No.

IN THE
Supreme Court of the United States

WAL-MART STORES, INC.,

Petitioner,

v.

BETTY DUKES, PATRICIA SURGESON, EDITH ARANA, KAREN WILLIAMSON, DEBORAH GUNTER, CHRISTINE KWAPNOSKI, CLEO PAGE, on behalf of themselves and all others similarly situated,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In a sharply divided 6-5 decision that conflicts with many decisions of this Court and other circuits, the en banc Ninth Circuit affirmed the certification of the largest employment class action in history. This nationwide class includes every woman employed for any period of time over the past decade, in any of Wal-Mart's approximately 3,400 separately managed stores, 41 regions, and 400 districts, and who held positions in any of approximately 53 departments and 170 different job classifications. The millions of class members collectively seek billions of dollars in monetary relief under Title VII of the Civil Rights Act of 1964, claiming that tens of thousands of Wal-Mart managers inflicted monetary injury on each and every individual class member in the same manner by intentionally discriminating against them because of their sex, in violation of the company's express anti-discrimination policy.

The questions presented are:

I. Whether claims for monetary relief can be certified under Federal Rule of Civil Procedure 23(b)(2)—which by its terms is limited to injunctive or corresponding declaratory relief—and, if so, under what circumstances.

II. Whether the certification order conforms to the requirements of Title VII, the Due Process Clause, the Seventh Amendment, the Rules Enabling Act, and Federal Rule of Civil Procedure 23.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The caption contains the names of all the parties to the proceeding below.

Pursuant to this Court's Rule 29.6, undersigned counsel state that Wal-Mart Stores, Inc. has no parent corporation and that no other publicly held corporation owns 10% or more of its stock.

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The opinion of the en banc court of appeals (App. 1a–161a) is published at 603 F.3d 571. Superseded panel opinions are reported at 509 F.3d 1168 and 474 F.3d 1214. The district court's certification order (App. 162a–283a) is published at 222 F.R.D. 137. A related evidentiary order is published at 222 F.R.D. 189.

JURISDICTION

The judgment of the court of appeals was entered on April 26, 2010. On July 7, 2010, Justice Kennedy extended the time for filing this petition to August 25, 2010. No. 10A19. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of Title VII, the Rules Enabling Act, and Federal Rule of Civil Procedure 23 are reproduced in the Appendix (at 286a–302a).

STATEMENT

The district court certified a sprawling nationwide class consisting of all current and former female employees of Wal-Mart Stores, Inc., estimated at the time to comprise at least 1.5 million women. The Ninth Circuit's 6-5 en banc decision upholding the certification order adopts standards that violate the rights of both defendants and absent class members and contradicts decisions of this Court and other circuits.

The Ninth Circuit created an acknowledged three-way circuit split on the standard for determining when claims for monetary relief can be certified

as a class action under Federal Rule of Civil Procedure 23(b)(2), which on its face applies only to claims for injunctive or corresponding declaratory relief. The majority expressly rejected both of the standards previously articulated in the circuits (one of which had been applied by the district court) and announced a new standard, thus exacerbating the long-standing conflict and confusion on this issue in the lower courts. This Court has previously granted review to address variants of this issue, but has never decided it. It is now time to do so.

The Ninth Circuit also departed from this Court's precedents, and created conflicts with virtually every other circuit, on several other important and recurring issues in class action and employment law. The majority absolved plaintiffs from adducing "significant proof" of an unlawfully discriminatory practice or policy that affected all class members in the same manner, as required by this Court and other circuits. The court then swept aside the need to determine millions of individual issues by relieving plaintiffs of their burden of proving intent and injury and by stripping Wal-Mart of its right to assert crucial defenses explicitly established by Title VII. This approach, which violates the Rules Enabling Act, the Due Process Clause, and the Seventh Amendment, contradicts numerous decisions of this Court and other circuits and warrants review.

1. Wal-Mart is the Nation's largest private employer. At the time of certification (in 2004), it operated approximately 3,400 stores in the United States and employed more than a million people. App. 163a.

At the time of certification, Wal-Mart's complex retail operation functioned as follows: It was divided

into seven divisions, which were split into 41 separate regions and then further divided into approximately 400 individual districts. App. 114a (Ikuta, J., dissenting). Each of Wal-Mart's regions consisted of 80 to 85 stores, employing 80 to 500 people per store. *Ibid.* Store managers who ran individual stores were responsible for hiring and promoting hourly employees in their respective stores. *Ibid.* Within each store, assistant managers (who were salaried) reported to store managers. *Ibid.* The company's hourly retail employees worked in 53 different departments and 170 different job classifications, including cashiers, team leads, and department managers. *Ibid.*

Wal-Mart's company-wide policy bars discrimination based on gender. As the district court recognized, "Wal-Mart has earned national diversity awards and its executives discuss diversity and include it in company handbooks and trainings. The company has diversity goals, performance assessments, and penalties for EEO violations." App. 195a (citations omitted).

The six class representatives are current or former Wal-Mart employees. They allege that, by delegating substantial discretion to individual managers, Wal-Mart "fosters or facilitates gender stereotyping and discrimination, . . . and that this discrimination is common to all women who work or have worked in Wal-Mart stores." App. 5a. On behalf of all women employed at any Wal-Mart retail store since 1998, they seek "injunctive and declaratory relief, back pay, and punitive damages, but not traditional 'compensatory' damages." *Ibid.*

Over Wal-Mart's objections, the district court determined that plaintiffs' evidence satisfied the re-

quirements of Rule 23(a) and (b)(2) and certified a class of "[a]ll women employed at any Wal-Mart domestic retail store at any time since December 26, 1998, who have been or may be subjected to Wal-Mart's challenged pay and management track promotions policies and practices." App. 283a.

2. On Rule 23(f) review, the Ninth Circuit issued three sharply divided decisions—a 2-1 panel decision, a 2-1 amended panel decision, and a 6-5 en banc decision—in which the majority voted to affirm, in substantial part, the certification order. App. 111a; *see also* 509 F.3d 1168; 474 F.3d 1214. The dissenters maintained that this unprecedented certification "departs from the language and intent of Rule 23 of the Federal Rules of Civil Procedure, ignores Supreme Court mandates, and neglects the rights of defendants." App. 113a (Ikuta, J., dissenting). And "[i]t sacrifices the rights of women injured by sex discrimination." 509 F.3d at 1200 (Kleinfeld, J., dissenting).

a. With respect to Rule 23(a)'s "commonality" requirement, the en banc majority concluded that "[e]vidence of Wal-Mart's subjective decision-making policies suggests a common legal or factual question regarding whether Wal-Mart's policies or practices are discriminatory." App. 78a. While acknowledging "the absence of a specific discriminatory policy," the majority held that plaintiffs were not required to establish such a policy at the certification stage, and that Wal-Mart's objections went to the "merits" of plaintiffs' claims. *Id.* at 59a.

As to the "typicality" requirement of Rule 23(a), the majority simply declared: "Even though individual employees in different stores with different managers may have received different levels of pay or

may have been denied promotion or promoted at different rates, because the discrimination they claim to have suffered occurred through alleged common practices—e.g., excessively subjective decision making in a corporate culture of uniformity and gender stereotyping— . . . their claims are sufficiently typical . . . ." App. 80a.

Regarding Rule 23(b)(2)'s applicability to monetary relief claims, the majority recognized that the Ninth Circuit had "previously joined the Second Circuit in adopting a test that focuses on the plaintiffs' subjective intent in bringing a lawsuit," while "several other circuits use the 'incidental damages standard' that was first enunciated by the Fifth Circuit." App. 85a. Rather than reconciling this conflict, however, the majority rejected the Ninth Circuit's previous standard and "instead" adopted a third standard under which monetary claims may be certified under Rule 23(b)(2) if they are not "superior in strength" (as determined using a new multi-factor test) to the requested injunction. *Id.* at 86a. Although most of the class members are former employees who lack standing even to secure injunctive or declaratory relief and collectively seek to recover *billions* of dollars in backpay, the Ninth Circuit affirmed the certification order, announcing a categorical rule that Title VII backpay claims are "fully consistent with the certification of a Rule 23(b)(2) class action." *Id.* at 92a.

While the majority vacated the certification of plaintiffs' claims for punitive damages, it suggested that those claims might be certifiable on remand under Rule 23(b)(2) or (b)(3) (App. 99a), rejecting the need for any "individualized punitive damages determinations." *Id.* at 98a.

The court also rejected Wal-Mart's argument that, by eliminating traditional individual hearings regarding entitlement to monetary relief, the district court's trial plan violated its "due process rights, as well as section 706(g)(2) of Title VII, the Rules Enabling Act, and the Supreme Court's decision in [*International Brotherhood of*] *Teamsters* [v. *United States*], 431 U.S. [324], 359–60 [(1977)]." App. 104a & nn.51–53. The court "express[ed] no opinion regarding Wal-Mart's objections to the district court's tentative trial plan (or that trial plan itself)," but instead noted that "there are a range of possibilities." *Id.* at 105. The court suggested that a statistical sampling method or the district court's formula plan might be invoked. It nevertheless declined to endorse either approach. *Id.* at 105a–110a & n.57 (citing *Hilao* v. *Estate of Marcos*, 103 F.3d 767, 782–87 (9th Cir. 1996)).

b. Judge Graber concurred on the ground that it makes no difference for class certification purposes whether the employer had 500 or 500,000 female employees. App. 111a–112a.

c. Judge Ikuta, dissenting, demonstrated that each of the majority's principal holdings is inconsistent with this Court's precedents or in conflict with the decisions of other circuits. *See*, *e.g.*, App. 121a–122a, 138a–139a, 154a–157a. She showed that the decision is irreconcilable with *General Telephone Co. of the Southwest* v. *Falcon*, 457 U.S. 147 (1982), which is both "the sole Supreme Court case addressing Rule 23(a) in the Title VII discrimination context" and "directly on point in this case." App. 122a. She explained that "[a]ny reasonable scrutiny of the evidence in this case compels the conclusion that although the six plaintiffs here may have individualized claims of discrimination, they cannot represent

a class of 1.5 million past and present employees." *Id.* at 138a.

Judge Ikuta also challenged the majority's invocation of Rule 23(b)(2), not only because it "br[oke] with the Second Circuit . . . as well as the Fifth, Sixth, Seventh, and Eleventh Circuits" and "creat[ed a] three-way circuit split" (App. 154a n.25), but also because it conflicts with the Rule's language and history and with this Court's precedents and the Rules Enabling Act. *Id.* at 154a–160a. And she established that this case cannot be tried in a manner that protects the statutory and constitutional rights of Wal-Mart and the absent class members. *Id.* at 145a–147a.

d. Chief Judge Kozinski also wrote a separate dissent, directly responding to Judge Graber's concurrence:

> Maybe there'd be no difference between 500 employees and 500,000 employees if they all had similar jobs, worked at the same half-billion square foot store and were supervised by the same managers. But the half-million members of the majority's approved class held a multitude of jobs, at different levels of Wal-Mart's hierarchy, for variable lengths of time, in 3,400 stores, sprinkled across 50 states, with a kaleidoscope of supervisors (male and female), subject to a variety of regional policies that all differed depending on each class member's job, location and period of employment.

App. 161a. "They have little in common," he concluded, "but their sex and this lawsuit." *Ibid.*

REASONS FOR GRANTING THE PETITION

The class certified by the district court was estimated to include over 1.5 million former and current female Wal-Mart employees who held different jobs in different stores in different States under the supervision of different managers. The class is larger than the active-duty personnel in the Army, Navy, Air Force, Marines, and Coast Guard *combined*—making it the largest employment class action in history by several orders of magnitude. *See* App. 244a. The majority decision conflicts with every pertinent decision of this Court and many decisions of other circuits on numerous important, recurring issues in class-action litigation, both in discrimination cases and generally.

This Court has cautioned against "judicial inventiveness" in class-action procedure, warning that "the rulemakers' prescriptions for class actions may be endangered by those who embrace Rule 23 too enthusiastically just as they are by those who approach the Rule with distaste." *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 620, 629 (1997) (internal quotation marks and alterations omitted). The Court has therefore "call[ed] for caution" where, as here, "individual stakes are high and disparities among class members great." *Id.* at 625. The majority's decision demonstrates that "the certification in this case does not follow the counsel of caution." *Ibid.*

As attested by the widespread attention this case has received in the national and academic press, it is one of the most important class-action decisions since the modern Rule 23 was adopted in 1966 and warrants this Court's review.

I. THIS COURT SHOULD GRANT REVIEW TO DECIDE WHETHER AND HOW RULE 23(B)(2) APPLIES TO MONETARY CLAIMS AND RESOLVE THE THREE-WAY CONFLICT ON THIS QUESTION

The majority decision expressly created a three-way circuit split on the standard for determining whether claims for monetary relief can be certified under Rule 23(b)(2). App. 85a–88a. The Ninth Circuit rejected the minority standard (applied now only in the Second Circuit) as well as the majority standard (applied in every other circuit to have considered the issue) in favor of a new multi-factor inquiry. This conflict warrants review, and all the more so because the Ninth Circuit's decision is so problematic. The issue frequently arises in class-action litigation and should be resolved consistently regardless of the forum in which suit is brought.

Rule 23(b)(2) allows class certification if the defendant "has acted or refused to act on grounds that apply generally to the class, so that final *injunctive* relief or corresponding *declaratory* relief is appropriate *respecting the class as a whole*." Fed. R. Civ. P. 23(b)(2) (emphases added). Certification under Rule 23(b)(2) is "mandatory"—it does not require notice to absent class members, and it does not permit them to opt out of the class. *See Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815, 842–47 (1999).

This Court has recognized the constitutional problems inherent in an overbroad application of mandatory certifications, *id.* at 842, and it has suggested that "actions seeking monetary damages . . . can be certified only under Rule 23(b)(3), which permits opt-out," requires notice to absent class members, and imposes strict requirements of predomi-

nance, superiority, and manageability, "and not under [Rule 23(b)(2)], which do[es] not," *Ticor Title Ins. Co.* v. *Brown*, 511 U.S. 117, 121 (1994) (per curiam); *see also Amchem*, 521 U.S. at 614–17. The Court has explained that Rule 23(b)(3)'s "predominance" requirement—which provides that common issues must "predominate" over individual issues—is a "vital prescription" governing monetary claims that is "far more demanding" than Rule 23(a)'s commonality requirement. *Amchem*, 521 U.S. at 622–24. Plaintiffs here cannot meet the Rule 23(b)(3) requirements, which is why they are invoking Rule 23(b)(2).

This Court has twice granted certiorari to consider variants of this issue. *Adams* v. *Robertson*, 520 U.S. 83 (1997) (per curiam); *Ticor*, 511 U.S. 117. In neither case, however, did the Court ultimately decide whether, or in what circumstances, Rule 23(b)(2) can be used to certify monetary claims.

This case is an ideal vehicle for providing much-needed clarity to the lower courts on this important and recurring question of class-action procedure.

A. The Circuits Have Split Three Ways

Although Rule 23(b)(2) authorizes certification only of claims for "injunctive relief or corresponding declaratory relief," some courts have relied on an Advisory Committee Note—which says that this provision does not apply where the relief sought "relates . . . predominantly to money damages"—to conclude that Rule 23(b)(2) allows certification of *some* monetary claims. Even before the Ninth Circuit's decision in this case, there was an acknowledged "split among circuits on how a court determines whether monetary relief predominates in a Rule 23(b)(2) class suit." *Richards* v. *Delta Air Lines, Inc.*, 453 F.3d 525, 531 n.8 (D.C. Cir. 2006). The Ninth Circuit's deci-

sion "aggravate[d] the already-existing inconsistency between the circuits" by creating a "three-way circuit split." App. 154a n.25 (Ikuta, J., dissenting).

The Fifth, Sixth, Seventh, and Eleventh Circuits have adopted the so-called "incidental damages" test, which prohibits certification under Rule 23(b)(2) where plaintiffs seek monetary relief unless the relief sought will "flow directly from liability to the class *as a whole* on the claims forming the basis of the injunctive or declaratory relief." *Allison* v. *Citgo Petroleum Corp.*, 151 F.3d 402, 415 (5th Cir. 1998); *see also Reeb* v. *Ohio Dep't of Rehab. & Corr.*, 435 F.3d 639, 649–50 (6th Cir. 2006); *Cooper* v. *Southern Co.*, 390 F.3d 695, 720 (11th Cir. 2004); *Lemon* v. *Int'l Union of Operating Eng'rs*, 216 F.3d 577, 580–81 (7th Cir. 2000); *cf. Thorn* v. *Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 330 n.25 (4th Cir. 2006).

The Second Circuit, in contrast, has expressly rejected *Allison*'s "incidental damages" standard, adopting instead a standard that turns on plaintiffs' subjective intent in bringing suit. *Robinson* v. *Metro-North Commuter R.R. Co.*, 267 F.3d 147, 164 (2d Cir. 2001). Until the decision below, the Ninth Circuit agreed, *Molski* v. *Gleich*, 318 F.3d 937, 949–50 (9th Cir. 2003), and both the district court and the three-judge panel followed *Molski*. *See* App. 237a; 509 F.3d at 1186; 474 F.3d at 1234.

The Ninth Circuit criticized and expressly rejected both of these conflicting lines of authority—deriding its own *Robinson-Molski* standard as "fatally flawed," "troubling," "nebulous," "incomplete," and "imprecise" (App. 86a)—but nonetheless affirmed the certification order. *Id.* at 86a–87a; *id.* at 154a n.25 (Ikuta, J., dissenting). For a new test, the court looked not to the language of Rule 23(b)(2) it-

self, but instead to what it described as the "advisory committee *requirement*" that "the appropriate final relief" not relate "exclusively or predominantly to money damages." *Id.* at 85a (emphasis added).

The majority announced that, to satisfy Rule 23(b)(2), "a class must seek only monetary damages that are not 'superior in strength, influence, or authority' to injunctive and declaratory relief" (App. 86a (quoting *Merriam-Webster's Collegiate Dictionary* 978 (11th ed. 2004))), as determined using "[f]actors such as whether the monetary relief sought determines the key procedures that will be used, whether it introduces new and significant legal and factual issues, whether it requires individualized hearings, and whether its size and nature—as measured by recovery per class member—raise particular due process and manageability concerns." *Id.* at 88a. Under this amorphous new test, "no single factor would be determinative" (*ibid.*), and the court "should also consider *any other factors* relevant to whether monetary relief predominates." *Id.* at 97a (emphasis added).

The majority, however, deemed one factor irrelevant: the total *amount* of monetary relief sought. *See* App. 89a. In other words, in deciding whether the "strength, influence, or authority" of the monetary relief request outweighs that of injunctive relief, it is irrelevant that the class members are seeking billions of dollars for their alleged individual injuries.

B. The Ninth Circuit's Standard Is Clearly Wrong

None of the three existing standards is wholly consistent with Rule 23(b)(2)'s language and structure. Limited by its terms to injunctive or corre-

sponding declaratory relief, this provision does not authorize certification of *any* claims for monetary relief. *Cf. Ticor*, 511 U.S. at 121. But the Ninth Circuit's new standard marks the most dramatic departure from the Rule's text and history and cannot be squared with this Court's decision in *Ortiz*.

Ortiz, which defined the bounds and characteristics of a permissible Rule 23(b)(1) "limited fund" class action, teaches that the mandatory provisions of Rule 23(b) must be applied carefully to ensure that the procedural class-action device does not impair the rights of either the defendant or absent class members. App. 138a–140a (Ikuta, J., dissenting). The mandatory provisions can be used to certify *only* classes that rest comfortably within the historical antecedents of Rule 23(b). *Ortiz*, 527 U.S. at 842–45. The cases cited by the Advisory Committee to illustrate the mandatory Rule 23(b)(2) category are vintage, *Brown*-era desegregation actions. App. 149a n.22 (Ikuta, J., dissenting) (citing cases). They bear no relation to a modern intentional discrimination case, which is essentially a tort claim for unliquidated damages. *See ibid.*; *Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 264 (1989) (O'Connor, J., concurring in judgment).

Rule 23(b)(2) expressly permits certification only of claims brought on "grounds that apply generally to the class" such that prospective relief "is appropriate respecting the class as a whole"; appellate courts have construed these requirements under the rubric of "cohesion." *Barnes* v. *Am. Tobacco Co.*, 161 F.3d 127, 143 (3d Cir. 1998) (collecting cases). Especially where, as here, monetary relief depends on the unique circumstances of each individual class member's case and does not automatically flow from a class-wide finding of liability, no such natural cohe-

siveness exists and certification under Rule 23(b)(2) is inappropriate. *Allison*, 151 F.3d at 413; *see also Thorn*, 445 F.3d at 330; *Lemon*, 216 F.3d at 580.

Moreover, due process requires both notice and the opportunity to opt out of the class in actions seeking monetary relief. *See Ortiz*, 527 U.S. at 848; *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 811–12 (1985). No provision of Rule 23 authorizes opt-outs in (b)(2) actions—in sharp contrast to (b)(3), which *requires* opt-outs. *See Ticor*, 511 U.S. at 121. Although some courts, including the district court here (App. 243a), have purported to confer opt-out rights on (b)(2) class members, Rule 23 does not authorize this procedure and this Court has repeatedly warned the lower courts against re-writing the Rule. *Amchem*, 521 U.S. at 620; *see also Leatherman* v. *Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168–69 (1993); *Harris* v. *Nelson*, 394 U.S. 286, 298 (1969).

Indeed, the very fact that the district court saw the need to create opt-out rights (App. 243a) signals that this case is not appropriate for (b)(2) certification. *See Bolin* v. *Sears, Roebuck & Co.*, 231 F.3d 970, 976 (5th Cir. 2000); *Jefferson* v. *Ingersoll Int'l Inc.*, 195 F.3d 894, 897–99 (7th Cir. 1999). The Ninth Circuit's ruling that the district court could dispense with such notice and opt-out rights as to billions of dollars of backpay claims (*see* App. 99a–100a) does not cure the problem; rather, it violates due process.

In any event, even if some monetary claims could be certified under Rule 23(b)(2), the claims for monetary relief "predominate" in this case under *any* standard because at least two-thirds of the class members are former employees who lack standing to

secure injunctive or declaratory relief. *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 103 (1983); *Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 227, 241 (1937). As other circuits hold, "certification under Rule 23(b)(2) is appropriate only if members of the proposed class would benefit from the injunctive relief they request." *In re Monumental Life Ins. Co.*, 365 F.3d 408, 416 (5th Cir. 2004); *see also*, *e.g.*, *In re New Motor Vehicles Canadian Exp. Antitrust Litig.*, 522 F.3d 6, 15–16 (1st Cir. 2008). Although the majority of the class is constitutionally precluded from seeking the injunctive or corresponding declaratory relief that is actually authorized by Rule 23(b)(2), the Ninth Circuit purported to "solve" this problem by limiting the class to those persons who were employed on or after the date the operative complaint was filed. App. 100a–102a. But a plaintiff who left the company the day after the complaint was filed has no more standing to obtain injunctive or declaratory relief than a person who quit the day before; each plaintiff must have standing to secure the requested relief throughout the lawsuit. *See*, *e.g.*, *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

The fact that plaintiffs are seeking monetary relief in the form of backpay, as opposed to compensatory damages, does not alter the predominance inquiry. While backpay is a form of monetary relief that has been characterized by some courts as equitable, it is simply monetary compensation for lost pay. "Congress treated backpay as equitable in Title VII only in the narrow sense that [Title VII] allowed backpay to be awarded *together with* equitable relief." *Great-West Life & Annuity Ins. Co.* v. *Knudson*, 534 U.S. 204, 218 n.4 (2002) (internal quotation marks, alteration and citation omitted). Although

the majority held that backpay is always available in a 23(b)(2) class (App. 92a), it recognized that other courts hold that backpay "weighs on the monetary side of the scale." *Id.* at 91a n.40. *See Thorn*, 445 F.3d at 331; *Eubanks* v. *Billington*, 110 F.3d 87, 95 (D.C. Cir. 1997). Even the panel in this very case held that "Plaintiffs' request for back pay weighs *against* certification under Rule 23(b)(2)." 509 F.3d at 1187. As the Fourth Circuit explained, "certification under Rule 23(b)(2) is improper when the predominant relief sought is not injunctive or declaratory, even if [it] is equitable in nature." *Thorn*, 445 F.3d at 331.

This Court has strongly suggested that claims for monetary relief can proceed *only* under Rule 23(b)(3), with its attendant procedural protections and stricter certification standards. *Ortiz*, 527 U.S. at 861–62; *Amchem*, 521 U.S. at 623–24. The Court has recognized that the constitutional dimensions of this question require absolute fidelity to the text of Rule 23. *Ticor*, 511 U.S. at 121. And the Court has held that courts may not alter the Rule to fit a particular case. *Amchem*, 521 U.S. at 620. The Ninth Circuit's approval of the mandatory certification of claims collectively seeking *billions* of dollars in monetary relief cannot be reconciled with these precedents.

C. The Question Is Important And Recurring

The three-way circuit conflict on the applicability of Rule 23(b)(2) to claims for monetary relief warrants review. Rule 23 is a uniform federal standard that should apply equally regardless of where a lawsuit is filed. Now, however, class claims for monetary relief are subject to one standard in New York, another in California, and yet another virtually everywhere in between. This case could not have been

certified under the "incidental damages" standard. The district court certified the case under a different standard (*Robinson-Molski*) (App. 237a–240a) that the majority held was fatally flawed. *Id.* at 86a–87a. Although the district court plainly abused its discretion in applying the wrong standard, *Koon* v. *United States*, 518 U.S. 81, 100 (1996), the majority nonetheless affirmed certification under a third, newly announced, multi-factor approach that had never been applied before.

The question whether and when monetary claims can be certified under Rule 23(b)(2) recurs repeatedly in class-action litigation. The mature and acknowledged circuit conflict will encourage forum shopping. Plaintiffs who cannot satisfy the stringent requirements of Rule 23(b)(3) (like plaintiffs here) have an incentive to bring suit under Rule 23(b)(2), in the hopes of securing a mandatory certification under the Ninth Circuit's malleable multi-factor test. Nationwide class actions will therefore gravitate to the Ninth Circuit. This Court has expressed an interest in resolving this conflict in some case. *Cf. Ticor*, 511 U.S. at 121. The Court should do so here, especially because the Ninth Circuit's test is incorrect and raises grave constitutional concerns.

II. THE DECISION BELOW CREATES OR EXACERBATES NUMEROUS ADDITIONAL CONFLICTS CONCERNING RULE 23, TITLE VII, THE DUE PROCESS CLAUSE, THE SEVENTH AMENDMENT, AND THE RULES ENABLING ACT

The overarching question posed by this certification is whether (as the majority thought) the procedural class device can trump the demands of the substantive law, or whether (as Congress has required,

and this Court has repeatedly held) a class can be certified only if such certification protects the substantive rights of plaintiffs, defendants, and absent class members. *See Amchem*, 521 U.S. at 629 (Rule 23 "must be interpreted with fidelity to the Rules Enabling Act and applied with the interests of absent class members in close view"). The Ninth Circuit's subordination of the substantive law to the procedural class device runs counter to this Court's decisions construing Rule 23 and Title VII.

The Rules Enabling Act provides that procedural rules may not "abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b). In holding that the widely diverging intentional discrimination claims that might be held by more than a million individual employees meet Rule 23(a)'s requirements of commonality, typicality, and adequacy, the majority impermissibly relieved plaintiffs of their burden of proving an unlawfully discriminatory practice or policy that affected all class members in the same manner. And to avoid what otherwise would be intractable manageability problems, the majority approved stripping Wal-Mart of its statutory and constitutional rights to defend itself against plaintiffs' accusations of intentional misconduct. In both respects the majority's decision remakes the substantive law in violation of the Rules Enabling Act. *Ortiz*, 527 U.S. at 845 ("no reading of [Rule 23] can ignore the Act's mandate"); *Amchem*, 521 U.S. at 612–13.

A. The Ninth Circuit Improperly Relieved Plaintiffs Of Their Burden Of Proof

According to the Ninth Circuit majority, "the district court found that Plaintiffs here have provided evidence sufficient to support their contention that

company-wide corporate practices and policies—including [1] excessive subjectivity in personnel decisions, [2] gender stereotyping, and [3] maintenance of a strong corporate culture—affected both compensation and promotion of all Plaintiffs in a common manner." App. 83a. The court's rulings on these three aspects of plaintiffs' theory produced a bevy of additional conflicts.

1. *Evidence of Excess Subjectivity*. The district court certified plaintiffs' disparate treatment claim, which "comprises two elements: [a] an employment practice, and [b] discriminatory intent." *Ledbetter* v. *Goodyear Tire & Rubber Co.*, 550 U.S. 618, 631 (2007), *superseded on other grounds by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, § 3, 123 Stat. 5, 5–6.

a. *The Employment Practice Element.* Although "plaintiff[s] must begin by identifying the specific employment practice that is challenged," *Watson* v. *Fort Worth Bank & Trust*, 487 U.S. 977, 994 (1988) (plurality), the Ninth Circuit majority acknowledged "the absence of a specific discriminatory policy promulgated by Wal-Mart." App. 59a. In fact, Wal-Mart's company-wide policy expressly bars discrimination based on gender and affirmatively promotes diversity. *Id.* at 195a. The majority nonetheless accepted plaintiffs' theory that the millions of pay and promotion decisions made by tens of thousands of Wal-Mart managers in thousands of stores over the course of a decade or more were all made pursuant to a company-wide "policy" of discretionary decision-making, which plaintiffs call "excessive subjectivity." *Id.* at 163a–164a, 173a. But this Court has held that "an employer's policy of leaving promotion decisions to the unchecked discretion of lower level supervisors should itself raise no inference of discriminatory

conduct." *Watson*, 487 U.S. at 990; *see also id.* at 991 (plurality) ("standardized testing techniques" cannot measure "common sense, good judgment, originality, ambition, loyalty, and tact").

Accordingly, plaintiffs who premise a Title VII disparate treatment claim on a policy of "excess subjectivity" must come forward with "[s]ignificant proof that an employer operated under a general policy of discrimination" *before* a class can be certified; simply pointing to excess subjectivity is not enough. *Falcon*, 457 U.S. at 159 n.15 (rejecting class certification and establishing certification requirements for Title VII claims); *see Watson*, 487 U.S. at 990. As Judge Ikuta explained, such proof is required because, "to maintain a company-wide class action based on discrimination, the plaintiff must bridge the 'wide gap' between: (1) the plaintiff's own discriminatory treatment; and (2) the existence of a class that has suffered the same injury as the plaintiff as a result of a company-wide discriminatory policy." App. 119a (quoting *Falcon*, 457 F.3d at 157).

The majority, however, dismissed *Falcon*'s "significant proof" standard as a "hypothetical in clear dicta" (App. 42a n.15), thereby creating a conflict with numerous decisions from other circuits, which faithfully apply *Falcon* in the context of "excess subjectivity" challenges. *Garcia* v. *Johanns*, 444 F.3d 625, 631–32 (D.C. Cir. 2006) ("Following *Falcon*, we have required a plaintiff seeking to certify a disparate treatment class under Title VII to make a significant showing to permit the court to infer that members of the class suffered from a common policy of discrimination that pervaded all of the employer's challenged employment decisions." (internal quotation marks omitted)); *Reeb*, 435 F.3d at 644 (plaintiffs must adduce "significant proof that [the em-

ployer] operated under a general policy of gender discrimination manifesting itself in the same general fashion" (internal quotation marks omitted)); *Griffin* v. *Dugger*, 823 F.2d 1476, 1490 (11th Cir. 1987) (same); *see also Love* v. *Johanns*, 439 F.3d 723, 729–30 (D.C. Cir. 2006); *Cooper*, 390 F.3d at 716; *Rossini* v. *Ogilvy & Mather, Inc.*, 798 F.2d 590, 598 (2d Cir. 1986); *Goodman* v. *Lukens Steel Co.*, 777 F.2d 113, 124 (3d Cir. 1985).

Although the majority asserted that its refusal to follow *Falcon* was consistent with the decisions of "nearly every Court of Appeals to consider the question" (App. 41a), it failed to cite any of the contrary decisions collected above and relied instead on outlier decisions from two circuits that themselves are internally conflicted. *Compare Brown* v. *Nucor Corp.*, 576 F.3d 149, 153 (4th Cir. 2009) (cited at App. 43a), *cert. denied*, 130 S. Ct. 1720 (2010), *with Holsey* v. *Armour & Co.*, 743 F.2d 199, 216 (4th Cir. 1984); *and Shipes* v. *Trinity Indus.*, 987 F.2d 311, 316 (5th Cir. 1993) (cited at App. 78a), *with Vuyanich* v. *Republic Nat'l Bank of Dallas*, 723 F.2d 1195, 1200 (5th Cir. 1984).

The Ninth Circuit thus exacerbated a split that has existed for over two decades. *See* Note, *Certifying Classes & Subclasses in Title VII Suits*, 99 Harv. L. Rev. 619, 630–31 (1986). The majority of the circuits correctly read *Falcon* as *requiring* class plaintiffs to adduce "significant proof" of an unlawful employment policy as an element of Rule 23(a)'s commonality and typicality requirements, which ensure that the class representatives are sufficiently aligned with the absent class members to bring the asserted claims on behalf of the entire class. 457 U.S. at 157 n.13; *E. Tex. Motor Freight Sys., Inc.* v. *Rodriguez*, 431 U.S. 395, 403 (1977).

The majority rejected *Falcon*'s "significant proof" standard because it mistakenly concluded that the existence of a class-wide discriminatory policy is a "merits" issue that cannot be resolved on certification. App. 43a–44a & nn.16–17. The majority's decision therefore conflicts with those from numerous other circuits, which *require* district courts to definitively *resolve* factual and legal disputes relevant to certification notwithstanding any overlap with the merits. *See In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 317 & n.17 (3d Cir. 2009) (collecting cases including *In re IPO Sec. Litig.*, 471 F.3d 24, 41 (2d Cir. 2006)). The majority departed from these authorities on the ground that they were brought under the securities and antitrust laws (App. 32a–39a), but the Federal Rules of Civil Procedure do not vary depending on the substantive law. *See Ashcroft* v. *Iqbal*, 129 S. Ct. 1937, 1953 (2009). In any event, the majority decision squarely conflicts with *Hohider* v. *United Parcel Service, Inc.*, 574 F.3d 169 (3d Cir. 2009), which required resolution of factual disputes going to each of the Rule 23 elements in the context of an employment discrimination claim certified under Rule 23(b)(2). *Id.* at 171, 196–98.

The district court *explicitly* said that it was "not called upon to make *any* determination on the merits of Plaintiffs' allegations of gender discrimination" at the certification stage. App. 166a (emphasis added) (citing *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974)); *see also id.* at 170a–171a & n.5. The majority admitted that this approach conflicted with the standard applied by every circuit to have addressed the issue (*id.* at 52a n.20), but it affirmed the certification on the ground that a "close reading" (*id.* at 49a) of the order somehow revealed that the district court in fact did something *other* than what it said it

was doing. *E.g.*, *id.* at 192a–193a, 198a & n.21. The majority's refusal to apply the correct standard to the central issue in this case places the Ninth Circuit squarely at odds with appellate courts in the rest of the country.

b. *The Intent Element*. "[T]he central element of [a disparate treatment claim] is discriminatory intent." *Ledbetter*, 550 U.S. at 624; *see Teamsters*, 431 U.S. at 335 n.15.

The Ninth Circuit majority opinion and the district court's certification order comprise 283 pages in the printed appendix, yet *nowhere* is the intent element of a disparate treatment claim addressed. Numerous other courts, however, have recognized that determining whether "excess subjectivity" was exercised in an intentionally discriminatory fashion requires individualized proof. *See*, *e.g.*, *Garcia*, 444 F.3d at 632 ("[e]stablishing commonality . . . is particularly difficult where, as here, multiple decisionmakers with significant local autonomy exist").

The Ninth Circuit's decision therefore squarely conflicts with the decisions of other circuits that refuse to certify multi-facility discrimination class actions where the claim asserted requires proof of decisionmaking by managers in separate facilities. *See Garcia*, 444 F.3d at 632; *Cooper*, 390 F.3d at 715; *Bacon* v. *Honda of Am. Mfg., Inc.*, 370 F.3d 565, 571 (6th Cir. 2004); *Holsey*, 743 F.2d at 216; *Stastny* v. *S. Bell Tel. & Tel. Co.*, 628 F.2d 267, 279 (4th Cir. 1980). Indeed, no other court has ever certified a class of employees who challenge the exercise of delegated discretion at thousands of facilities where the claim requires proof of decisionmaking by managers in separate facilities. This is because the essential elements of the claim, including discrimina-

tory intent and actual injury, could never be proven on a classwide basis, as Chief Judge Kozinski succinctly explained. App. 161a; *see also id.* at 113a (Ikuta, J., dissenting).

The majority's failure to take into account the intent element before certifying the class conflicts with decisions of the Second and Third Circuits. *Hohider,* 574 F.3d at 184 ("it is necessary to . . . assess what elements must be demonstrated for the court to reach . . . a determination of unlawful discrimination and a finding of classwide liability and relief"); *see McLaughlin* v. *Am. Tobacco Co.*, 522 F.3d 215, 223–25 (2d Cir. 2008). Just as it "does not follow . . . that the particular supervisors to whom this discretion is delegated always act without discriminatory intent," *Watson*, 487 U.S. at 990, it simply cannot be assumed that each of them acted *with* discriminatory intent regarding millions of pay and promotion decisions. Proof that an individual store manager *intended* to treat a woman or group of women differently because of their sex—a necessary element of plaintiffs' disparate treatment claim—therefore destroys commonality and typicality under Rule 23(a).

2. *Evidence of Gender Stereotyping*. Plaintiffs relied heavily on the notion, propounded by one of their experts, that Wal-Mart and other large organizations are "vulnerable to gender bias." App. 55a. In response to Wal-Mart's objection that this "opinion" is unreliable and inadmissible (*see* John Monahan et al., Essay, *Contextual Evidence of Gender Discrimination: The Ascendance of "Social Frameworks*," 94 Va. L. Rev. 1715, 1747–48 (2008)), the majority held that *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), does not have "exactly the same application at the class certification stage as it does to expert testimony . . . at trial." App. 57a n.22. But

as the dissent pointed out, "the majority never . . . explain[ed] why the district court can rely on an expert's testimony that is not reliable, at the class certification stage or any other." *Id.* at 136a n.16. By "erroneously approv[ing] the district court's reliance on an arguably unreliable expert opinion" (*id.* at 137a), the majority created a conflict with the Second, Third, Fifth, and Seventh Circuits, which hold that *Daubert* applies with equal force at class certification. *See*, *e.g.*, *Am. Honda Motor Co.* v. *Allen*, 600 F.3d 813, 817–18 (7th Cir. 2010) (per curiam); *Hydrogen Peroxide*, 552 F.3d at 315 n.13; *McLaughlin*, 522 F.3d at 232; *IPO*, 471 F.3d at 42; *Unger* v. *Amedisys Inc.*, 401 F.3d 316, 323 n.6 (5th Cir. 2005); *see also* App. 135a (Ikuta, J., dissenting). This too warrants review by this Court.

3. *Evidence of "Corporate Culture."* According to the majority, "Plaintiffs produced substantial evidence of Wal-Mart's centralized firm-wide culture and policies, thus providing a nexus between the subjective decision making and the considerable statistical evidence demonstrating a pattern of lower pay and fewer promotions for female employees." App. 78a (citation omitted). This observation obscures a key dispute between the parties' statistical experts: Although plaintiffs' theory centers on decisions made by individual *store* managers, their expert aggregated the data at the *national* or *regional* level. Wal-Mart's expert, however, concluded that "when data is considered *at the store level*, over 90 percent of Wal-Mart's stores showed no statistical difference in the hourly pay rates between men and women associates with similar work-related characteristics." *Id.* at 130a–131a (Ikuta, J., dissenting) (emphasis added).

The district court refused to resolve the appropriate level of aggregation (calling it a "merits" issue, App. 197a–198a), and the Ninth Circuit majority approved this refusal on the ground that "[t]he disagreement [between the parties' experts] *is* the common question," and certified the class without resolving this critical dispute. *Id.* at 71a. As the dissent explained, "[t]he district court's superficial examination of [plaintiffs'] statistics constituted legal error." *Id.* at 129a. The Ninth Circuit's approval of the district court's approach "amounts to a delegation of judicial power to the plaintiffs, who can obtain class certification just by hiring a competent expert." *West* v. *Prudential Sec., Inc.*, 282 F.3d 935, 938 (7th Cir. 2002). It conflicts with the decisions of numerous other circuits, which recognize that disputes among the experts relating to the Rule 23 factors *must* be resolved on certification. *See*, *e.g.*, *Hydrogen Peroxide*, 552 F.3d at 323–24; *McLaughlin*, 522 F.3d at 232; *IPO*, 471 F.3d at 42; *In re PolyMedica Corp. Sec. Litig.*, 432 F.3d 1, 5–6, 19 (1st Cir. 2005); *West*, 282 F.3d at 938.

This is not simply an issue of the size of the company or the class. *Compare* App. 112a (Graber, J., concurring), *with id.* at 161a (Kozinski, C.J., dissenting). Rather, where (as here) a disparate treatment claim is premised on discretionary decisionmaking, the class at a minimum must bear some relation to the decisionmaking unit (region, store, department, etc.). *Cf.* 42 U.S.C. § 2000e-5(f)(3). The Ninth Circuit, however, certified a class that is not so limited; on the contrary, it is precisely the type of "across-the-board" class that this Court condemned in *Falcon*. 457 U.S. at 157.

B. The Ninth Circuit Improperly Stripped Wal-Mart Of Its Right Of Defense

1. Aggregated disparate treatment claims typically proceed in two stages. *Teamsters*, 431 U.S. at 336, 361–62; *Cooper* v. *Fed. Reserve Bank of Richmond*, 467 U.S. 867, 876 n.9 (1984). First, the plaintiffs must prove that "discrimination was the company's standard operating procedure." *Teamsters*, 431 U.S. at 336. If they carry this burden, a rebuttable presumption arises that each class member is entitled to appropriate relief. *Id.* at 361. At the second stage, "a district court must usually conduct additional proceedings . . . to determine the scope of individual relief" and afford the employer the opportunity "to demonstrate that the individual . . . was denied an employment opportunity for lawful reasons." *Id.* at 362.

The district court acknowledged that "holding individual hearings for the number of women potentially entitled to backpay in this case *is impractical on its face*, and thus the traditional *Teamsters* mini-hearing approach *is not feasible here*." App. 251a (emphases added). But rather than refusing to certify the class, the court did away with individualized hearings altogether, concluding that Wal-Mart's insistence on individualized proceedings "is inconsistent with the fundamental character of the class action proceeding." *Id.* at 245a. "That this shortcut was necessary in order for this suit to proceed as a class action should have been a caution signal to the district court that class-wide proof of damages was impermissible." *Broussard* v. *Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 343 (4th Cir. 1998).

An employer has a statutory, as well as a constitutional, right to an individualized defense. Congress has expressly provided that, if the employer proves that it took an employment action "for any reason other than discrimination on account of . . . sex," a court shall not order the "hiring, reinstatement, or promotion of *an individual* as an employee, or *the payment to him of any back pay*." 42 U.S.C. § 2000e-5(g)(2)(A) (emphases added). And even if the adverse employment action was partially motivated by unlawful discrimination, a court may not award damages or backpay to that employee if the employer can prove that it "would have taken the same action in the absence of the impermissible motivating factor." *Id.* § 2000e-5(g)(2)(B). Thus, even where class plaintiffs can satisfy the first step of the *Teamsters* framework, the employer is entitled to an opportunity to rebut the claims of each individual class member under the substantive law. *See Reeb*, 435 F.3d at 651.

"An employer cannot be deprived of its statutory right to raise individualized defenses to claims for monetary relief merely because plaintiffs characterize their claim as a pattern or practice of discrimination and bring the suit on behalf of a class." App. 141a (Ikuta, J., dissenting). Similarly, the Rules Enabling Act prohibits the courts from eliminating statutory defenses to accommodate Rule 23 procedure. *See Amchem*, 521 U.S. at 612–13; *Hohider*, 574 F.3d at 185. Yet that is precisely what the district court did here, in so many words: Wal-Mart "is not . . . entitled to circumvent or defeat the class nature of the proceeding by litigating whether every individual store discriminated against individual class members." App. 247a. As the dissent noted, it is hard to imagine a clearer violation of the Rules Ena-

bling Act, which "prohibits a district court from depriving an employer of this right simply to facilitate the certification of a class action." *Id.* at 145a.

Yet the Ninth Circuit majority *nowhere* grappled with the Rules Enabling Act—a statute that this Court has twice held *must* be applied by reviewing courts in considering challenges to class certification. *Ortiz*, 527 U.S. at 845; *Amchem*, 521 U.S. at 612–13. Indeed, as the dissent explained, "the majority fail[ed] to address the specific legal and factual framework of Title VII or consider how it impacts the certification of plaintiffs' proposed class." App. 139a–140a. In fact, the majority expressly recognized that, as to some class members, "unequal pay or non-promotion was due to something *other* than gender discrimination," but nonetheless endorsed procedures that barred Wal-Mart from presenting its ordinarily available defenses to those claims. *Id.* at 110a n.56.

The majority's approach directly conflicts with the decisions of other circuits, which refuse to certify a class if the substantive law would preclude class-wide treatment. *See*, *e.g.*, *Sullivan* v. *DB Invs., Inc.*, __ F.3d __, 2010 WL 2736947, at *11 (3d Cir. July 13, 2010) (vacating certification "extend[ing] antitrust remedies that . . . have no root in state substantive law"); *McLaughlin*, 522 F.3d at 225; *Thorn*, 445 F.3d at 323–24. It also conflicts with decisions recognizing that certification is inappropriate where numerous individualized hearings would be necessary. *In re Allstate Ins. Co.*, 400 F.3d 505, 508 (7th Cir. 2005) (reversing (b)(2) certification where "more than a thousand individual hearings" would be required regarding damages); *Lemon*, 216 F.3d at 581; *Allison*, 151 F.3d at 419–20. As the dissent points out, the answer is not to dispense with the element that is

incompatible with class certification, but rather to deny certification. App. 146a.

2. The majority's decision also violates Wal-Mart's "right to litigate the issues raised," which is "guaranteed . . . by the Due Process Clause," *United States* v. *Armour & Co.*, 402 U.S. 673, 682 (1971), and includes the right "to present every available defense," *Lindsey* v. *Normet*, 405 U.S. 56, 66 (1972) (internal quotation marks omitted). The consequences are dire. Wal-Mart will be precluded from proving that its managers did not discriminate against individual class members, and uninjured class members will be allowed to collect backpay at the expense of the actually injured. The district court recognized as much, labeling this "rough justice." App. 254a.

a. The district court's suggested approach of trying the case through use of formulas to estimate the amount of monetary relief (App. 251a–258a), and the Ninth Circuit's invocation of the statistical sampling method used in *Hilao*, 103 F.3d at 782–87 (App. 105a–110a), to estimate the number of people injured squarely conflict with the Second Circuit's decision in *McLaughlin*, which held that "[r]oughly estimating the gross damages to the class as a whole and only subsequently allowing for the processing of individual claims would inevitably alter defendants' substantive right to pay damages reflective of their actual liability" in violation of the Rules Enabling Act and due process. 522 F.3d at 231–32.

b. In addition, while the Ninth Circuit vacated and remanded the portion of the certification order related to punitive damages, it suggested that the district court nonetheless might be able to certify the punitive damages claims under Rule 23(b)(2) or (b)(3) and resolve such claims without regard to individual

issues. App. 98a–99a. This ruling conflicts with numerous decisions that have rejected adjudication of punitive damages on a class-wide basis because it requires individualized and fact-specific inquiries. *See*, *e.g.*, *Reeb*, 435 F.3d at 651; *Cooper*, 390 F.3d at 721; *Lemon*, 216 F.3d at 581; *Allison*, 151 F.3d at 418. And in *Philip Morris USA* v. *Williams*, 549 U.S. 346 (2007), this Court squarely held that "the Due Process Clause prohibits a State from punishing an individual without first providing that individual with an opportunity to present *every* available defense." *Id.* at 353 (emphasis added) (internal quotation marks omitted).

It would also violate Wal-Mart's Seventh Amendment rights if a jury did not resolve all factual issues related to punitive damages. *See Tull* v. *United States*, 481 U.S. 412, 422–23 (1987); *see also Feltner* v. *Columbia Pictures Television, Inc.*, 523 U.S. 340, 355 (1998). Other circuits have held that adjudicating claims for compensatory and punitive damages in a Rule 23(b)(2) class raises Seventh Amendment problems. *See Hohider*, 574 F.3d at 202 n.26; *Allison*, 151 F.3d at 419–22.

c. Absent class members fare no better. Without individualized hearings, non-victims would be overcompensated at the expense of anyone who was actually injured, as the district court recognized. App. 254a; 474 F.3d at 1244, 1249 (Kleinfeld, J., dissenting). The majority's acknowledgement that "a few nonvictims might also benefit from the relief" (App. 110a n.57 (quoting *Segar* v. *Smith*, 738 F.2d 1249, 1291 (D.C. Cir. 1984))) hardly commends the approach. *See Firefighters Local Union No. 1784* v. *Stotts*, 467 U.S. 561, 579 (1984) (Title VII relief limited to "actual victims" of illegal discrimination).

3. Finally, the majority's failure to require a trial plan conflicts with decisions of other circuits. *Hohider*, 574 F.3d at 202; *Hydrogen Peroxide*, 552 F.3d at 311–12; *Wachtel* v. *Guardian Life Ins. Co.*, 453 F.3d 179, 189 (3d Cir. 2006). Rule 23(c)(1)(B) *requires* the certification order to set forth the "class claims, issues, [and] defenses." Yet the Ninth Circuit found no error in the district court's failure to adhere to this mandatory provision.

The Ninth Circuit wrongly held that Rule 23(a) does not require the district court to determine "how the facts at issue would play out . . . in the merits of the litigation." App. 38a. Contrary to the Ninth Circuit's conclusion (*id.* at 31a), it is not enough for the case to present mere common "questions"; the *answers* to those questions must be found in a lawful and fair trial proceeding. The impracticability of allowing Wal-Mart to present statutory and constitutional defenses does not mean that the defenses can be eliminated; rather, it means that the class is not manageable and should not be certified. *See McLaughlin*, 522 F.3d at 223–25.

The district court's trial plan was hopelessly deficient, yet the majority (after refusing to address Wal-Mart's objections) said that "the option proposed by the district court may also remain viable." App. 110a n.57. The majority also encouraged the district court, on remand, to consider the statistical sampling approach adopted in *Hilao*, 103 F.3d at 782–87 (App. 105a–110a)—an approach that violates basic due process principles and has never been adopted by *any* other court. *See* App. 124a–128a (Ikuta, J., dissenting). For the majority even to suggest that *Hilao*, an "extraordinarily unusual" case involving claims against a foreign dictator who pillaged his country and terrorized its population, 103 F.3d at

786, has any applicability whatsoever in a Title VII case against America's largest private employer underscores the need for this Court's review.

C. The Issues Are Important and Recurring

The unprecedented certification order here stands at the intersection of Title VII and Rule 23, in the shadow of the Rules Enabling Act and constitutional constraints. It implicates numerous circuit splits on important and recurring issues.

The plaintiffs secured mandatory certification of this unprecedented class on the ground that Wal-Mart's delegation of decentralized decisionmaking authority to local managers opened a "conduit" for gender bias, a charge that can be levied against every organization of any size (including the federal government). *See* Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 159 (2009) ("[T]he disparities in pay or promotion at Wal-Mart roughly track those across the economy more broadly"). If the Ninth Circuit decision in this case stands, virtually every employer in the land could be subject to a similar suit. App. 160a (Ikuta, J., dissenting) ("the door is now open to Title VII lawsuits targeting national and international companies, regardless of size and diversity, based on nothing more than general and conclusory allegations"). And although Title VII does not require employers to adopt "quotas and preferential treatment" to "avoid[] expensive litigation and potentially catastrophic liability," the Ninth Circuit's decision will have precisely the "chilling effect on legitimate business practices" that the Court has sought to avoid. *Watson*, 487 U.S. at 993 (plurality). This Court's guidance is needed in this case to chart the future

course of class litigation in the employment context and beyond.

As the sharp division in the court below establishes, this case exposes widespread conflict and uncertainty regarding the appropriate standards for certifying class actions. This uncertainty is unfair and unjust for all involved, including class representatives, absent class members, and defendants. This Court's review is necessary to provide much-needed clarity and to ensure that the ends of justice are served.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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