NOT YET SCHEDULED FOR ORAL ARGUMENT

Nos. 04-5448, 05-5002

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

GUADALUPE L. GARCIA, JR., *et al.*,

Plaintiffs–Appellants,

v.

MICHAEL JOHANSS, Secretary,
United States Department of Agriculture,

Defendant–Appellee.

Appeal from the United States District Court
For the District of Columbia
Civil Action No. 00-2445

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING APPELLEE

Robin S. Conrad
Robert J. Costagliola
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337 – phone
(202) 463-5346 – fax

Glen D. Nager
Shay Dvoretzky
Jason J. Jarvis
JONES DAY
51 Louisiana Ave., N.W.
Washington, D.C. 20001
(202) 879-3939 – phone
(202) 626-1700 – fax

Counsel for *Amicus Curiae*

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), counsel for *amicus curiae* submits the following:

(A) Parties and Amici.

All parties, intervenors, and amici appearing before this Court are listed in the Brief for Appellants.

(B) Rulings Under Review.

References to the rulings at issue appear in the Brief for Appellee.

(C) Related Cases.

References to related cases appear in the Brief for Appellee.

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Counsel for *Amicus Curiae*

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1, in addition to the entities and persons cited in the parties' briefs, the Chamber of Commerce of the United States submits that the following persons and entities have an interest in the outcome of this matter:

Amicus Curiae:

Chamber of Commerce of the United States

Counsel for *Amicus Curiae*:

JONES DAY,

Glen D. Nager

Shay Dvoretzky

Jason J. Jarvis

NATIONAL CHAMBER LITIGATION CENTER, INC.,

Robin S. Conrad

Robert J. Costagliola

Counsel for *Amicus Curiae*

GLOSSARY

ECOA	Equal Credit Opportunity Act
ADEA	Age Discrimination in Employment Act

STATUTES AND REGULATIONS

Applicable statutes are contained in the Appellants' brief.

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MISCELLANEOUS

INTEREST OF THE *AMICUS CURIAE*

The Chamber of Commerce of the United States (the "Chamber") represents over three million businesses and organizations in every industrial sector and geographic region of the country. A principal function of the Chamber is to represent the interests of its members by filing *amicus* briefs in cases involving issues of vital concern to the nation's business community.

The Chamber's members have a substantial interest in the issues that this case presents regarding the proper standards for class certification. These issues could have significant implications for actions brought against the Chamber's members pursuant to the Equal Credit Opportunity Act and Title VII of the Civil Rights Act of 1964, as well as products liability cases, breach-of-contract claims, securities cases, and myriad other cases in which plaintiffs may seek class treatment.

For example, the decision in this case could have ramifications for the propriety of class certification in discrimination cases where challenged decisions are made by multiple individuals in different locations pursuant to criteria that incorporate both subjective and objective factors. Indeed, in addressing this issue, the District Court and the parties have relied on a wide range of discrimination cases brought against businesses of the sort that make up the Chamber's membership. In addition, this Court may address the circumstances under which a

class seeking substantial monetary damages may be certified under Federal Rule of Civil Procedure 23(b)(2), as well as the appropriateness of certifying hybrid classes based on Rules 23(b)(2) and (b)(3)—issues potentially pertinent to all class actions.

Particularly given the potential exposure to liability resulting from certification of large classes in discrimination and other cases, and the pressure to settle such cases independently of the merits of the plaintiffs' claims, the members of the Chamber have a substantial interest in these issues regarding the proper standards for class certification. This Court granted the Chamber's motion to file an *amicus* brief in this case on June 23, 2005.

SUMMARY OF ARGUMENT

Appellants rely on anomalous and specious opinions of a few other courts in asking this Circuit to vastly expand the scope of the class action device. Appellants' arguments not only contravene the requirements of Rule 23 and the deference properly accorded to a district court's ruling on class certification, but also threaten grave consequences for America's businesses.

As a practical matter, the certification of classes seeking sweeping injunctions and/or massive monetary claims vastly raises the stakes for defendants in all sorts of class actions ranging from employment cases to claims of product liability. "Class certification magnifies and strengthens the number of unmeritorious claims." *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996). As a result, certification creates "intense pressure to settle" even unmeritorious claims. *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995). "The risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low." *Castano*, 84 F.3d at 746; *see also, e.g.*, *Rutstein v. Avis Rent-A-Car Sys. Inc.*, 211 F.3d 1228, 1241 n.21 (11th Cir. 2000) ("certifying this case as a class action" may function as "blackmail" that "coerc[es] the defendant into a settlement"); *In re Diet Drugs Prods. Liab. Litig.*, 93 Fed. Appx. 345, 350 (3d Cir. 2004) ("the pressure to settle that is imposed [by class certification] may be grave . . . .").

Cognizant of these and other implications of adopting Appellants' position, the District Judge below, the Honorable James Robertson, insisted on applying the proper standards for class certification as mandated by Rule 23. This Court should likewise decline to follow the aberrant and unsound authority on which Appellants' base their arguments regarding five critical questions.

1. A court of appeals reviews a district court's ruling on a class certification motion for abuse of discretion. Contrary to Appellants' argument, that standard of review does not vary depending on whether the district court granted or denied the class certification motion.

2. In order to satisfy Rule 23(a)'s requirement to show commonality and typicality, the proponent of a disparate-impact class must identify (1) a *specific, common* selection criterion that (2) allegedly *caused* a disparate impact on the class members on the basis of race. Contrary to Appellants' argument, merely identifying a purported racial imbalance in the distribution of government benefits (or, for example, in the composition of an employer's workforce) and alleging that "subjectivity" was involved in the selection process does not identify the "specific" selection practice, or show the causation necessary, to establish the necessary common question of law or fact.

3. Certification of a disparate-treatment class similarly requires identification of a practice by the defendant that demonstrably affects all class

members in substantially, if not completely, comparable ways. Where, as here, decisions are made by multiple decisionmakers in different locations based on varying criteria, uniform decisionmaking criteria do not unite the class, and commonality and typicality are not established.

4. Rule 23(b)(2), which allows certification of appropriate classes seeking injunctive or declaratory relief, presumes that class members are cohesive and have few, if any, conflicting interests. Thus, because monetary damages may depend on individual circumstances and lead to divergences of interest among class members, Rule 23(b)(2) does not authorize certification of classes seeking exclusively or predominantly monetary relief. Following the weight of authority, this Court should also hold that monetary relief predominates for purposes of (b)(2) certification unless it is incidental to requested injunctive or declaratory relief—that is, unless damages flow automatically from liability to the class as a whole and do not depend in any significant way on each class member's individual circumstances. Appellants, who seek $20 billion in damages that will depend heavily on individualized circumstances, did not satisfy this standard for Rule 23(b)(2) certification.

5. Finally, to certify a "hybrid" class for declaratory and injunctive relief under Rule 23(b)(2) and for damages under Rule 23(b)(3), if ever permissible at all, requires finding that the claims for damages satisfy the predominance and

superiority requirements of subsection (b)(3). These requirements cannot be satisfied where, as here, the resolution of the plaintiffs' claims turns on fact-specific inquiries unique to each plaintiff.

ARGUMENT

I. THIS COURT REVIEWS A DISTRICT COURT'S DENIAL OF CLASS CERTIFICATION FOR ABUSE OF DISCRETION.

Relying on *Caridad v. Metro-North Commuter Railroad*, 191 F.3d 283, 291 (2d Cir. 1999), Appellants claim that the District Court's ruling on their class certification motion "is entitled to *no deference*." Appellants' Br. at 30-31 (emphasis added). Appellants are wrong.

The Supreme Court, this Court, and the other circuits have all held that a class certification decision is reviewed "*only* to ensure against abuse of discretion or erroneous application of legal criteria." *Hartman v. Duffey*, 19 F.3d 1459, 1471 (D.C. Cir. 1994) (emphasis added); *see also, e.g.*, *Califano v. Yamasaki*, 442 U.S. 682, 703 (1979); *In re Linerboard Antitrust Litig.*, 305 F.3d 145, 149-50 (3d Cir. 2002), *cert. denied*, 538 U.S. 977 (2003); *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 424 (4th Cir. 2003); *Doe v. Lexington-Fayette Urban County Gov't*, 407 F.3d 755, 761 (6th Cir. 2005); *Uhl v. Thoroughbred Tech. & Telecomms. Inc.*, 309 F.3d 978, 985 (7th Cir. 2002). Contrary to Appellants' argument, the standard of review—a neutral procedural principle grounded in appellate judicial economy and deference to the district court's factual expertise—does not vary depending on the

outcome of the class certification motion in the district court. *See generally Fleming v. Jefferson County Sch. Dist.*, 298 F.3d 918, 922 (10th Cir. 2002) (explaining that an appellate standard of review depends on "the issue . . . not the outcome below"), *cert. denied*, 537 U.S. 1110 (2003). This Court has applied an abuse-of-discretion standard of review when the district court has denied class certification, *see, e.g., Twelve John Does v. Dist. of Columbia*, 117 F.3d 571, 575 (D.C. Cir. 1997), as well as when the district court has certified a class, *see, e.g., Postow v. OBA Fed. Sav. & Loan Ass'n*, 627 F.2d 1370, 1380-81 (D.C. Cir. 1980). *See also, e.g., Wagner v. Prof'l Eng'rs in Cal. Gov't*, 354 F.3d 1036, 1040 (9th Cir. 2004); *Alaska v. Suburban Propane Gas Corp*. 123 F.3d 1317, 1321 (9th Cir. 1997); *Valley Drug Co. v. Geneva Pharms., Inc*., 350 F.3d 1181, 1187 (11th Cir. 2003); *Murray v. U.S. Bank Trust Nat'l Ass'n*, 365 F.3d 1284, 1288 (11th Cir. 2004).

To the extent that the Second Circuit's opinion in *Caridad* can be read as supporting an argument that a less deferential standard of review applies where the district court denies class certification than where the court certifies a class, it contravenes the law of the Supreme Court, this Court, the Second Circuit itself, and every other circuit. Indeed, the Second Circuit itself has held that a "district court's *denial or grant* of class action status will be reversed only for abuse of discretion . . . ." *Abrams v. Interco Inc.*, 719 F.2d 23, 28 (2d Cir. 1983) (internal

quotation marks omitted; emphasis added). Appellants' suggestion that the Court give "no deference" to the district court's denial of class certification should be unhesitatingly rejected.

II. APPELLANTS' ARGUMENTS IN SUPPORT OF COMMONALITY AND TYPICALITY AMOUNT TO AN ASSAULT ON THE REQUIREMENTS OF RULE 23(a).

Under Federal Rule of Civil Procedure 23(a), a class may be certified only if the proponent of class certification shows, among other things, that the prerequisites of commonality and typicality are satisfied. *See* Fed. R. Civ. Proc. 23(a). Commonality requires that there be "questions of law or fact common to the class," and typicality requires that "the claims or defenses of the representative parties [be] typical of the claims or defenses of the class." *Hartman*, 19 F.3d at 1468. Courts often consider the commonality and typicality requirements together. *See id.* The District Court here acted well within its discretion in concluding that Appellants had failed to satisfy the requirements of Rule 23(a) with respect to both their disparate-impact and their disparate-treatment claims. In contrast, Appellants and the isolated cases on which they rely misapprehend the requirements of Rule 23 and would extend the class action device far beyond its authorized boundaries.

A. A Disparate-Impact Plaintiff Seeking Class Certification Must Show That Class Members Are Challenging A Common, Specific Selection Criterion That Caused A Disparate Impact On The Basis Of Prohibited Criteria.

In considering whether a proposed disparate-impact class satisfies commonality and typicality, it is necessary to understand the nature of plaintiffs' burden in establishing such a claim for a class. As this Court has explained, a district court must tailor "the closely related inquiries into commonality [and] typicality . . . to the specific factual claims as shaped by [the] substantive theor[y] of liability" underlying the plaintiffs' claims. *Wagner v. Taylor*, 836 F.2d 578, 587 n.60 (D.C. Cir. 1987) (internal citations omitted); *see also Stastny v. S. Bell Tel. & Tel. Co.*, 628 F.2d 267, 273 (4th Cir. 1980) (explaining that the class certification "inquiry must be carefully adapted to the controlling principles of substantive and procedural law that give content to and order proof of the particular claims and defenses asserted"). "It is not *every* common question that will suffice" under Rule 23(a), because "at a sufficiently abstract level of generalization, almost any set of claims can be said to display commonality." *Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 397 (6th Cir. 1998) (emphasis added). Rather, a court must "loo[k] for . . . a common issue the resolution of which will advance the litigation" in light of the substantive elements that the plaintiffs must prove. *Id.*

Here, as an initial matter, Appellants did not even attempt to demonstrate commonality in terms of the substantive elements mandated by the ECOA for a

disparate-impact claim. They ignore, for example, that the statute does not expressly authorize such a claim. *See* 15 U.S.C. § 1691(a)(1) (providing that a creditor may not "discriminate against any applicant . . . on the basis of [prohibited criteria]"). They likewise ignore that the text of the ECOA differs from the language of Title VII and the Age Discrimination in Employment Act ("ADEA") that the Supreme Court has interpreted to authorize a disparate-impact claim. *See Smith v. City of Jackson*, 125 S. Ct. 1536, 1542 (2005) (recognizing disparate-impact claims under the ADEA, which uses language "identical" to Title VII in prohibiting "such actions that 'deprive any individual of employment opportunities or *otherwise adversely affect* his status as an employee, because of such individual's' race or age") (quoting 42 U.S.C. § 2000e-2(a)(2) (emphasis added in *Smith*). They thus fail from the outset to establish that disparate-impact claims are even actionable under the ECOA, let alone certifiable for class treatment under Rule 23. *See id.* at 1542-43 & n. 7 (explaining that different statutory language than that in the ADEA and Title VII "may [have] warrant[ed] addressing disparate-impact claims in the two statutes differently").

In any event, even if disparate-impact claims are cognizable under the ECOA and, as Appellants urge, are governed by principles applicable to Title VII, determining whether a "common" disparate-impact claim exists requires understanding the proper nature of such a claim. The Supreme Court has held that

disparate-impact plaintiffs must identify a *specific* selection criterion and show that the particular criterion *causes* a disparate impact on the basis of race. Thus, in *Ward's Cove Packing Co. v. Atonio*, 490 U.S. 642, 656-57 (1989), the Court stressed that "[o]ur disparate-impact cases have always focused on the impact of *particular* hiring practices on employment opportunities for minorities." (emphasis in original.) Likewise, the Court explained that disparate-impact plaintiffs must "demonstrate that the disparity they complain of is the result of one or more of the employment practices that they are attacking . . . specifically showing that each challenged practice has a significantly disparate impact on employment opportunities for whites and nonwhites." *Id.* at 657.

These requirements of disparate-impact plaintiffs have important implications for class certification. Because a disparate-impact claim depends on showing that a *specific* selection criterion *causes* a disparate impact on the basis of prohibited factors, class certification may not be premised on aggregating putative class members who were affected differently by *multiple* selection criteria into a single class. Where plaintiffs fail to identify a specific policy that adversely impacts each class member in the same way, the commonality and typicality requirements of Rule 23(a) are not satisfied.

Appellants do not even purport to meet this burden. They do not identify any particular selection practice (or, as directly relevant, a particular loan eligibility

criterion) that purportedly had a common disparate impact on the class members on the basis of race. In these circumstances, a district court acts well within its discretion in finding a lack of commonality and typicality.

Appellants plainly err in suggesting that identifying "subjectivity" as the practice being challenged by the class satisfies commonality and typicality. A plaintiff does not satisfy his substantive burden, or provide a basis for commonality, by merely identifying "subjectivity" in general as the practice in issue. While subjective practices may be challenged on a disparate-impact theory, it is still necessary to identify the *particular* subjective practice in issue, and to show that this particular subjective practice has caused a disparate impact. "Because each [plaintiff's] exposure to [the defendant's] subjective decision-making . . . will vary in nature and degree, any trial on 'class' issues will quickly erode into a series of individual trials focused on issues specific to each [plaintiff]." *Ramirez v. DeCoster*, 194 F.R.D. 348, 353 (D. Me. 2000); *see also, e.g.*, *Stastny*, 628 F.2d at 279 (explaining that identification of subjectivity as the practice in issue "cuts against any inference [of] commonality").

Furthermore, contrary to Appellants' argument, plaintiffs raising ECOA disparate-impact claims cannot invoke Title VII's statutory exception to the requirement that a plaintiff identify the *specific* practice being challenged, *see* 42 U.S.C. § 2000e-2(k)(B)(i). For purposes of Title VII disparate-impact claims, the

Civil Rights Act of 1991 does indeed provide that a "decisionmaking process may be analyzed as one employment practice" if the "elements of [the] decisionmaking process are not capable of separation for analysis." *See id*. But, as the Supreme Court recently held in *Smith*, "[w]hile the relevant 1991 amendments expanded the coverage of Title VII, they did not amend" other statutes. 125 S. Ct. at 1545. "Hence, *Wards Cov[e]* . . . remains applicable" and governs disparate-impact claims brought under statutes besides Title VII.

Likewise, Appellants' reliance on *General Telephone Company of the Southwest v. Falcon*, 457 U.S. 147 (1982), and cases interpreting it is unavailing. In *Falcon*, which involved disparate-*treatment* claims, the Supreme Court considered whether a single named plaintiff who alleged injury from discriminatory promotion practices could also represent class members who challenged discriminatory hiring practices. *Id*. at 149. In holding that the named plaintiff was not a "proper class representative," the Supreme Court stressed that he lacked "standing to litigate . . . all possible claims of discrimination against a common employer" on behalf of "an identifiable class of persons of the same race or national origin," because "the interests of the absent parties [were not] fairly encompassed" and protected "within the named plaintiff's claim . . . ." *Id.* at 159-60 & n.15. The Court further speculated in dicta that "a class of both applicants and employees" could "conceivably" be united by "[s]ignificant proof that an

employer operated under a general policy of discrimination . . . [and] the discrimination manifested itself in hiring and promotion practices in the same general fashion, such as through entirely subjective decisionmaking processes." *Id.* at 159 n.15. But, whether or not an entirely subjective decisionmaking process by a defendant unites otherwise dissimilar discrimination claims sufficiently to protect the interests of absent class members and alleviate the concerns about *adequacy of representation* discussed in *Falcon*, that dicta has no bearing on the absence of *commonality* that is at issue in this case.

Moreover, as numerous courts have held, footnote 15 of *Falcon*—which concerns a defendant's use of "*entirely subjective* decisionmaking processes" as a means of implementing "a general policy of discrimination," *Falcon*, 457 U.S. at 159 n.15 (emphasis added)—by its terms does not support class certification for a disparate-impact claim, particularly where, as here, a defendant's centrally imposed decisionmaking process incorporates both subjective and objective elements. *See, e.g., Bacon v. Honda of Am. Mfg., Inc.*, 370 F.3d 565, 572 (6th Cir. 2004), *cert. denied*, 123 S. Ct. 1334 (2005) (requiring an entirely subjective decisionmaking process to approve of certification in the absence of specifically enumerated criteria); *Vuyanich v. Republic Nat'l Bank*, 723 F.2d 1195, 1199-1200 (5th Cir. 1984) (same); *Cox v. Am. Cast Iron Pipe Co.*, 784 F.2d 1546, 1551, 1556 (11th Cir. 1986) (holding that the defendant's selection system was "*entirely* one of

subjective evaluation" and that the commonality criterion was satisfied) (emphasis added)); *Goodman v. Lukens Steel Co.*, 777 F.2d 113, 124 (3d Cir. 1985) (requiring entirely subjective decisionmaking in accordance with *Falcon*).

Appellants' reliance on this Court's opinion in *Wagner* is similarly misplaced. In *Wagner*, as in *Falcon*, a named plaintiff sought to represent a disparate-treatment class comprising both "current employees and disappointed job applicants." *Wagner*, 836 F.2d at 594. In affirming the district court's denial of class certification, this Court, adverting to the Supreme Court's dicta in *Falcon*, noted that "[t]he existence of . . . subjective decisionmaking can form the nexus between employees and applicants, but [that the appellant had] not alleged the existence of such a practice common to both groups." *Id.* (citing *Falcon*) (footnotes omitted). Thus, *Wagner*, like *Falcon*, suggested in dicta that entirely subjective decisionmaking processes could allow a named plaintiff to represent a disparate-treatment class including members with different claims, notwithstanding the concerns about adequacy of representation that such a class would otherwise raise. For reasons noted above, *see supra* p. 14, that dicta has no bearing on this case or the reasons that the District Court, in its discretion, denied certification of a disparate-impact class.

Finally, Appellants mistakenly rely on *McReynolds v. Sodexho Marriott Services, Inc.*, 208 F.R.D. 428 (D.D.C. 2002), an aberrant case in which District

Judge Ellen Huvelle found commonality in a class of over 2000 employees on the basis of the defendant's purportedly subjective decisionmaking processes. In that case, Judge Huvelle discounted evidence of objective factors because, in her view, *Falcon* requires "'entirely subjective *decisionmaking processes*,' rather than . . . entirely subjective hiring criteria." *Id.* at 442 (quoting *Falcon*) (emphasis added in *McReynolds*). But a decisionmaking process cannot be *entirely* subjective if it incorporates objective criteria. Moreover, Judge Huvelle's opinion contravenes the overwhelming weight of authority described above, undermines the judicial economy that Rule 23 was intended to serve, and finds no support in the plain language of *Falcon*.

At bottom, in failing to identify a *specific* practice in issue that allegedly *caused* a common disparate impact on class members on the basis of race, Appellants ask this Court to certify a disparate-impact class comprising claims based on widely divergent circumstances merely on the basis of "unexplained discrepancies in the distribution of government benefits" (or, by implication, in the distribution of loans by private creditors or in an employer's workforce). *Garcia v. Veneman*, 224 F.R.D. 8, 11 (D.D.C. 2004). That approach would relax the standards for class certification far beyond the bounds authorized by Rule 23, by the law of the Supreme Court and of this Circuit, and by the overwhelming weight of authority from other courts.

B. A Disparate-Treatment Class Is Not Properly Certified Where, As Here, Decentralized And Geographically Dispersed Decisionmakers Make Independent Selection Decisions.

Appellants' effort to certify a disparate-treatment class in this case is similarly flawed. It ignores both the applicable law and the undisputed facts of record.

Establishing commonality and typicality for a disparate-treatment class requires the proponent of class certification to show, as this Court has explained, that "there exists the requisite pattern or practice [of discrimination] sufficiently and comparably affecting an identifiable class of protected [individuals]." *Wagner*, 836 F.2d at 587 n.60 (quoting *Stastny*, 628 F.2d at 273-74). Thus, the putative class must do more than allege that class members "were, individually, subjected to intentional discrimination . . . ." *Cooper v. Southern Co.*, 390 F.3d 695, 715 (11th Cir. 2004), *cert. denied*, 74 U.S.L.W. 3050 (Oct. 17, 2005). They must also show "that other class members suffered from the *same* discrimination." *Id.* at 716 (emphasis added). Appellants ask this Court to disregard the overwhelming weight of authority holding that class members do not suffer from the *same* discrimination, and hence that commonality and typicality are defeated, where the record shows that a defendant makes independent decisions by myriad decisionmakers following myriad criteria in a geographically dispersed organization.

For example, in *Stastny*, the Fourth Circuit held that the district court abused its discretion in certifying a statewide pattern-or-practice class because the lower court "fail[ed] to appreciate the significance of the dispersion of . . . the putative class members throughout a great number of geographically separated facilities" that had "almost complete local autonomy" in determining pay and promotions. *Stastny*, 628 F.2d at 278, 279. That factor, the Fourth Circuit explained, "bears crucially upon the likelihood that there is truly an employment pattern or practice . . . of intentional disparate treatment that sufficiently affects 'in common' the class member[s] . . . in all the facilities." *id.* at 278. Likewise, for similar reasons, the Eleventh Circuit affirmed the denial of class certification of class where the challenged employment "decisions affecting each of the named plaintiffs were made by individual managers in disparate locations, based on the individual plaintiffs' characteristics . . . ." *Cooper*, 390 F.3d at 714-15. The Fifth Circuit has reached a similar conclusion. *See Bradford v. Sears, Roebuck & Co.*, 673 F.2d 792, 795 (5th Cir. 1982) (reversing class certification in part because the employment practices complained of occurred in different retail stores where "[d]ifferent staffs supervise the stores and oversee the personnel decisions").

Numerous district courts have likewise denied certification where employees sought class certification to challenge decisions made by different managers spread throughout different geographic locations. In this situation, courts have found that

commonality is absent and that "resolution of the merits of the claims," instead of turning on a classwide pattern or practice of discrimination, "would degenerate into an unmanageable plethora of multiple individual determinations for each individual proposed class member." *Webb v. Merck & Co.*, 206 F.R.D. 399, 406 (E.D. Pa. 2002) (declining to certify a class of employees working at six facilities in five states); *see also, e.g., Stubbs v. McDonald's Corp.*, 224 F.R.D. 668, 675 (D. Kan. 2004); *Carson v. Giant Food, Inc.*, 187 F. Supp. 2d 462, 471 (D. Md. 2002), *aff'd*, 68 Fed. Appx. 393 (4th Cir.), *cert. denied*, 540 U.S. 1074 (2003); *Donaldson v. Microsoft Corp.*, 205 F.R.D. 558, 566-67 (W.D. Wash. 2001); *Lott v. Westinghouse Savannah River Co.*, 200 F.R.D. 539, 555-56 (D.S.C. 2000); *Abrams v. Kelsey-Seybold Med. Group, Inc.*, 178 F.R.D. 116, 133 (S.D. Tex. 1997); *Appleton v. Deloitte & Touche L.L.P.*, 168 F.R.D. 221, 231 (M.D. Tenn. 1996).

Here, as the Government argues at length, "[b]ecause determinations regarding a farmer's likely ability to repay a loan necessarily require a detailed assessment of prevailing local farming conditions and the specific circumstances of individual applicants, decisions to approve or deny loan applications were largely delegated to local officials in over 2700 different counties." Government's Br. at 7. Where decisions regarding the loan applications of over 20,000 farmers were made over 20 years by officials in over 2700 different counties pursuant to varying criteria and individual circumstances, the District Court acted well within its

discretion in concluding that Appellants' proposed disparate-treatment class failed to satisfy commonality and typicality.

Appellants ask this Court to jettison the avalanche of well-reasoned authority described above regarding the impropriety of certifying a class that challenges decentralized, geographically dispersed decisionmaking. Appellants rely on a single case, *Staton v. Boeing Co.*, 327 F.3d 938 (9th Cir. 2003), in which the Ninth Circuit affirmed certification of a large and geographically dispersed settlement class. *Staton* is inapposite, however, because it concerned certification *only* for settlement purposes, as the Ninth Circuit stressed when it noted its "concerns . . . as to whether the case could be maintained as a class action if the litigation continues . . . ." *Id.* at 953. In any event, the court in *Staton* concluded that, despite the geographic dispersal of the class, "the large class [was] united by . . . *company-wide* discriminatory practices," as underscored by "evidence of *centralized* decisionmaking . . . ." *Id.* at 954, 956 (emphasis added). In contrast, here—and in many cases of the sort brought against the Chamber's members—geographic dispersal and decentralized decisionmaking go hand in hand, precluding a finding of commonality because of the individualized inquiries required into many decisions made by multiple decisionmakers based on varying criteria and circumstances.

III. APPELLANTS ASK THIS COURT TO CERTIFY CLASSES PROHIBITED BY RULE 23(b).

In addition to satisfying Rule 23(a), class plaintiffs must also show that their claims may be brought as a class action pursuant to one of the subsections of Rule 23(b). Appellants' arguments in favor of relaxing the stringent requirements for class certification under Rule 23(b)(2) or Rule 23(b)(3) should be rejected.

A. Rule 23(b)(2) Authorizes Class Certification Only Where Plaintiffs Seek Declaratory Or Injunctive Relief With Respect To The Class As A Whole And Where Damages, If Any, Are Incidental To Declaratory Or Injunctive Relief.

Rule 23(b)(2) permits class certification where "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thus making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Because of "the group nature of the harm alleged and the broad character of the [declaratory or injunctive] relief sought," a "(b)(2) class is, by its very nature, assumed to be a homogenous and cohesive group with few conflicting interests among its members." *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 413 (5th Cir. 1998). But, as this Court has explained, that cohesiveness "begins to break down when the class seeks to recover . . . monetary [relief] to be allocated based on individual injuries." *Eubanks v. Billington*, 110 F.3d 87, 95 (D.C. Cir. 1997); *see also Allison*, 151 F.3d at 413 (explaining that the cohesiveness of a (b)(2) class breaks down when monetary relief is introduced

because monetary damages are typically "related directly to the disparate merits of individual claims"). For this reason, the Supreme Court has suggested (without resolving the question) that "actions seeking monetary damages" might *never* be certifiable under Rule 23(b)(2), *see Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 121 (1994), and the Advisory Committee notes to Rule 23(b)(2) provide that class certification under that subsection is not permitted when "the appropriate final relief relates exclusively or predominately to money damages." *See also Eubanks*, 110 F.3d at 92 (explaining that a (b)(2) class may not be certified where monetary relief "predominate[s]").

Although this Court has not yet articulated a standard for determining when the relief sought by a putative class relates "predominantly" to monetary damages, the Fifth, Seventh, Ninth, and Eleventh Circuits have all held that monetary relief predominates for purposes of (b)(2) certification "unless it is incidental to requested injunctive or declaratory relief"—that is, unless damages "flow directly from liability to the class *as a whole* on the claims forming the basis of the injunctive or declaratory relief." *Allison*, 151 F.3d at 415(emphasis in original); *see also In re Allstate Ins. Co.*, 400 F.3d 505, 507 (7th Cir. 2005) ("The present case is one of incidental damages because if the plaintiffs get the declaration they are seeking, the benefits to which the ERISA plan entitles them will simply be read off from the plan."); *Cooper*, 390 F.3d at 720; *Kanter v. Warner-Lambert Co.*, 265

F.3d 853, 860 (9th Cir. 2001); *Manual for Complex Litigation (Fourth)* § 21.221 (2004). "Incidental" damages are "those to which class members automatically would be entitled once liability to the class . . . as a whole is established," or are "at least . . . capable of computation by means of objective standards and not dependent in any significant way on the . . . differences of each class member's circumstances." *Allison*, 151 F.3d at 415; *see also, e.g.*, *Allstate*, 400 F.3d at 507 ("The operational meaning of 'incidental' damages in this setting is that the computation of damages is mechanical, without the need for individual calculation . . . so that a separate damages suit by individual class members would be a waste of resources") (citing *Manual for Complex Litigation (Fourth)* § 21.221 (2004)) (internal quotation marks omitted).

This Court should follow the well-reasoned opinions of the Fifth, Seventh, Ninth, and Eleventh Circuits. The rule adopted by these circuits is easy to administer and serves the two basic purposes behind Rule 23(b)(2)'s predomination requirement. *First*, it protects the interests of absent class members, since "variations in individual class members' monetary claims may lead to divergences of interest that make unitary representation of a class" under Rule 23(b)(2) inappropriate. *Eubanks*, 110 F.3d at 95; *see also, e.g.*, *Allison*, 151 F.3d at 415. *Second*, it serves the main purpose behind the class action device—achieving judicial economy—by inherently concentrating the litigation on common questions

of law and fact rather than individualized inquiries into damages. *See, e.g.*, *Holmes v. Cont'l Can Co.*, 706 F.2d 1144, 1156 (11th Cir. 1983).

This Court should refuse to follow the Second Circuit, the only court that has declined to adopt the "incidental damages" approach. *See Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 164 (2d Cir. 2001). In *Robinson*—an opinion that even Appellants do not defend—the Second Circuit held that "the assessment of whether injunctive or declaratory relief predominates will require an ad hoc balancing that will vary from case to case," with a particular focus on "the relative importance of the remedies sought, given all of the facts and circumstances . . . ." *Id.* (internal quotation marks and citation omitted). Specifically, a district court in the Second Circuit "may allow (b)(2) certification if it finds . . . that (1) the positive weight or value to the plaintiffs of the injunctive or declaratory relief sought is predominant even though compensatory or punitive damages are also claimed, and (2) class treatment would be efficient and manageable . . . ." *Id.* (internal quotation marks and brackets omitted). But the Second Circuit's utterly standardless approach flouts the rights of absent class members, provides no workable criteria for appellate review of the certification of a (b)(2) class, and allows the district court virtually unbridled discretion to certify a class whenever plaintiffs bring an action that includes a request for injunctive or declaratory relief. Moreover, by allowing district courts to shoehorn nearly any complaint into the

(b)(2) mold, the Second Circuit renders subsections (b)(1) and (b)(3) superfluous. This Court should not countenance such a wholesale and unauthorized expansion of the class action device.

Here, as the Government explains, Appellants cannot show that the monetary damages they seek—amounting to $20 billion—are incidental to injunctive or declaratory relief. Far from "flow[ing] directly from liability to the class *as a whole* on the claims forming the basis of the injunctive or declaratory relief," *Allison*, 151 F.3d at 415 (emphasis in original), the damages sought by Appellants would require, as the District Court concluded, "hundreds or perhaps thousands of individual inquiries about each claimant's particular circumstances." *Garcia*, 211 F.R.D. at 24. These individualized inquiries destroy the homogeneity on which a (b)(2) class must be premised and renders certification under that subsection inappropriate.

B. A Hybrid Class Under Rules 23(b)(2) And (b)(3) May Be Certified, If At All, Only If The Predominance And Superiority Requirements Of Subsection (b)(3) Are Satisfied With Respect To Damages Claims.

Finally, Appellants challenge the District Court's refusal to certify a hybrid class—that is, a (b)(2) class for declaratory and injunctive relief and a (b)(3) class for damages. Appellants ignore the strict limits imposed by Rule 23 on (b)(2) and (b)(3) certification. Their arguments in favor of vastly expanding the scope of these subsections should be rejected.

As an initial matter, as this Court has explained, "the question of whether district courts may certify a (b)(2) class solely for purposes of equitable relief without first determining if plaintiffs' claims for monetary relief predominate over their equitable claims is both unsettled . . . and fundamental." *In re Veneman*, 309 F.3d 789, 795 (D.C. Cir. 2002). The Advisory Committee Notes to Rule 23(b)(2) provide that certification "'does not extend to *cases* in which the appropriate final relief relates exclusively or predominantly to money damages.'" *In re Veneman*, 309 F.3d at 795 (quoting Adv. Comm. Notes) (emphasis in original). Because the monetary relief that Appellants seek in this "case" predominates over injunctive or declaratory relief, the hybrid certification sought by Appellants is legally unavailable.

Even when this Court has recognized the possibility of hybrid certification for limited settlement purposes, *see Thomas v. Albright*, 139 F.3d 227, 235 (D.C. Cir. 1998); *Eubanks*, 110 F.3d at 96, it has stressed that the district court still must find that the claims for damages are "appropriate for certification under [Rule 23](b)(3)." *Thomas*, 139 F.3d at 235. Rule 23(b)(3), in turn, permits certification only if (1) "questions of law or fact common to the members of the class *predominate* over any questions affecting only individual members"; and (2) "a class action is *superior* to other available methods for the fair and efficient adjudication of the controversy." (Emphasis added).

The predominance requirement of Rule 23(b)(3) is "far more demanding" than the commonality and typicality requirements of Rule 23(a). *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623-24 (1997). Predominance cannot be satisfied where "the plaintiffs' claims will stand or fall, not on the answer to [a purported common] question . . . but on the resolution of [other] highly case-specific factual issues." *Jackson v. Motel 6 Multipurpose, Inc.*, 130 F.3d 999, 1006 (11th Cir. 1997). In *Jackson*, for example, the district court certified a class on the basis of a common "practice or policy of racial discrimination." *Id.* The Eleventh Circuit granted a writ of mandamus ordering the district court to decertify the class because, despite the common question identified by the district court, the resolution of the class plaintiffs' claims would "brea[k] down into an unmanageable variety of individual legal and factual issues" and would "require distinctly case-specific inquiries into the facts surrounding each alleged incident of discrimination." *Id.* (internal quotation marks omitted). *See also Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 344 (4th Cir. 1998) (explaining that certification is impermissible when, despite common issues, resolution of the plaintiffs claims would depend on individualized inquiries).

Apparently ignoring these standards, Appellants do not even challenge the District Court's conclusion that "the diversity of the plaintiffs' anecdotal support for their class certification motion underscore[s] . . . that, if this case were

permitted to proceed as a class action, it would quickly devolve into hundreds or perhaps thousands of individual inquiries [that] would be much more important to any claimant's recovery" than common questions regarding classwide discrimination. *Garcia*, 224 F.R.D. at 16 (internal quotation marks omitted). Under these circumstances, a court acts well within its discretion in concluding that common issues do not predominate over individual questions and that any efficiencies to be gained by class treatment do not render a class action "superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3).

Finally, the Chamber urges the Court to be aware that the Seventh Amendment, while not at issue here because ECOA claims against the Government are not juriable, *see Haynie v. Veneman*, 272 F. Supp. 2d 10, 20 (D.D.C. 2003), presents an additional obstacle to hybrid certification in a class action brought against private defendants. If plaintiffs sought to have class claims submitted to a jury and the ensuing individual claims submitted to different juries, the Seventh Amendment's Re-Examination Clause would prohibit them from doing so. *See generally Gasoline Prods. Co. v. Champlin Ref. Co.*, 283 U.S. 494, 500 (1931) (issues in a single suit can only be tried by different juries if they are "so distinct and separable from the others that a trial of [them] alone may be had without injustice"); *Miller v. Hygrade Food Prods. Corp.*, 198 F.R.D. 638, 644

(E.D. Pa. 2001) (explaining in employment discrimination case that "it would be highly impractical to have one jury weigh all the evidence within the liability phase and then apply that presumption, if so found, to each of the potential 200 class members," but that the "Court would run afoul of the single jury requirement of the Seventh Amendment if it were to bifurcate issues to separate juries"); *Ramirez*, 194 F.R.D. at 354 (same). That prohibition on bifurcation would in turn render the proposed class unmanageable. *See Miller*, 198 F.R.D. at 644; *Ramirez*, 194 F.R.D. at 354.

CONCLUSION

For the foregoing reasons, the Chamber respectfully requests that this Court affirm the judgment of the District Court.

Respectfully submitted,

Glen D. Nager
Shay Dvoretzky
Jason J. Jarvis
JONES DAY
51 Louisiana Ave., N.W.
Washington, D.C. 20001
(202) 879-3939 – phone
(202) 626-1700 – fax

Robin S. Conrad
Robert J. Costagliola
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337 – phone
(202) 463-5346 – fax

Counsel for Amicus Curiae

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in FRAP 32(a)(7)(B). This brief contains 6,575 words.

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Counsel for *Amicus Curiae*

CERTIFICATE OF SERVICE

I hereby certify that, on October 28, 2005, I caused copies of the foregoing Brief of the Chamber of Commerce of the United States as *Amicus Curiae* Supporting Appellee to be served by First Class U.S. Mail on the following counsel:

Alan M. Wiseman
Stephen S. Hill
Howrey, Simon, Arnold & White, LLP
1299 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 783-0800

Robert M. Loeb
Charles W. Scarborough
Attorneys, Appellate Staff
Civil Division, Room 7244
Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001

_____
Counsel for *Amicus Curiae*