No. 1869*, the number of mini-trials would number in the thousands. *See In re Rail Freight Fuel Surcharge Antitrust Litig. - MDL No. 1869*, 934 F.3d at 624 (noting the putative class included "at least 2,037 (and possibly more) class members"). Such putative class sizes numbering in the thousands is common. Indeed, in *Dukes,* the putative class size was "about one and a half million plaintiffs". *Dukes*, 564 U.S. 338, 342.

Each mini-trial in an expansive putative class action imposes discrete costs: witness preparation, document production, court reporter fees, and attorney time. For a franchisor defending the entire system, these costs are enormous. But for individual franchisees who may be swept into the litigation as co-defendants, or who bear the practical consequences of a judgment against the franchisor, the costs are existential. The cost of participating in dozens or even hundreds of individualized mini-trials creates the kind of insurmountable pressure to settle that this Court has recognized as a hallmark of improperly certified class actions. *See Concepcion*, 563 U.S. at 350.

For franchise defendants, these concerns are not theoretical. The "class rostering" procedure converts what should be individual lawsuits—each requiring proof of each element as to each plaintiff—into a mass proceeding where the weight of numbers, rather than the strength of the evidence, drives outcomes. In short, franchise defendants will feel insurmountable pressure to settle regardless of the merits.

CONCLUSION

For the foregoing reasons, the International Franchise Association respectfully urges this Court to grant the petition for a writ of certiorari.

Respectfully submitted,

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