IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
Case No.: 14-1816

MONIQUE DA SILVA MOORE, MARYELLEN O'DONOHUE, LAURIE MAYERS, HEATHER PIERCE, KATHERINE WILKINSON, on behalf of themselves and others similarly situated, and ZANETA HUBBARD, on her own behalf,	)	**Brief of *Amicus Curiae* Center for WorkLife Law in Support of Petition for Leave to Appeal Pursuant to Rule 23(f) from the United States District Court for the Southern District of New York**
Plaintiffs-Petitioners,	)	
v.	)	
PUBLICIS GROUPE SA and MSLGROUP,	)	**Case No.: 1:11-cv-1279 (ALC)**
Defendants-Respondents.	)	**Hon. Andrew L. Carter**

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Amicus is a public interest organization with no parent corporation and with no publicly held corporation owning more than 10% of its stock.

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INTEREST OF *AMICUS CURIAE*

Amicus curiae is a public interest organization housed at the University of California, Hastings College of the Law, dedicated to reviving the gender revolution by focusing on a few projects that hold the promise of producing concrete social or institutional change. WorkLife Law has pioneered the research and documentation of family responsibilities discrimination. Current initiatives include work on advancing women leaders, law firm rainmakers and new models of legal practice, how gender bias differs by race, and pregnancy accommodation.

Amicus submits this brief to highlight the importance of the process of litigating employment discrimination class actions set out in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), to enforcing the rights of employees harmed by discriminatory policies and practices, and the danger posed to the continued use of this process by the district court's decision.[1]

INTRODUCTION

The district court concluded that a class action would not "fairly and efficiently adjudicate the claims currently before the Court" because it would require approximately 150 individual mini trials addressing liability and damages.

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[1] *Amicus* affirms that no party or party's counsel authored this brief in whole or in part; no party or party's counsel contributed money to fund the preparation or submission of this brief; and no other person except *amicus curiae*, its members, or their counsel contributed money intended to fund the preparation or submission of this brief. *See* Fed. R. App. P. 29(c)(5); Local Rule 29.1(b).

Slip op. at 18. That mini trial process was established by the Supreme Court in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), and has been critical in efforts to achieve a workplace of equal opportunity. The district court identifies no circumstances in this case that would make a mini trial process inordinately unmanageable. The conclusion that the possibility of 150 straightforward mini trials would render a class action unmanageable, if generally adopted, would effectively end employment discrimination class actions seeking individualized relief. It would make the only purportedly manageable class actions so small that it would be difficult, if not impossible, to perform statistical analyses that are critical, if not indispensable, in employment discrimination class actions.

This Court should not allow such a damaging ruling to stand without review. It should grant the Rule 23(f) petition and reject the notion that a class action is unmanageable because a district court may have to conduct up to 150 mini trials.

ARGUMENT

I. The *Teamsters* Two-Stage Trial Process is Critically Important to Certification of Employment Discrimination Class Actions and to Protection of Employee Rights

A. The Supreme Court Established in *Teamsters* a Two-Stage Process for Resolving Employment Discrimination Class Cases

In *Teamsters*, the Supreme Court promulgated a two-stage, burden-shifting framework for pattern-or-practice claims brought by the Government under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* 431 U.S. at 358–62.

During the first stage, plaintiffs must establish a prima facie case that intentional discrimination against a protected group was "the company's standard operating procedure." *Teamsters*, 431 U.S. at 336, 360. No individual issues are adjudicated at this stage. *See id.* at 361. A court may enter classwide injunctive or declaratory relief unless an employer defeats plaintiffs' prima facie showing. *Id.* at 360–61.

If plaintiffs also seek individual relief, the case proceeds to the second stage where the court conducts mini trials to determine entitlement to and the scope of individual relief. *Id.* at 361. The finding of a discriminatory policy carries over into the second stage and creates a rebuttable inference that "any particular employment decision . . . was made in pursuit of that policy." *See id.* at 361–62. The *Teamsters* process promotes judicial efficiency in that class members need not individually establish a prima facie case of discrimination.

Courts extended *Teamsters* beyond pattern-or-practice claims brought by the Government under Title VII. The Supreme Court approved use of *Teamsters* in private party class actions. *See Cooper v. Fed. Reserve Bank*, 467 U.S. 867, 876 n.9 (1984). It now applies to other employment discrimination statutes, including 42 U.S.C. § 1981, *see, e.g., Lowery v. Circuit City Stores, Inc.*, 158 F.3d 742, 759 n.6 (4th Cir. 1998), *vac'd on other grounds*, 527 U.S. 1031 (1999); the Age Discrimination in Employment Act, *Aliotta v. Bair*, 614 F.3d 556, 562 (D.C. Cir. 2010); and the Americans with Disabilities Act, *Hohider v. United Parcel Serv.*,

Inc., 574 F.3d 169 (3d Cir. 2009). It also has been extended to disparate impact claims. *See Chin v. Port Auth. of N.Y. & N.J.*, 685 F.3d 135, 151–52 (2d Cir. 2012). The Supreme Court recently reaffirmed use of the *Teamsters* two-stage process in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. ___, 131 S. Ct. 2541, 2552 n.7, 2561 (2011).

B. ***Teamsters*** **Is Critically Important to Certification of Employment Discrimination Class Actions**

Without *Teamsters*, certification of employment discrimination class actions, at least those seeking individualized relief, would be difficult. To maintain a class action, a plaintiff must satisfy the prerequisites of Rule 23(a) and one of the provisions of Rule 23(b). In *Dukes*, the Court held that a class seeking individualized relief must be certified under Rule 23(b)(3). 131 S. Ct. at 2557. Under Rule 23(b)(3), common issues must predominate and class action litigation must be superior to other procedures based on factors including manageability.

In *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013), the Supreme Court held that an antitrust class of two million people had been improperly certified under Rule 23(b)(3) because plaintiffs failed to show that "damages are capable of measurement on a classwide basis," and without such a showing, "[q]uestions of individual damage calculations will inevitably overwhelm questions common to the class." *Id.* at 1433. The Court did not explain why individual damage calculations would inevitably overwhelm common questions. Regardless of how

Behrend is interpreted in class cases not involving employment discrimination, it does not apply in employment discrimination cases. *Teamsters* makes clear, and *Dukes* reaffirms, that the inability to measure damages on a classwide basis is not a reason to deny certification in employment discrimination class actions.

C. The *Teamsters* Model Is Critically Important to the Enforcement of Employment Discrimination Laws

By facilitating certification of employment discrimination class actions, the *Teamsters* two-stage framework is vital to ensuring that the American workplace is open to people of all backgrounds. Private class action lawsuits are important "in accomplishing the statutory purpose of eliminating discrimination in employment"; "any restrictions on such [class] actions would greatly undermine the effectiveness of Title VII." *See Gay v. Waiters' & Dairy Lunchmen's Union*, 549 F.2d 1330, 1333 (9th Cir. 1977) (quotations omitted). The possibility of individualized relief is necessary for class actions to continue; plaintiffs are unlikely to bear the risks and expenses of litigation purely to obtain classwide injunctive relief.

Individual litigation is not a substitute for class actions for at least two reasons. First, individual employment discrimination lawsuits have a very low success rate. *See* Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL'Y REV. 103 (2009) (finding that during 1979–2006 period, plaintiff win rate for employment cases (15%) was much lower than that for non-employment cases

(51%)). Second, even if individual plaintiffs prevail, company-wide injunctive relief generally is available only via class actions. *See Lowery*, 158 F.3d at 766.

For these reasons, the ability to use the *Teamsters* model is critical to the continued viability of employment discrimination class actions and the enforcement of employment discrimination laws.

II. The District Court's Conclusion that a Class Action Would Not Be Manageable Because It Might Result in *Teamsters* Mini Trials for Up to 150 Employees Threatens the Viability of All Employment Discrimination Class Actions Seeking Individualized Relief

A. If 150 Mini Trials Are Unmanageable, Employment Discrimination Class Actions Would Have to Fit into a Small Numerical Window

The *Publicis* plaintiffs discussed *Teamsters*, explained how its two-stage framework would be superior to other means of resolving the dispute, and presented a trial plan identifying issues to be decided at each of the two stages. Pls. Mem. in Supp. of Class Cert'n, at 44-50. The district court did not identify any unusual circumstances that would make *Teamsters* mini trials more complicated in this case than in other employment discrimination class actions. Nonetheless, it denied certification under Rule 23(b)(3) partly because the possibility of 150 mini trials created manageability difficulties. Slip op. at 18.

The district court's conclusion is at odds with numerous decisions that have certified larger classes pursuing employment discrimination claims under *Teamsters*. There were over 335 class members in *Teamsters* itself. 431 U.S. at

331-32. Prior to *Dukes*, this Court approved the use of the *Teamsters* process, including mini trials, for classes exceeding 150. *Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 155, 159, 165-69 (2d Cir. 2001) (reversing denial of certification of class of about 1,300 persons). Post-*Dukes*, courts have remained unfazed by classes considerably larger than 150. *See Ellis v. Costco Wholesale Corp.*, 285 F.R.D. 492, 540 (N.D. Cal. 2012) (finding class of approximately 700 members manageable); *United States v. City of New York*, 276 F.R.D. 22, 47-51 (E.D.N.Y. 2011) (certifying class with roughly 7,000 members and explaining that "an individual claims process … strikes the appropriate balance between 'the class members' interests . . . and the efficiencies that will be obtained from resolving common questions in class proceedings").

If, notwithstanding these decisions, the district court were correct that the need to conduct up to 150 mini trials justifies the denial of certification, the range for an allowable class would be quite narrow as well as uncertain: how many persons fewer than 150 would be manageable? A class must be large enough to satisfy Rule 23(a)(1)'s numerosity requirement, which generally requires at least 20 members. *See Novella v. Westchester Cnty.*, 661 F.3d 128, 144 (2d Cir. 2011). Such a narrow and uncertain target would mean that many previously certified classes would no longer be viable.

B. Small Classes Would Rob Many Statistical Analyses of Their Power and Make Litigation of Class Actions Uneconomical

The district court's decision has broader implications than just small classes. A cap of roughly 150 members combined with the requirements for statistical analyses would sound the death knell for employment discrimination class actions.

Statistical analyses are central to employment discrimination class actions. A disparate impact claim "requires a plaintiff to make a statistical showing that a challenged employment practice has a disparate adverse impact on the protected class." *M.O.C.H.A. Soc'y, Inc. v. City of Buffalo*, 689 F.3d 263, 273 (2d Cir. 2012). Statistical analyses invariably are also introduced to prove a pattern or practice of discrimination because "gross statistical disparities … alone may in a proper case constitute prima facie proof of a pattern or practice of discrimination." *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 307-08 (1977). The import of statistical analyses on the merits of employment discrimination actions results in such analyses also playing a central role in the decision whether to certify a class.

It is difficult to support class certification of employment discrimination cases with statistical evidence when the class is small because small classes offer low statistical power. The statistical power of an analysis is the chance that a test for statistical significance "will declare an effect when there is an effect to declare. This chance depends on the size of the effect and the size of the sample." David H. Kaye & David A. Freedman, *Reference Guide on Statistics*, *in* FEDERAL JUDICIAL

CENTER, REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 83, 125-126 (2d ed. 2000). Other things being equal, statistical power is low when the size of the sample is small. *See Apsley v. Boeing Co.*, 691 F.3d 1184, 1201 (10th Cir. 2012).

Moreover, the Supreme Court's reasoning in *Dukes* increased the need for classes of a sufficient size to perform analyses with substantial statistical power. Most important, if there are independent decision-making units, the analysis must show that the disparities are "uniform" across units instead of being driven by "a small set" of the units. *Id.* at 2555. If there were several independent decision-making units in a class with fewer than 150 members of a protected group, none of those units might be sufficiently large for an analysis to reflect statistically significant disparities between the protected group and other employees.

Economics also is a factor. The additional analyses responsive to *Dukes* cost money; experts must be compensated. The smaller the class, the smaller the potential recovery, and the harder it is to justify prospective substantial expert fees. *See United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 402 (1980) (explaining that one "justification[ ] that led to the development of the class action" was "the facilitation of the spreading of litigation costs among numerous litigants with similar claims"). Thus, even if a class of under 150 members would have been sufficiently large to reflect statistically significant disparities in the types of

statistical analyses discussed in *Dukes*, it is unlikely that prospective class counsel or class members would incur the costs of testing its statistical power.

For these reasons, a rule that a class action is not superior within the meaning of Rule 23(b)(3) because of the possibility of 150 mini trials is effectively a rule that individualized relief is unavailable in employment discrimination class actions. Nothing in *Dukes* or any other authority goes so far. This Court should not let stand a decision that effectively limits employment discrimination class actions to those seeking class-wide declaratory and injunctive relief.

CONCLUSION

For the reasons set forth above, the Court should accept the 23(f) petition and, after briefing and argument, reject the portion of the district court's ruling concerning the manageability of up to 150 mini trials.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This Brief in Support of Plaintiffs-Petitioners' Petition for Leave to Appeal Pursuant to Rule 23(f) complies with the length requirement of Fed. R. App. P. 29(d) because it is ten pages, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

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