No. 15-2049

In the United States Court of Appeals for the Third Circuit

DARRYL WILLIAMS AND HOWARD BROOKS,
individually and on behalf of others similarly situated,

Plaintiffs-Appellees,

v.

JANI-KING OF PHILADELPHIA, INC., JANI-KING, INC., and
JANI-KING INTERNATIONAL, INC.,

Defendants-Appellants.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
Civil No. 09-1738-RBS
The Honorable R. Barclay Surrick

PETITION OF DEFENDANTS-APPELLANTS FOR REHEARING OR REHEARING *EN BANC*

Kerry L. Bundy
Aaron D. Van Oort
FAEGRE BAKER DANIELS LLP
2200 Wells Fargo Center
90 S. Seventh Street
Minneapolis, Minnesota 55402
Telephone: (612) 766-7000

Counsel for Defendants-Appellants

STATEMENT OF COUNSEL PURSUANT TO FEDERAL RULE OF APPELLATE PROCEDURE 35 AND THIRD CIRCUIT LOCAL RULE 35.1

I, the undersigned counsel for petitioners, express a belief, based on a reasoned and studied professional judgment, that the decision by a 2-1 majority of the panel in *Williams v Jani-King of Philadelphia, Inc.*, --- F.3d ----, 2016 WL 5111920 (3d Cir. Sept. 21, 2016) ("*Williams*"), a copy of which is attached hereto as Exhibit A, is contrary to decisions of the United States Supreme Court and the United States Court of Appeals for the Third Circuit. In particular, in an appeal under Rule 23(f) from an order certifying a class action, the panel majority expressly declined to decide what the elements of plaintiffs' legal claims required them to prove, calling that issue a premature merits inquiry. This decision conflicts with both the Supreme Court's and this Court's class action decisions, including *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011); *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305 (3d Cir. 2008); *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154 (3d Cir. 2011); and, most recently, *Harnish v. Widener University School of Law*, --- F.3d ----, 2016 WL 4363133 (3d Cir. Aug. 16, 2016), which was decided less than two months ago and which expressly requires courts to resolve the type of question that the panel majority declined to resolve in this case.

This question of class-action procedure is one of exceptional importance. It is pervasive in class-action practice, and it cuts to the heart of the question whether common questions actually exist that can be resolved in a class proceeding.

In addition, the underlying legal issue that the majority declined to address is also one of exceptional importance—whether, "as a matter of state law, controls that are necessary to protect the franchisor's own trademark, trade name, and goodwill are, by themselves, not sufficient to make the franchisor the employer of its own franchisees"? (*Williams*, Dis. Op. at 2-3.) As the dissent concluded, "Pennsylvania's highest court would not allow the very thing that defines [franchising]—the uniformity of product and control of its quality and distribution—to be used to put at risk this critical and generally beneficial sector of our economy." (*Id.* at 10-11.)

Rehearing *en banc* is necessary to restore consistency to the law of this Circuit and to address these two questions of exceptional importance.

/s/ Kerry Bundy
Kerry Bundy
Attorney for Petitioners
Defendants-Appellants

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

Jani-King respectfully requests rehearing of the panel's 2-1 split decision in *Williams v. Jani-King of Philadelphia, Inc.*, --- F.3d ----, 2016 WL 5111920 (3d Cir. Sept. 21, 2016) ("*Williams*") ("Exhibit A"), which conflicts with the class-action decisions of this Circuit and the Supreme Court, and which addresses two questions of exceptional importance.

The first question—on which there is now a conflict in this Circuit—is whether a court that is considering whether to certify a class must resolve disputes over what the elements of plaintiffs' claims require them to prove, so the court can determine what evidence is relevant to those claims and therefore whether the evidence will be common or individualized. Both the Supreme Court and this Court have repeatedly held that a court must resolve such disputes, and the dissenting judge in this case faithfully applied those decisions. (Dis. Op. at 2, 11.) The majority opinion, in contrast, characterized this question as a premature merits issue and declined to address it. (Maj. Op. at 16 ("This appeal is not the proper place for us to answer this question, and we decline to do so.").) The Court should rehear this case *en banc* to restore consistency to its law on this question of class-action practice.

The underlying question of substantive law that the dissent reached but the majority did not is also one of profound importance—whether the system controls that are both necessary to and inherent in franchising can transform a franchisor into an employer. As the dissent noted, "this opinion will most likely lead to additional

class action litigation against other franchisors." (*See* Dis. Op. at 4.) Resolving this question is another reason to rehear the case *en banc*.

ARGUMENT

I. THE MAJORITY OPINION CONFLICTS WITH SUPREME COURT AND THIRD CIRCUIT PRECEDENT GOVERNING CLASS CERTIFICATION AND INCORRECTLY RESOLVES A QUESTION OF EXCEPTIONAL IMPORTANCE TO CLASS ACTION PRACTICE.

This Court has long held that a court deciding class certification "cannot be bashful. It 'must resolve all factual or legal disputes relevant to class certification, even if they overlap with the merits—including disputes touching on elements of the cause of action.'" *Marcus v. BMW of North Am., LLC*, 687 F.3d 583, 591 (3d Cir. 2012) (quoting *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 307 (3d Cir. 2008)). Why must the court resolve disputes regarding the elements of the cause of action? "Because the nature of the evidence that will suffice to resolve a question determines whether the question is common or individual," and the court can only determine what evidence is sufficient if it settles what the elements require. *Hydrogen Peroxide*, 552 F.3d 311-12 (quotation and citation omitted); *see also In re Constar Int'l Inc. Sec. Litig.*, 585 F.3d 774, 780 (3d Cir. 2009).

Just within the last two months, this Court issued yet another opinion emphasizing the importance of resolving at the class-certification stage disputes over *what* a plaintiff must prove and *whether* the common evidence in the record is capable of meeting that standard. *See Harnish v. Widener University School of Law*, --- F.3d ----,

2016 WL 4363133 (3d Cir. Aug. 16, 2016). It is not enough, held the Court, that "a proposed class-wide method of proof is 'plausible in theory.'" *Id.* at *3 (quoting *Hydrogen Peroxide*, 552 F.3d at 311). Rather, "the court's Rule 23(b)(3) finding necessarily entails some analysis of whether the proposed class-wide evidence will *actually be sufficient* for the class to prevail on the predominant issues in the case." *Id.* (emphasis added). "[T]he law is clear," the Court added, "that a class-wide method of proof must be more than 'plausible in theory' and that a district court is to consider 'all relevant evidence and arguments' in predicting whether the class-wide proof will suffice." *Id.* at *4.

The *Williams* majority never cites *Harnish*, and the approaches taken by those two cases cannot be reconciled. *Harnish requires* courts to resolve disputes over the merits to the extent necessary to determine whether the purported common proof could be legally sufficient to meet the elements of the plaintiffs' claim. The *Williams* majority, in contrast, expressly *declined* to conduct this analysis, calling it a premature merits issue.[1] (Maj. Op. at 16 ("This appeal is not the proper place for us to answer this question, and we decline to do so.").) But *Harnish* rebutted this very argument, stating that the analysis required by Rule 23 "will often resemble a merits

[1] The majority is correct, of course, that class certification is no place for "free-ranging merits inquiries." (Maj. Op. at 16.) A court need not, and should not, decide whether a plaintiff will prevail on a claim before certifying a class. But a plaintiff seeking certification must demonstrate that the essential elements of his claim are "*capable of proof* at trial through evidence that is common to the class rather than individual to its members." *Hydrogen Peroxide*, 552 F.3d at 311-12 (emphasis added).

determination, in that it relates to plaintiffs' ability to prove the elements of their claims. But the analysis is not a merits determination." 2016 WL 4363133, at *3.

As a practical matter, the majority's approach denies courts the ability to determine whether the issues presented are truly common or not. Without resolving the threshold issue of what an element requires—and hence what evidence is relevant and sufficient to establish that element—the court cannot determine whether plaintiffs have carried their burden of demonstrating that the elements of their claims are "capable of proof at trial through evidence that is common to the class rather than individual to its members." *Hydrogen Peroxide*, at 311-12. The dissent was correct on this issue: A court *must* determine what evidence is necessary to prevail on a claim in order to address commonality and predominance. (*Id.* at 2) ("Given the rigorous obligations imposed by Rule 23, I do not see how we could avoid addressing this basic question."). The only common evidence that matters to the Rule 23 analysis is common evidence that is capable of resolving a disputed element of a claim. Evidence that is shared but irrelevant does not count in the commonality analysis. The dissent captured this point precisely:

> The predominance inquiry turns on what Pennsylvania law requires as evidence of employment status… If, as a matter of state law, controls that are necessary to protect the franchisor's own trademark, trade name, and goodwill are, by themselves, not sufficient to make the franchisor the employer of its own franchisees—and the common evidence in the record merely implicates such "franchise system controls," the Court then must determine that Plaintiffs cannot possibly show that "each element is capable of proof through evidence that is common to the class," *Hydrogen Peroxide*, 552 F.3d at 311.

(Dis. Op. at 2-3).

The dissent's approach—not the majority's—is consistent with a long line of cases in which this Court has analyzed the underlying substantive law to determine what must be proved to establish a claim in order to determine whether class certification is appropriate. *See generally Ungar v. Dunkin' Donuts of Am., Inc.*, 531 F.2d 1211, 1218-26 (3d Cir. 1976) (reviewing application of antitrust rules to franchise agreements and reversing order certifying class); *Hydrogen Peroxide*, 552 F.3d at 317 ("[T]he question at class certification stage is whether, if such [antitrust price] impact is plausible in theory, it is also susceptible to proof at trial through available evidence common to the class. When the latter issue is genuinely disputed, the district court must resolve it after considering all relevant evidence."); *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 605-10 (3d Cir. 2012) (determining whether plaintiffs' and defendant's conduct must be considered in deciding whether to certify a consumer fraud act claim); *Behrend v. Comcast Corp.*, 655F.3d 182, 191-95 (3d Cir. 2011) (analyzing antitrust plaintiffs' ability to prove the relevant geographic market through common evidence), *rev'd on other grounds*, 133 S. Ct. 1426 (2013).

The Court should rehear this appeal to resolve the conflict between the majority opinion and this Court's long-standing law. In addition, if this Court does not take the case *en banc* and resolve the critical issue, both the district court and the parties will be left without any controlling decision by this Court on what type of

control Pennsylvania law requires to establish an employment relationship. The majority correctly predicted that the Pennsylvania Supreme Court would use a multifactor test to determine the existence of an employment relationship, and it held that the right to control is the most important factor under that test. (Maj. Op. at 14.) But the majority erred in refusing to address the further, critical question of whether franchise system controls are the type of controls that matter under this test. That is the crux of the parties' dispute, and the majority's decision not to reach it simply ensures another appeal to this Court after trial below. There is also a strong likelihood that the time and costs spent on remand will be wasted, because the only judge from this Court who reached the issue concluded that franchise system controls necessary to protect a franchisor's trademark, trade name, and goodwill alone are not sufficient to create an employment relationship under Pennsylvania law. (Dis. Op. at 11.) The dissent distinguished between franchise system controls and "day-to-day supervisory control" and held that a court must "go beyond the mere use of labels like 'franchisor' and 'franchisee' and assess whether the controls at issue exceed what is necessary to protect a franchisor's trademark, trade name, or goodwill." (*Id.* at 11-12.)

Applying that standard, the dissent found that "each of the contractual provisions and policies identified by the district court is simply an example of a common franchise system control, not a manifestation of the type of day-to-day supervisory control that indicates an employment relationship." (Dis. Op. at 12.) Setting those franchise system controls aside, the dissent found "very little—if any—

common evidence tending to prove an employer-employee relationship between Jani-King and its franchisees." (*Id.* at 13 (citation omitted).) This conclusion is not only correct, but if adopted by a majority of this Court, it would compel reversal of the order certifying a class.

II. THIS APPEAL PRESENTS A SECOND ISSUE OF EXCEPTIONAL IMPORTANCE: WHETHER FRANCHISE SYSTEM CONTROLS ESTABLISH AN EMPLOYMENT RELATIONSHIP UNDER PENNSYLVANIA LAW.

The Court should also rehear this appeal *en banc* because the underlying substantive issue—whether common franchise system controls establish an employment relationship—is a question of exceptional importance, and the majority's decision not to resolve it "threatens the viability of [the] basic economic bedrock" of franchising in Pennsylvania. (Dis. Op. at 1.)

Both the majority and the dissent recognized that this Court has long held that "[s]ome degree of control by the franchisor over the franchisee would appear to be inherent in the franchise relationship and may even be mandated by federal [trademark] law." (Maj. Op. at 20; Dis. Op. at 6 (both quoting *Drexel v. Union Prescription Centers, Inc.*, 582 F.2d 781, 786 (3d Cir. 2008).) Yet the majority allowed the case to proceed as a class without determining what types of controls can be exercised without triggering an employment relationship. (Maj. Op. at 16.)

Under the majority's approach, an employment-classification claim can be brought as a class action against every Pennsylvania franchisor simply by invoking the franchise documents (*e.g.*, franchise agreements, manuals, etc.). This is not because the

plaintiffs will ultimately prevail on the merits: As the majority made clear, "Jani-King may ultimately be correct" that the franchise system controls present here are insufficient to transform Jani-King's franchisees into employees under Pennsylvania law. (Maj. Op. at 16.) Rather, every franchisor can be sued in a class action because, under the majority's approach, the district courts will be powerless to conclude that the controls imposed by the implicated franchisor's documents do not reflect the type of day-to-day supervisory control that matters under Pennsylvania law. As the dissent rightly observed, franchise system controls "constitute an *essential aspect* of the franchising mechanism." (*Id.* at 5 (emphasis added).) The majority opinion will therefore "most likely lead to additional class action litigation against other franchisors." (*Id.* at 4.) This has profound implications for Pennsylvania franchisors because "a district court's certification order often bestows upon plaintiffs extraordinary leverage." *Hydrogen Peroxide*, 552 F.3d at 320 (citation omitted).

The difference between franchise system controls and day-to-day supervisory control is an issue of exceptional importance under Pennsylvania law, both because of its consequences and because many other courts have held, as the dissent did, that franchise system controls are insufficient to create an employment relationship. *See Juarez v. Jani-King of California, Inc.*, 273 F.R.D. 571, 583 (N.D. Cal. 2011). The Court should grant Jani-King's petition to address this issue.

CONCLUSION

The Court should rehear this appeal *en banc* to address the two questions of exceptional importance it presents and to restore consistency in Third Circuit law governing the analysis required by Rule 23.

Dated: October 5, 2016

Respectfully submitted,

/s/ Kerry L. Bundy
Kerry L. Bundy (MN #266917)
Aaron D. Van Oort (MN #315539)
Faegre Baker Daniels LLP
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402-3901
Phone: 612-766-7000
Fax: 612-766-1600
kerry.bundy@faegrebd.com
aaron.vanoort@faegrebd.com

Attorneys for Defendants-Appellants Jani-King of Philadelphia, Inc., Jani-King, Inc., and Jani-King International, Inc.

CERTIFICATE OF SERVICE

I, Kerry L. Bundy, certify that on October 5, 2016, Petition of Defendants-Appellants for Rehearing or Rehearing En Banc was served on the following counsel for Plaintiffs-Appellees via the CM/ECF system:

Shannon Liss-Riordan
Adelaide Pagano
LICHTEN & LISS-RIORDAN, P.C.
729 Boylston St., Ste. 2000
Boston, MA 02166

Wayne A. Ely
David J. Cohen
KOLMAN ELY, P.C.
414 Hulmeville Ave.
Penndel, PA 19047

Patrick Howard
Saltz Mongeluzzi Barrett & Bendesky, PC
1650 Market Street, 52nd Floor
Philadelphia, PA 19103

Dated: October 5, 2016

Respectfully submitted,

/s/ Kerry L. Bundy

Kerry L. Bundy
Faegre Baker Daniels LLP
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402-3901
Phone: 612-766-7000
Fax: 612-766-1600