

NOT YET SCHEDULED FOR ORAL ARGUMENT

No. 04-5449

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

ROSEMARY LOVE, *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
(Honorable James Robertson)

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

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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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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:

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Dated: October 28, 2005

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GLOSSARY

ECOA Equal Credit Opportunity Act

ADEA Age Discrimination in Employment Act

STATUTES AND REGULATIONS

Except for 15 U.S.C. § 1691(a), attached as an addendum, applicable statutes are contained in the Appellants' brief and addendum.

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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 employment discrimination cases where challenged decisions are made by multiple individuals in different locations pursuant to criteria that incorporate both subjective and objective factors. 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 or

provisional 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," placing undue settlement pressure on defendants. *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996). "The risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low." *Id.*

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 authority on which Appellants' base their erroneous arguments regarding six critical questions.

1. A district court's inquiry into commonality and typicality should be informed by an understanding of the nature of plaintiffs' burden in establishing their claim for a class. Where, as here, plaintiffs do not even identify the substantive theory on which they rely, let alone show a common issue the resolution of which would advance the litigation in light of the substantive elements that they must prove, plaintiffs have not satisfied the commonality and typicality requirements of Rule 23(a).

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

3. Establishing commonality and typicality for a disparate-treatment class requires that the proponent of class certification show a pattern or practice of discrimination that affects class members in a substantially, if not completely, *common* way. Where, as here, decisions are made by multiple decisionmakers in different locations based on varying criteria, uniform decisionmaking criteria do

not exist to unite a class challenging the *same* discrimination, and commonality and typicality are not established. Moreover, where statistical evidence shows a mere imbalance in the distribution of credit (or in the composition of a workforce) without establishing that the imbalance resulted from a pattern or practice of discrimination commonly affecting the putative class, plaintiffs have not met their burden of showing commonality or typicality.

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. 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 significantly on each class member’s individual circumstances.

5. 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 class member.

6. Finally, Rule 23 does not authorize the certification of "provisional" classes in which equitable claims are certified under Rule 23(b)(2) while the question of certifying damages claims is deferred or ignored. Such a practice contravenes the requirements of both Rule 23(b)(2) and Rule 23(b)(3) and serves no purpose besides raising the stakes for defendants and creating immense pressure to settle even unmeritorious claims.

ARGUMENT

I. 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 v. Duffey*, 19 F.3d 1459, 1468 (D.C. Cir. 1994). The District Court acted well within its discretion in concluding that Appellants failed to satisfy these requirements 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. Class Plaintiffs Must Tailor Their Showing Of Commonality And Typicality To The Factual Assertions And Controlling Principles Of Law That Govern Their Claims.

In considering whether a proposed class satisfies commonality and typicality, it is necessary to consider the nature of plaintiffs' burden in establishing their claims for a class. Appellants disregard their burden to demonstrate *relevant* common questions that would permit class certification.

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 Castano*, 84 F.3d at 744 (“[A] court must understand the claims, defenses, relevant facts, and applicable substantive law in order to make a meaningful determination of the certification issues.”); *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.* Basing commonality on a purportedly common question that is unmoored from the plaintiffs’ theory of liability would vastly expand the class action device and contravene its intended purposes—enhancing judicial economy and facilitating litigation of common claims.

Appellants challenge the District Court’s denial of certification with respect to two putative classes, yet neither Appellants nor their amici ever identify the theory of liability (disparate impact, disparate treatment, or other) underlying each putative class, let alone tailor their commonality and typicality showings “to the[ir] specific factual claims as shaped by [that] substantive theor[y],” as is their burden. *Wagner*, 836 F.2d at 587 n.60. The District Court’s denial of class certification should be affirmed based on that deficiency alone.

B. 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.

To the extent that Appellants seek certification of classes encompassing disparate-impact claims, they and their amici ignore the undisputed facts of record and ask this Court to ignore applicable law regarding the showing of commonality and typicality that they must make to permit certification of such a class.

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 implicitly suggest, 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. Disparate-impact plaintiffs must identify a *specific* selection criterion and show that the particular criterion *causes* a disparate impact on the basis of gender. Thus, in *Ward’s Cove Packing Co. v. Atonio*, 490 U.S. 642, 656 (1989), the Supreme 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 gender. In these circumstances, a district court acts well within its discretion in finding a lack of commonality and typicality.

Appellants and their amici plainly err in suggesting that identifying “subjectivity” as the practice being challenged by the class (regardless of whether that subjectivity is “excessiv[e],” “partia[l],” or “predominan[t]”) satisfies commonality and typicality. *See* Appellants’ Br. at 21; *see also* Brief of Amici Curiae The Impact Fund, *et al.* (“IF Br.”) at 8; Brief of Amici Curiae National Women’s Law Center, *et al.* (“NWLC Br.”) at 10. 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”).

Likewise, Amici’s reliance on *General Telephone Company of the Southwest v. Falcon*, 457 U.S. 147 (1982), and cases interpreting it, is unavailing. *See* IF Br. at 10-15; NWLC Br. at 12. In *Falcon*, 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. 457 U.S. 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 (which, by its terms, is a claim about effects of a neutral policy), 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); *Vuyanich v. Republic Nat’l Bank*, 723 F.2d 1195, 1199-1200 (5th Cir. 1984); *Cox v. Am. Cast Iron Pipe Co.*, 784 F.2d 1546, 1551,

1556 (11th Cir. 1986); *Goodman v. Lukens Steel Co.*, 777 F.2d 113, 124 (3d Cir. 1985).

Finally, Appellants and their amici mistakenly rely on *McReynolds v. Sodexo 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. See Appellants' Br. at 13, 16; NWLC Br. at 12. 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." 208 F.R.D. at 442 (quoting *Falcon*) (emphasis added in *McReynolds*). But a decisionmaking process cannot be *entirely* subjective if it incorporates objective criteria. In any event, Judge Huvelle's opinion contravenes the overwhelming weight of authority described above, and undermines the judicial economy that Rule 23 was intended to serve.

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 gender, Appellants ask this Court to allow a disparate-impact class comprising claims based on widely divergent circumstances to be certified merely on the basis of unexplained discrepancies in the distribution of credit. That approach would relax the standards for class certification far beyond the bounds authorized by Rule 23.

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

To the extent that Appellants' proposed classes also include disparate-treatment claims, their effort to certify classes comprising such claims is similarly flawed. In this regard, Appellants and their amici ignore both the applicable law and the undisputed facts of record.

Establishing commonality and typicality for a disparate-treatment class requires that the proponent of class certification 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). Rather, 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 the cases involves 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. For similar reasons, the Eleventh Circuit affirmed the denial of class certification of a 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.

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); *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. So, too, was responsibility for disseminating loan applications when requested. Where decisions regarding the loan applications of over thousands of 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 failed to establish commonality and typicality.

Amici ask this Court to jettison the avalanche of well-reasoned authority described above. *See, e.g.*, IF Br. at 19-21. Amici rely principally on *McReynolds*, which, for the reasons described above, based its finding of commonality on a flawed reading of *Falcon*, *see supra* at 14; and on *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 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, independent decisionmaking go hand in hand, precluding a finding of commonality because of the individualized inquiries required into many decisions made by multiple, independent decisionmakers based on varying criteria and circumstances.

D. Statistical Evidence Of A Mere Gender Imbalance Does Not Support Commonality Or Typicality With Respect To Either Disparate-Treatment Or Disparate-Impact Classes.

Appellants argue that statistical evidence of a disparity between the percentage of women farmers nationwide and the percentage of credit given by the Government to women nonetheless establishes commonality and typicality. But class plaintiffs cannot meet their burden of showing commonality for either a disparate-impact class or a disparate-treatment class by relying on such a purported imbalance. As this Court has explained, in order to establish commonality under either a disparate-impact or a disparate-treatment theory, statistical evidence must support the “inference that class members suffered a *common* injury.” *Hartman*, 19 F.3d at 1472 (emphasis in original); *see also Cooper*, 390 F.3d at 717 (statistics must “establish that the named plaintiffs had claims in *common* with other class members under either a pattern and practice or disparate impact theory”) (emphasis in original).

For purposes of a disparate-treatment claim, the statistical evidence must help prove “that discrimination was the [defendant’s] standard operating procedure.” *Cooper*, 390 F.3d at 716. “A plaintiff’s statistical evidence must therefore focus on eliminating . . . nondiscriminatory explanation[s] by showing disparities in treatment between individuals with comparable qualifications for the positions at issue.” *Segar v. Smith*, 738 F.2d 1249, 1274 (D.C. Cir. 1984).

“Statistics laying bare a[n] . . . unbalanced workforce” on the basis of race or gender, “absent further evidence drawing comparisons with the relevant labor market,” do not establish a pattern or practice of discrimination, let alone discrimination *common* to the class members. *Wagner*, 836 F.2d at 593.

Moreover, statistics aggregated across a wide geographic area that do not “sho[w] . . . the extent to which, if at all, the overall disparities were paralleled” in individual locations do not establish that a *common* “practice or policy” of discrimination existed. *Stastny*, 628 F.2d at 279. Indeed, “proof of discrimination in some districts and not others tends to *defeat* the argument that” class plaintiffs were commonly subject to the employer’s “nationwide standard operating procedure.” *Morgan v. UPS of Am., Inc.*, 380 F.3d 459, 464 (8th Cir. 2004), *cert. denied*, 125 S. Ct. 1933 (2005) (emphasis added). Thus, for statistics to establish commonality on an organization-wide basis against a defendant with geographically dispersed facilities, each decisionmaking unit must exhibit comparable disparities. *See Stastny*, 628 F.2d at 279.

“To prove disparate impact, a plaintiff *must* establish . . . a causal nexus between the [specific] facially neutral . . . practice [being challenged] and [a] statistically significant disparity” among “members of different groups affected by” that practice. *Cooper*, 390 F.3d at 716 (emphasis in original). A plaintiff does not satisfy his substantive burden, or provide a basis for commonality, by merely

identifying a gender imbalance in the distribution of loans (or in an employer's workforce), because such statistics, standing alone, do not demonstrate a disparate impact *caused* by a *common* practice by the defendant. *Id.* For example, the Supreme Court explained in *Wards Cove* that plaintiffs' statistics showing a high percentage of nonwhite workers in unskilled jobs and a low percentage of such workers in skilled jobs could not establish a class disparate-impact claim. 490 U.S. at 650. Rather, the plaintiffs were required to compare "the racial composition of the qualified persons in the labor market and the persons holding at-issue jobs" *Id.* Where such labor market statistics are impossible to ascertain, "measures indicating the racial composition of 'otherwise-qualified applicants' for at-issue jobs" may also be probative. *Id.* at 651. But in no event may plaintiffs make out a disparate-impact claim, let alone a common disparate-impact claim, by relying on statistics merely showing that a defendant "had a segment of his work force that was—for some reason—racially imbalanced" *Id.* at 652.

Appellants and their amici contravene these principles in arguing that commonality is established merely by evidence showing that women constituted 6.9 percent of farm operators but received only 3.2 percent of the credit given by the Government. As the District Court properly held, evidence of a disparity only begins to "ha[ve] meaning" for *either* a disparate-treatment or a disparate-impact class "only if we know how many women farmers and how many men farmers

applied for loans, and we do not.” *Love*, 224 F.R.D. at 244. Absent such evidence, plaintiffs’ statistics do not even begin to establish injury *caused by* a pattern of practice of discrimination *common to* class members, or by the disparate impact of a *specific* loan qualification criterion *commonly* challenged by the class. Likewise, plaintiffs’ aggregated statistical evidence of a *national* disparity does not show that the same disparity commonly affected all class members. This Court should reject Appellants’ effort to escape their burden of establishing commonality through relevant statistical evidence.

II. 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. 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.”

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); *Cooper*, 390 F.3d at 720; *Kanter v. Warner-Lambert Co.*, 265 F.3d 853, 860 (9th Cir. 2001).

“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 Allstate*, 400 F.3d at 507.

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 predominance 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 on 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 and their amici 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 v. Veneman*, 211 F.R.D. 8, 24 (D.D.C. 2002) (referred to in *Love*, 224 F.R.D. at 244). 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.

Appellants and their amici 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. But Appellants just ignore the strict limits imposed by Rule 23 on (b)(2) and (b)(3) certification.

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, 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 v. Albright*, 139 F.3d 227, 235 (D.C. Cir. 1998). 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 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 any common question, 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) (same).

Ignoring these standards, Appellants do not even challenge the District Court’s conclusion 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 to common questions regarding classwide discrimination. *Love*, 224 F.R.D. at 246. 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).

Moreover, 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 jurable, *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 could well 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.

C. A District Court May Never “Provisionally” Certify A Rule 23(b)(2) Class For Liability Only While Deferring Consideration Of Whether A Damages Class May Be Certified Under Rule 23(b)(3).

Appellants and their *amici* argue that the District Court abused its discretion in declining to certify a class for purposes of liability and injunctive relief under Rule 23(b)(2) while deferring consideration of whether a damages class could be certified under Rule 23(b)(3). *See* Appellants’ Br. at 30; IF Br. at 27-30. Appellants’ argument contravenes the requirements of Rule 23 and should be rejected.

First, as described above, *see supra* p. 27, this Court has expressed doubt about whether a district court may certify a (b)(2) class “without first determining if plaintiffs’ claims for monetary relief predominate” *In re Veneman*, 309 F.3d at 795. Before certifying a class under Rule 23(b)(2), the district court must assess whether the “case” as a whole is one in which “the appropriate final relief relates exclusively or predominantly to monetary damages.” Advisory Committee Notes to Rule 23(b)(2).

Second, the proponent of class certification bears the burden of submitting a trial plan showing that the predominance and superiority requirements of Rule 23 are satisfied and that a class action would be manageable. *See* Fed. R. Civ. P. 23(b)(3)(D). “Absent knowledge of how [the class action] would actually be tried,” it is “impossible for the [district court] to know whether” the requirements

for class certification are satisfied. *Castano*, 84 F.3d at 745. Where, as here, the court finds at the certification stage “that there are serious problems now appearing” regarding the management of the case as a class action, “it should not certify the class merely on the assurance of counsel that some solution will be found.” *Windham v. Am. Brands, Inc.*, 565 F.2d 59, 70 (4th Cir. 1977).

Finally, as Judge Robertson correctly concluded, there is “no point in [such] certification, unless it would be to create the sort of high-stakes situation that puts substantial pressure on the defendant to settle independent of the merits of the plaintiffs’ claims.” *Love*, 224 F.R.D. at 245 (internal quotation marks omitted). As described above, *see supra* p. 3, the improper certification of classes vastly raises the stakes for defendants and creates “intense pressure to settle” even unmeritorious claims. *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995). This Court should not permit such an unauthorized and improper expansion of the class action device.

CONCLUSION

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

Respectfully submitted,

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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 6,971 words.

Dated: October 28, 2005

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CERTIFICATE OF SERVICE

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ADDENDUM

15 U.S.C. § 1691(a)