No. 19-56514

In the United States Court of Appeals for the Ninth Circuit

OLEAN WHOLESALE GROCERY COOPERATIVE, INC., et al.,
Plaintiffs-Appellees,

v.

BUMBLE BEE FOODS LLC, et al.,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
No. 3:15-md-02670-JLS-MDD
Hon. Janis L. Sammartino

AMICUS BRIEF OF IMPACT FUND, BET TZEDEK, CALIFORNIA RURAL LEGAL ASSISTANCE FOUNDATION, CENTRO LEGAL DE LA RAZA, LEGAL AID AT WORK, AND PUBLIC COUNSEL IN SUPPORT OF PLAINTIFFS-APPELLEES, REHEARING EN BANC, AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and 29(a)(4)(A), amici curiae Impact Fund, Bet Tzedek, California Rural Legal Assistance Foundation, Centro Legal de la Raza, Legal Aid at Work, and Public Counsel represent that they do not have parent corporations or publicly held companies holding 10% or more of any stock.

Dated: May 19, 2021

By: /s/ Jocelyn D. Larkin

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Amici curiae Impact Fund, Bet Tzedek, California Rural Legal Assistance Foundation, Centro Legal de la Raza, Legal Aid at Work, and Public Counsel are non-profit legal organizations that employ Federal Rule of Civil Procedure 23 to enforce the legal rights of low-income workers.

INTRODUCTION

The panel decision imposes, for the first time, a requirement at class certification that plaintiffs prove that no more than a *de minimis* number of class members are uninjured to demonstrate predominance under Rule 23(b)(3). *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 993 F.3d 774, 792-93 & n.12 (9th Cir. 2021). This Court should grant en banc review because this new prerequisite is not grounded in the text of Rule 23(b)(3) and forces a full-blown merits inquiry at class certification that the Supreme Court has expressly forbidden. *See Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S.

[1] No party's counsel authored this brief in whole or in part. No counsel or party contributed money to fund its preparation or submission. No person other than amici and their counsel contributed money for its preparation or submission.

455, 466 (2013) ("Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage.").

Amici write separately to urge en banc review because the new *de minimis* rule is also inconsistent with decades of Supreme Court and Ninth Circuit precedent regarding the certification and trial of class actions challenging employment discrimination and other workplace violations.

In Title VII cases challenging pattern-or-practice discrimination, the question of which class members are injured and entitled to individual relief is determined through individual hearings that occur, if at all, *after* a finding of class-wide liability at trial. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 366-67 (2011) (citing *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 361-62 (1977)). The Supreme Court has never suggested that the number of uninjured class members must instead be ascertained and tabulated as a prerequisite to class certification in employment discrimination class cases.

The same is true in other worker's rights class cases in which individual damages typically cannot be determined ahead of trial. The Supreme Court and this Court have recognized that the number of

uninjured class members need not be determined at class certification. *See Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 455-59 (2016); *Ruiz Torres v. Mercer Canyons, Inc.*, 835 F.3d 1125, 1136 (9th Cir. 2016).

The panel decision is starkly at odds with this established precedent. Because it is rarely possible to differentiate injured from uninjured workers at the class certification stage, plaintiffs who challenge systemic discrimination and wage theft will be unable to satisfy the panel's novel *de minimis* requirement. An arbitrary numerical cap not found in Rule 23 or grounded in its analytical framework should not limit access to a critical procedural tool for the vindication of workers' rights. The case thus presents a question of extraordinary importance warranting the full Court's review.

ARGUMENT

A. The Decision Is Inconsistent with Supreme Court Precedent Governing Litigation of Title VII Class Actions.

The panel decision disrupts the established framework for Title VII pattern-or-practice class action cases challenging systemic employment discrimination. The Supreme Court first articulated a bifurcated liability framework for such cases over forty years ago in

Teamsters, a government enforcement action. 431 U.S at 361-62. The *Teamsters* bifurcated trial model is commonly used in Title VII class actions against private defendants. *Dukes*, 564 U.S. at 352 n.7.

Following class certification, in the first stage of trial, plaintiffs must "establish by a preponderance of the evidence that . . . discrimination was the company's standard operating procedure[,] the regular rather than the unusual practice." *Teamsters*, 431 U.S. at 336. If the plaintiffs are successful, the court may enter "an injunctive order against continuation of the discriminatory practice." *Id.* at 361. In the second stage of trial, the "stage one" liability finding gives rise to a rebuttable inference that individual class members are victims of the discriminatory practice. *Id.* at 361-62. "[T]he burden of proof will shift to the company, but it will have the right to raise any individual affirmative defenses it may have, and to 'demonstrate that the individual applicant was denied an employment opportunity for lawful reasons.'" *Dukes*, 564 U.S. at 366-67 (quoting *Teamsters*, 431 U.S. at 362 and citing 42 U.S.C. § 2000e-5(g)(2)(A)). Only at this second and final stage does the court conduct "additional proceedings" to identify which class members were injured and which were not, and determine

individual remedies for those who were injured. *Teamsters*, 431 U.S. at 361. The *Teamsters* model therefore implicitly acknowledges that a class will include some number of uninjured class members and ensures a mechanism for the court to identify them before a defendant is compelled to provide individual relief to any of them.

Courts routinely grant Rule 23(b)(3) certification in Title VII class action cases, even though the number and identity of uninjured class members will not be known until the individual "stage two" proceedings are completed. *See, e.g.*, *In re Johnson*, 760 F.3d 66, 74-75 (D.C. Cir. 2004) (affirming certification of class of African-American Secret Service agents challenging discrimination in promotion); *Gulino v. Bd. of Educ.*, No. 96-cv-8414, 2013 WL 4647190, at *11-12 (S.D.N.Y Aug. 29, 2013) (certifying relief phase class in challenge by African-American and Latino public school teachers to racially discriminatory standardized licensing tests); *Ellis v. Costco Wholesale Corp.*, 285 F.R.D. 492, 545-46 (N.D. Cal. 2012) (certifying class of female employees who challenged discretionary system for management promotions); *Easterling v. Conn. Dep't of Corr.*, 278 F.R.D. 41, 51 (D. Conn. 2011) (denying decertification

and modifying class certification order in challenge by female correctional officers to physical fitness test).

Ellis illustrates why a *de minimis* rule cannot, and should not, be applied in a Title VII pattern-or-practice class action. In *Ellis*, a proposed class of an estimated 700 female employees alleged that Costco's companywide practices for selecting upper-level managers in its retail warehouses disadvantaged female candidates. 285 F.R.D. at 496, 500. The district court approved the proposed class defined as current or former female Costco employees "who have been or will be subject to Costco's system for promotion" to the top positions.[2] *Id.* at 500, 545. In evaluating predominance, the court ruled that the plaintiffs' proposed *Teamsters*-style trial plan addressed any concern related to "individualized questions" of relief. *Id.* at 539.

The *Ellis* plaintiffs—like virtually all Title VII plaintiffs—could not have made the factual showing necessary to satisfy the *Olean*

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[2] The class definition was not limited to only those "injured" by the challenged practice, as this limitation would have created an impermissible "fail safe" class— "one defined so narrowly as to preclude membership unless the liability of the defendant is established." *Torres*, 835 F.3d at 1138 n.7 (quotation omitted). As approved, the class definition also included women who had been promoted and were, therefore, "uninjured."

panel's *de minimis* rule. Proof of liability did not require the plaintiffs to demonstrate that *every* woman in the class had been adversely affected by Costco's policies; they only had to offer evidence of statistical disparities in the rates of promotion of male and female candidates under the allegedly discriminatory system. *See* 42 U.S.C. § 2000e-2(k)(1). The certified class definition included "uninjured" class members: the small group of women who had been promoted as well as those who had not been promoted for non-discriminatory reasons, such as lack of interest in or qualification for promotion. That latter group of uninjured class members could not be counted, or even estimated, at the time of class certification without extensive, individualized merits determinations. Those individual merits questions would, moreover, require the district court to decide core liability questions, such as whether the proffered qualifications were valid and consistently applied.

But, such individual merits inquiries unrelated to addressing the Rule 23 requirements are not permitted or possible at class certification. *Amgen*, 568 U.S. at 466; *Stockwell v. City & County of S.F.*, 749 F.3d 1107, 1113 (9th Cir. 2014). These kinds of inquiries are

also at odds with a key purpose of class proceedings: to maximize judicial efficiency by focusing on common legal questions shared by all class members. *Amchem Prods. v. Windsor*, 521 U.S. 591, 615 (1997). Moreover, Rule 23 provides a "one-size-fits-all formula" for class certification, *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 383, 399 (2010), and courts are not permitted to add new prerequisites, *see Amchem*, 521 U.S. at 591 ("The text of a rule . . . limits judicial inventiveness."). This Court has previously "decline[d] to interpose an additional hurdle into the class certification process delineated in the enacted Rule." *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1126 (9th Cir. 2017).

The *de minimis* rule turns the well-established *Teamsters* process on its head, obligating the district court to differentiate injured versus uninjured class members at the certification stage before it has ruled on liability, rather than at the back-end of the litigation as prescribed by *Teamsters* and *Dukes*. If the panel decision stands, district courts will have to deny class certification to Title VII plaintiffs unable to make this impossible and impermissible showing.

B. The Decision Is Inconsistent with Supreme Court and Ninth Circuit Precedent Governing Other Workers' Rights Class Actions.

The panel decision also contravenes the Supreme Court's decision in *Tyson Foods*, 577 U.S. at 455-59, and this Court's decision in *Torres*, 835 F.3d at 1136, which do not require an individualized injury inquiry at the Rule 23 stage. Cases challenging wage violations present a range of merits issues among class members that are not appropriate for resolution at class certification. *See Leyva v. Medline Indus. Inc.*, 716 F.3d 510, 513 (9th Cir. 2013) ("[D]amages determinations are individual in nearly all wage-and-hour class actions.").

In *Tyson*, a class and collective action challenging the employer's failure to pay overtime at a pork processing plant, the Supreme Court upheld certification of a Rule 23(b)(3) class of over 3,000 workers that "contain[ed] hundreds of uninjured employees." 577 U.S. at 462 (Roberts, C.J., concurring). The Court concluded that because the employer failed to maintain records, the workers could meet their burdens at class certification by relying on estimated averages derived from a representative sample. *Id.* at 450, 454-55. The Court affirmed that common questions predominated over inquiries about individual

work time. *See id.* at 454. Plainly, if the Court in *Tyson* accepted that a representative sample could be used to establish the presence of injury across the class for Rule 23 predominance purposes, then the *much higher* burden of proving that the number of uninjured class members is *de minimis* is not a proper reading of Rule 23.

The panel decision also cannot be reconciled with this Court's decision in *Torres*, which expressly held that the presence of uninjured class members does not defeat predominance. 835 F.3d at 1136. The *Torres* panel affirmed class certification of a Rule 23(b)(3) class of farmworkers alleging wage violations and held that the district court properly concluded that "the existence of some individualized issues did not overwhelm an overall finding of predominance." *Id.* at 1135.

Torres clarified that predominance is not "a matter of nose-counting": in its analysis, "more important questions apt to drive the resolution of the litigation" outweigh "individualized questions which are of considerably less significance to the claims of the class." *Id.* at 1134. So long as the court can "winnow out those non-injured members at the damages phase of the litigation" or "refine the class definition" if overly broad, "fortuitous non-injury to a subset of class members does

not necessarily defeat certification of the entire class." *Id*. at 1137. A dispute about how many class members were exposed to a defendant's conduct but were ultimately uninjured "merely reflects the existence of contrasting litigation positions on the proper scope of liability, and a merits issue that the district court [can] later resolve." *Id*. at 1138.

Liability and individual injury are critical questions in class actions enforcing workplace rights. But, as this Court and the high court agree, the injury determination is properly conducted after the district court has certified the class and the trier of fact has found class-wide liability. The panel decision upset this firmly-established process and added an unnecessary hurdle to Rule 23 that will be difficult for workers to overcome at class certification.

CONCLUSION

For the foregoing reasons, Amici urge the Court to grant rehearing en banc.

Dated: May 19, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned, counsel for amici curiae, certifies that this brief complies with the word of limit of Fed. R. App. P. 29(a)(5), 9th Cir. R. 29-2, and this Court's April 28, 2021 order (App. Dkt. No. 101), and contains 2,071 words according to the word processing program used to prepare it, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a).

Dated: May 19, 2021

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing **AMICUS BRIEF OF IMPACT FUND, BET TZEDEK, CALIFORNIA RURAL LEGAL ASSISTANCE FOUNDATION, CENTRO LEGAL DE LA RAZA, LEGAL AID AT WORK, AND PUBLIC COUNSEL IN SUPPORT OF PLAINTIFFS-APPELLEES, REHEARING EN BANC, AND REVERSAL** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on May 19, 2021.

I certify that the listed participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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I declare under penalty of perjury, under the laws of the United States and the State of California, that the foregoing is true and correct.

Executed on May 19, 2021 at Berkeley, California.

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